No 20-7905

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER KNUTE SKAGEN

Petitioner,

v.

OREGON STATE BAR

Respondent.

On Petition for a Writ of Certiorari
To the Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. For a judgment to be enforced, the originating statute must not just state 'judgment,' as in BR 3.5(a) but it must also state 'and a court of a foreign country,' therefore the judgment from New Zealand cannot be enforced reciprocally. 'Jurisdiction' is not defined in Bar rules, and it is used here for a reciprocal disciplinary judgment from the court of a foreign country.
2. The statutory standard of evidence in New Zealand disciplinary proceedings is 'on the balance of probabilities.' This standard is not sufficient to allow a finding in the United States, which requires the higher standard of 'clear and convincing evidence' for lawyer discipline. The Court erred in stating that such evidence standard was sufficient to uphold a disciplinary violation in Oregon. Although Bar proceedings are considered *sui generis*, like criminal matters, they are a lifetime judgment of personal integrity. The New Zealand standard does not meet the United States' evidentiary standard and to adopt such a standard violates due process. The statutory standard of evidence in New Zealand is 'on the balance of probabilities.' This standard is not sufficient to allow a finding in the United States, which requires a higher standard. The Court erred in stating that such evidence standard was sufficient to uphold a disciplinary violation in Oregon. A

lower standard violates the Fifth and Fourteenth Amendments of the United States Constitution.

3. The Petitioner invoked the Substantive Due Process defense argument of vagueness, which embodies the definition of misconduct in New Zealand. The *Lawyers and Conveyancers Act* 2006, Section 7(1)(a)(ii) definition of misconduct, is autocratic, subjective and majoritarian, violating the substantive due process of the Fifth and Fourteenth Amendments of the Constitution of the United States.
4. The tribunal and the High Court used the defenses and factual and legal arguments in Petitioner's pleadings as a means of questioning his honesty and inflaming the proceedings. The Petitioner's honesty and integrity were criticized, and his evidence marginalized and ignored. This was a violation of procedural due process and a violation of his substantive due process rights under the First and Fourteenth Amendments of the United States Constitution. Freedom of Speech in legal proceedings must be enforced.
5. The Law Society suspended Petitioner from practice without adequate notice or hearing by refusing to continue membership based on a lien they claimed over it for court costs. Such a lien is unlawful. There are no Due Process procedural rules regarding non-issuance of a practising certificate. Suspension from practice without adequate notice and no hearing is a violation of the right to Due Process under the Fifth and

Fourteenth Amendments of the United States Constitution. This concurrent narrative, which caused damage to a client, was removed from the case and is a defense to such an alleged violation.

6. The Petitioner was unable to appear at the Law Society Tribunal because an accused must be physically present. Remote appearance is forbidden by the rules. He disagreed with material facts, and with witness statements and affidavits. Other issues of witnesses, subpoena's and other matters of trial created issues in the High Court that are endemic to the system. This was a violation of procedural due process under the Fifth and Fourteenth Amendments of the United States Constitution.
7. The Petitioner objected to one member of the tribunal panel, his objection was ignored, and there is no formal procedure in New Zealand for such objection. This was a violation of procedural due process under the United States Constitution, Fifth and Fourteenth Amendments.
8. The Law Society Investigator demanded all files and bank records of the Petitioner's clients without a court order. Except for the two complaining clients, the Petitioner refused production of bank statements and the entirety of client files to the investigator for reasons of client privacy and lawyer/client privilege. The investigator obtained personal bank account details directly from the Petitioner's

bank without a court order, later personally stating that clients and lawyers have no rights in an investigation. This was a violation of Procedural Due Process in that the investigator demanded and obtained privileged and private records without a court order, and the Petitioner refused to answer questions beyond the two complaining clients. Since the decision by the Oregon Supreme Court, the Bar can demand to see everything a lawyer has in relation to all clients and be charged with failure to cooperate if they refuse access. Probable cause for such extensive investigation would need to be compelling. The investigation, demanding, and obtaining client records without a court order are a violation of the Fifth and Fourteenth Amendments of the United States Constitution.

9. The Bar has brought ten charges of violation of disciplinary rules, of which nine were found violated. There are only two Oregon comparable charges that were brought and succeeded in New Zealand. To place those New Zealand charges within the Oregon context is inappropriate and a violation of Due Process. BR 1.2 prohibits this Court and the Bar from going beyond the rules for Oregon. Mixing and matching with presumption is an inappropriate manner of upholding the law. The rules presume a legal environment that is identical to the United States, and New Zealand law is radically different, as displayed by these Questions and the facts surrounding this case. This is a violation

of the Fifth and Fourteenth Amendments of the United States Constitution.

PARTIES TO THE PROCEEDING

Christopher Knute Skagen, Petitioner

Oregon State Bar, Respondent

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner, Christopher Knute Skagen, states that he has no parent company, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a *Writ of Certiorari* to review the judgment of the Oregon Supreme Court.

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In re Complaint as to the Conduct of CHRISTOPHER K. SKAGEN, OSB No. 911020, 367 Or 236 (2020).

Skagen v Wellington Standards Committee of the New Zealand Law Society [2015] NZHC 2634 (the Interlocutory Judgment)

Skagen v Wellington Standards Committee of the New Zealand Law Society [2016] NZHC 1772 (the Substantive Judgment);

Skagen v Wellington Standards Committee of the New Zealand Law Society [2016] NZHC 2799 (the First Recall Judgment);

Skagen v Wellington Standards Committee of the New Zealand Law Society [2020] NZHC 762 (the Second Recall Judgment).

