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June 16, 2014

Matthew Azer, Chief Administrative Law Judge  
ATTN: Doug Platt  
Office of Administrative Courts (OAC)  
1525 Sherman St., 4th floor  
Denver, CO 80202

Re: OAC Rulemaking (Procedural Rules)

Dear Judge Azer:

We submit the following comments and proposed amendments to the proposed OAC "Procedural Rules for General Services" published on May 29, 2014.

Introductory Statement.

These Rules have not been modified since 2006. In the intervening years, several persistent, material problems, most notably related to discovery and trial management, have gone unresolved, to the detriment of licensees, their regulatory agencies, and (if we may presume to say so) the efficient management of the OAC. Assuming the rules will not be modified again for another lengthy period of time, it is incumbent upon all stakeholders to try to adopt changes to repair these problems now.

Rule 4.

As you, of course, know, this rule once prohibited settings more than 180 days out. While we do not advocate reinstatement of an outer limit, more latitude and less potential abuse might occur if the last sentence reads, "A prompt hearing on the merits shall be set within 90-120 days of the setting date, unless for good cause shown, a later date is ordered."

Rule 5.

Amend and clarify the new second (last) sentence reflecting a two-step process, to read, "An out-of-state attorney seeking to enter his or her appearance shall comply with C.R.C.P. 221.1 for admission and C.R.C.P. 121 for withdrawal."

Rule 8.

Add a new section C., reflecting and acknowledging §24-4-105(2)(b), "For good cause shown, upon written application, the entry of default may be set aside within ten (10) days after entry."

Rule 9.

Problem: how do the prosecuting and defense bars avoid (or at least minimize) the costly, contentious, and inefficient struggle over complete disclosure of the evidence which has become the hallmark of disciplinary litigation in recent years? Answer: with compulsory, concise, mutual disclosure at the earliest possible point in each proceeding.

Amend Rule 9B as follows.

B. "C.R.C.P. 16 does not apply specifically to proceedings before the OAC; however, the following disclosure requirements do apply.

1. Factual disclosure. The name, contact, e-contact information of every person likely to have discoverable or relevant information related to the allegations in the Notice of Charges (charging document) or Answer and a brief summary of that information, and a listing of all data of whatever nature within the custody or control of any party related to the allegations in the Notice of Charges or Answer shall be served simultaneously on the opposing party within fifteen (15) days of the filing and service of the Answer.

2. Expert disclosure. Every expert retained to provide testimony by any party shall be disclosed, with a detailed summary of his/her opinions, by service on every opposing party within thirty (30) days of the filing and service of the Answer by the complaining party and within forty-five (45) days by the opposing party."

Amend Rule 9E as follows, to create different discovery timelines in summary suspensions. "...pursuant to Rules 13 and 21."

Rule 12.

Amend the first and last sentences to preclude mediation less than fifteen (15) days before trial. Any closer is too disruptive and counterproductive.

Rule 13.

Amend section A. The proximity of Prehearing Statement to commencement of trial has been shown to be, repeatedly, too close to avoid damaging surprise, if not outright abuse. Change, therefore, the filing date by lengthening it to "...no later than 30 days prior to the date set for hearing...." (C.R.C.P. 16(f) uses a 28 day measurement.)

Amend section A.3 to add the potent sanction afforded by C.R.C.P. 11. "...claims and defenses, and reasonable costs, including attorneys' fees, to the prevailing party."

Add a new section A.4 to prohibit late discovery, which is both disruptive and aggravating to all. "No discovery shall take place after the filing date for the Prehearing Statements without the consent of all parties or order of the administrative law judge."

Amend sections B and C to distinguish "case management" from "status" from "prehearing" conferences. In the years since the last amendments to these rules, a few attorneys have attempted to regulate the course of litigation using management orders entered early in the process. Such orders, in our experience, have proven so useful as to recommend themselves to formal use.

"B. The parties may request or the administrative law judge may on his/her own motion order one or more case management conferences at which scheduling, discovery, motions deadlines, and other procedural matters can be determined or modified. The parties may request or the administrative law judge may on his/her own motion order one or more status conferences at which compliance with discovery, case management, or other procedural matters can be determined."

"C. Prehearing conferences may be held on the request of either party or upon motion of the administrative law judge, at which the course of trial shall be determined. If a prehearing conference is held and prehearing Order entered, that Order shall control the course of the hearing."

Rule 19.

If a case is settled, the pending litigation at OAC should always be dismissed with prejudice. Amend the rule to read, "...file a motion to dismiss with prejudice when the case has settled."

Rule 20.

Amend the rule to clarify that every material written communication with an administrative law judge should be contemporaneously copied to opposing counsel or the *pro se* party. "...consent of all other parties or their counsel has been obtained and a copy of every written communication supplied contemporaneously to those parties or their counsel."

The second (last) sentence of this rule is a different subject and should be deleted here and moved to Rule 25.

Rule 21.

*Barry v. Barchi*, 443 U.S. 55 (1979), introduced the speed with which trial after summary suspension is required as "without appreciable delay." The OAC's rule requires a "prompt" hearing. There is an on-going, unresolved dispute between prosecutors and defense counsel as to how quickly the Notice of Charges must be filed; the word "prompt" has not helped. It is a critical concept: the control of the OAC cannot be established until the charges are filed. If a date certain is required, the problem is solved.

Amend Section A to read, "...afford a right to hearing, without appreciable delay."

Amend Section B to read, " the agency shall file and serve a charging document and notice to set the hearing on the merits with the OAC no later than seven (7) days after the Order of Suspension is served on a respondent or his/her counsel of record. The Notice to Set shall contain...."

Amend Section D to change a party's request for a "prehearing conference" to one for a "case management conference."

Amend Section E to change and clarify that a "prehearing conference" in summary suspension cases will always be mandatory. The time line is too compressed to manage these cases otherwise. "In all cases tried after summary suspension, the administrative law judge shall set and conduct a prehearing conference."

Rule 22.

Amend to add the other controlling "time" references, found in §24-2-105(2), (5), (14), and (15) (notice of charges before hearing, time to answer, time for filing, service, and appeal of initial and final agency decisions).

Rule 25.

With the advent of "Case Connect," the parties are allowed to serve by e-mail as a matter of right, not only by "agreement." Delete the "agreement" reference.

Rule 28 [new].

We propose a rule requiring the parties to provide an Exhibit List and notebooks of tabbed exhibits for the administrative law judge, opposing counsel, and witnesses at the commencement of every merits hearing.

I am authorized and pleased to state that my colleagues Linda Siderius and Kari Hershey join in these comments and proposals.

I am, finally, applying to present oral testimony on July 2, 2014, as necessary to clarify and defend the contents of this letter.

Sincerely,

SHEILA H. MEER, P.C.



Sheila H. Meer  
Attorney at Law

Cc: Linda Siderius, Kari Hershey