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When the Light Goes On: Differences Between Disciplinary Proceedings and Other Litigation

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This past Fall, I argued a disciplinary case before the Oregon Supreme Court. As is customary at the Supreme Court, a red light comes on to let the advocates know when they have used their time. When the light flashes for the last time, the Court takes the case under advisement and the parties typically don't hear from the Court again until it issues a decision. In one sense, this is a time-tested ritual for cases generally. In another, however, it is quite different in the disciplinary context. For Oregon lawyers accustomed in other settings to seeing judges early and often as a typical case progresses, the one hour for oral argument at the Supreme Court is the first—and the last—time an accused lawyer will see a judge in a disciplinary case.

For many lawyers, this comes as a surprise. Although historical statistics compiled by the ABA suggest that Oregon lawyers have traditionally been formally prosecuted at per capita rates exceeding their peers nationally, many lawyers don't have a good grasp of how the process works. It is a little bit like knowing that your local hospital probably has an oncology department, but you really don't want to know the details. One of the odd parts about representing lawyers in disciplinary matters is that I often end up having to explain how the system differs from Oregon court practice. As both ORS 9.529 states and the

Supreme Court on many occasions has noted (see, e.g., *In re Harris*, 334 Or 353, 359, 49 P3d 778 (2002)), disciplinary proceedings in Oregon are “sui generis,” which Black’s defines as: “Of its own kind or class; unique or peculiar.”

In this column, we’ll look at the primary elements of the disciplinary process that I frequently have to explain: pleadings and pleadings motions; dispositive motions; and trials. I should emphasize at the outset that although procedures in disciplinary cases are *different*, the Supreme Court has held repeatedly that they are *constitutional*.

Pleadings and Pleadings Motions

Oregon lawyers are intimately familiar with two hallmarks of state civil practice: fact pleading and its twin, extensive pretrial motion practice under ORCP 21. Under Bar Rule of Procedure 4.1(c), however, a complaint is only required to provide an accused lawyer with reasonable notice. The Supreme Court put it this way in *In re Devers*, 328 Or 230, 232, 974 P2d 191(1999): “The ‘essential elements’ of due process in the context of a lawyer discipline proceeding are notice and an opportunity to be heard[.]” Similarly, pretrial motion practice is severely constricted when compared to its civil counterpart, ORCP 21. The only motion against the pleadings permitted under BR 4.4(a) is a “motion to require a formal complaint to comply with BR 4.1(c) (reasonable notice)[.]”

Dispositive Motions

Oregon lawyers are equally familiar with the basic tool available in civil practice to either narrow the issues for trial or to preclude the necessity of trial altogether if there are no disputed issues of material fact: summary judgment under ORCP 47. The very short answer under the Bar Rules of Procedure is that summary judgment doesn't exist. Although there is authority from the analogous rule governing judicial discipline (see *State ex rel Kaino v. Oregon Com'n on Judicial Fitness and Disability*, 335 Or 633, 74 P3d 1080 (2003)) that at least motions to dismiss are permitted, the Bar Rules of Procedure don't actually mention them and I have handled cases where the Bar has hotly disputed the right to dismissal short of trial. In sum, absent settlement, there is usually no procedural avenue available other than trial.

Trial

Trials in disciplinary proceedings vary in several key respects from their counterparts in other settings. To begin with, trials in disciplinary cases are conducted by panels of two lawyers and one non-lawyer who have volunteered for service under BR 2.4 rather than either an elected judge or private citizens who have been summoned randomly for jury service. Although in the analogous area of legal malpractice claimants must generally present expert testimony that a lawyer failed to meet the standard of care (see *Vandermay v. Clayton*, 328 Or 646, 655, 984 P2d 272 (1999)), experts are generally prohibited in disciplinary

cases on the issue of whether the accused lawyer failed to meet the requirements of the Rules of Professional Conduct (see *In re Leonard*, 308 Or 560, 570, 784 P2d 95 (1990)). Finally, the evidence rules do not apply (see *In re Barber*, 322 Or 194, 206, 904 P2d 620 (1995)) and an error in improperly admitting evidence is considered “harmless” under BR 5.1(b) unless it denies the accused lawyer of a fair hearing altogether.

Summing Up

Review at the Supreme Court is *de novo* under BR 10.6 and includes a full briefing schedule under BR 10.5(c). But, for lawyers whose reputations or livelihoods are on the line, the one hour before the red light goes on stands in stark contrast to the way they handle cases every day in Oregon courts.

ABOUT THE AUTHOR

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