

January 23, 2001

No. 8275

This opinion is issued in response to questions from The Honorable Dan Gardner, State Representative, regarding the candidacy of a district attorney for reelection.

FIRST QUESTION PRESENTED

May an incumbent district attorney be a candidate for reelection when a trial panel of the Oregon State Bar's disciplinary board has issued a decision to disbar the individual and that decision is before the Supreme Court of Oregon for review?

ANSWER GIVEN

Unless and until the disbarment decision of the trial panel is adopted by the Supreme Court, the incumbent district attorney remains an active member of the Oregon State Bar (state bar) and nothing in state law prohibits that individual from running for reelection or, if reelected, serving a second term as district attorney.

SECOND QUESTION PRESENTED

If the Supreme Court adopts the trial panel's disbarment decision after the incumbent district attorney wins reelection, may the incumbent district attorney serve the remainder of the term in office?

ANSWER GIVEN

No. The Supreme Court's order of disbarment would create a vacancy in the office as a matter of law.

DISCUSSION

I. Candidacy Pending Supreme Court Review

ORS 8.630 requires, in part, that a person elected to the office of district attorney, “at the time of election, have been admitted to practice in the Supreme Court of Oregon.”^{1/} We have interpreted this requirement to mean that the person must be an active member of the state bar at the time of the *general* election. *See* 11 Op Atty Gen 640, 642 (1924).^{2/} Changes in state law require us to modify this conclusion.^{3/} For a nonpartisan office such as district attorney, ORS 249.088(1) now provides that a candidate may be elected to office at the primary election if he or she receives a majority of the primary votes cast for that office. Hence, we interpret ORS 8.630 to require that a person be an active member of the state bar by the date of the election in which he or she is elected to office.

ORS 9.534(1) provides for the Supreme Court to appoint a disciplinary board to conduct attorney disciplinary proceedings. Rules of procedure approved by the Supreme Court provide for trial panels, each consisting of three disciplinary board members, to hear and decide formal charges brought by the state bar against attorneys licensed to practice in Oregon. State Bar Rule of Procedure 2.4. When a trial panel orders an attorney to be disbarred, the trial panel’s decision is subject to automatic review by the Supreme Court. ORS 9.536(2). The court’s review is *de novo*, meaning that the court considers the case anew and may adopt, modify or reject, in whole or in part, the trial panel’s decision. ORS 9.536(3). The trial panel’s decision to disbar an attorney is not effective until acted upon by the Supreme Court. *See* ORS 9.527 and State Bar Rule of Procedure 10.1. Therefore, until the Supreme Court issues a disbarment order, an attorney remains an active member of the state bar and is qualified for election, or reelection, as a district attorney under ORS 8.630.

II. Disbarment After Reelection to Office

We are also asked whether, if reelected, a district attorney could continue to serve in office if the Supreme Court adopts a trial panel’s decision for the district attorney’s disbarment. ORS 8.630 does not specifically state that a district attorney must remain an active member of the state bar during his or her tenure in office. The statute requires that “[a] person elected district attorney must, *at the time of election*, have been admitted to practice in the Supreme Court of Oregon” (emphasis added.)

A second statute, ORS 236.010, speaks generally to the causes for vacancies in public office before the expiration of an office holder’s term. The statute provides that a vacancy is created if “[t]he incumbent ceases to possess any * * * qualification required for election.” ORS 236.010(1)(g). Applying ORS 236.010 to the office of district attorney in light of the qualifications for election stated in ORS 8.630, a person must be an active member of the state bar not only at the time of election but throughout the person’s tenure in office.^{4/}

If the Supreme Court adopts the decision of the trial panel and disbars a district attorney, that person would no longer be an active member of the state bar. A disbarred district attorney,

therefore, would not possess a statutory qualification for election to office and a vacancy would be created under ORS 236.010.^{5/}

HARDY MYERS
Attorney General

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^{1/} Under ORS 9.160, a person is prohibited from practicing law in Oregon unless that person is an active member of the state bar. Thus, we refer interchangeably to active members of the state bar and persons admitted to practice law in Oregon.

^{2/} Our 1924 opinion dealt with a person who wanted to file as a candidate for district attorney in a primary election but was in the process of being admitted to the state bar and would not attain membership until shortly before the general election. The opinion concluded that a candidate was not required to be a member of the state bar until the date of the general election. 11 Op Atty Gen at 642. Implicitly, the opinion concluded that the “election” referred to in the statute was the general election, with the primary election being for purpose of nomination.

^{3/} See Or Laws 1989, ch 218, § 1 (amending ORS 249.088 to permit election by majority at nominating election).

^{4/} In context, a statutory qualification for office that must exist "at the time of election" could suggest that the subsequent loss of that qualification will not result in a vacancy under ORS 236.010(1)(g). For example, a statutory qualification that is a personal characteristic subject to inevitable change over time, such as an age requirement, may signify that loss of the qualification by an officerholder will not result in a vacancy under ORS 236.010(1)(g). See 40 Op Atty Gen 353 (1980). Given that a qualification required "at the time of election" is substantively indistinguishable from the phrase "qualification required for election" used in ORS 236.010(1)(g), such instances will be rare. We do not find ORS 8.630 to be such an instance.

^{5/} Article XV, section 1, of the Oregon Constitution provides that, with certain exceptions, “[a]ll officers * * * shall hold their offices until their successors are elected, and qualified.” This provision does not apply in the case of a “vacancy” in office. Upon the occurrence of any of the events enumerated in ORS 236.010, the incumbent’s tenure in office is terminated and the office becomes vacant. See *Fehl v. Jackson County*, 177 Or 200, 209, 161 P2d 782 (1945). When a vacancy occurs in a state elective office, “the governor shall fill such vacancy by appointment.” Or Const Art V, § 16.