Skagen v Wellington Standards Committee of the New Zealand Law Society [2021] NZHC 107 [Application whether permission to appeal is granted or not allowed]

JURISDICTION

The Oregon Supreme Court entered judgment on 19 November, 2020.

20. The Court has jurisdiction under 28 U.S.C. §1257 as the next court of appeal. 150 day Covid 19 filing Rule.

STATEMENT OF FACTS

The Petitioner included an extensive factual statement based on all papers filed with the Court, including Attachment C, which contains the Appeal filed with the Oregon Supreme Court. The numbering of those facts as used here do not duplicate the cited facts in this writ (references to Attachment C facts are noted – (C#). In the Oregon brief, facts are supported by footnotes that relate back to all manner of pleadings filed with the High Court. Except for legal conclusions cited in the facts, Respondent does not appear to disagree with the facts (there are some legal conclusions that may

not be fact) as alleged by the Petitioner in the original appeal. Some are close to the Oregon Supreme Court factual findings. Number 11 has been edited as being over long and clumsy.

1. (C7)In February 2011 Petitioner entered into a contract with client E to represent him in a matrimonial (divorce) proceeding. The contractual agreement required the client to pay lump sum of $4,100 for half of the entire proceeding, which was paid.
2. (C8)Petitioner and Client E engaged as lawyer and client with a lump sum fee. The instructing solicitor was conflicted out and E was told that he needed to find another instructing solicitor.
3. (C9)Client found a different lawyer who demanded that Petitioner return the entire fee, and who later filed a complaint against Petitioner with the Law Society.
4. (C10)In April, 2011 the Petitioner was sent a letter notifying him of his failure to make full payments on the Costs Award and demanded full payment.
5. (C11)In May 2011 Petitioner entered into a contract to represent client W in a matrimonial matter for $6,900. Kevin Smith, a Barrister and Solicitor instructed Petitioner and Petitioner communicated extensively with W for the preparation of a Property Affidavit. The reason why W hired Peitioner was because his previous lawyer was unresponsive.

6. (C12)Subsequent to being hired by W, Petitioner communicated with the client, and received email communications and Skype communications regarding preparation of his Property Affidavit. W stated in his affidavit, which the prosecutor assisted him in preparing, that Petitioner had not communicated with him or done anything with regard to the Property Affidavit.
7. (C13)Petitioner appeared at a telephone conference with the Court on 9 June 2011 regarding orders to supply a Property Affidavit by W, and notified the client of the need to provide discovery. Client stated that there were no further communications with the Petitioner. The client perjured himself, and the prosecutor assisted with that perjury.
8. (C14)Petitioner had communicated fully with the client regarding preparation of a detailed Property Affidavit, and prepared a property affidavit for W that he could have sworn, but the instructing solicitor refused to file it with the court.
9. (C15)Petitioner's membership with the New Zealand Law Society was due to expire 30 June, 2011. On June 23, 2011, one week before his membership was to expire, he was notified by the Law Society that in order for his membership with the Law Society to be renewed, he would have to pay the entire amount of a Costs Award from an Oregon disciplinary case which was brought against the Petitioner in New

Zealand, they stated that his failure to pay the costs order (of $4,100) made him unfit to be allowed a practising certificate.

10. (C16)Petitioner notified them on 29 June, 2011 that he was unable to pay the entire amount of the Costs Award, and requested that he be allowed to bring payments current and continue to make payments.

11. (C17)Petitioner's practising certificate lapsed on 30 June 2011.

12. (C18)The Fitness for Practice Committee met on 1 July 2011 and decided that Petitioner's explanations were unsatisfactory and requested financial information in the form of an affidavit by 12 July 2011 showing that he could pay the entire costs amount.

13. (C19)On 15 July 2011, Petitioner was mailed a letter that referred to a formal application and that his practising certificate had lapsed. There was no enclosure included in, or accompanying, the letter.

14. (C20)On 18 July 2011, Petitioner was emailed an application for renewal that required receipt and payment by 19 July 2011.

15. (C21)On 19 July 2011, Petitioner sent an email that notified of his intention to apply for a practising certificate.

16. (C22)On 20 July 2011, Petitioner received an email confirming that a 'renewal pack' was not mailed to him the previous week. The email stated that it was emailed to him, but the Law Society records revealed no such email, and the Law Society admitted that it had not been sent as stated. He received the first notice at this time for maintaining his

practising certificate in a retroactive manner under s 40 of the *Lawyers and Conveyancers Act* 2006.

17. (C23)Petitioner failed to notify W that his Law Society membership had lapsed and that he would be unable to represent him in court.

18. (C24)Although the Petitioner had prepared a Property Affidavit that he could have signed, the Instructing Solicitor, Kevin Smith, refused to file the Property Affidavit and appeared by telephone with the Petitioner, who notified the Court that he was unable to file the Property Affidavit, and could not 'appear' at that hearing because his Law Society membership had lapsed. The Instructing Solicitor refused to 'act' for the client. The Court awarded costs against W and Petitioner in the amount of $800.

19. (C25)Petitioner received a letter from the Law Society dated 3 August 2011 declining his application for a practising certificate based on the fact of non-payment of the costs order which made him 'disgraceful and dishonourable,' such finding being grounds for discipline in New Zealand.

20. (C26)On August 29, 2011 Petitioner met with the Law Society investigator and said he would provide all information on the two complaining clients, but that records of personal bank deposits and client files were protected by privilege. He had two meetings with the Law Society investigator, who demanded that he produce all bank

records and all client files for him to view. Petitioner stated that he would give the investigator all records of both clients, but refused to provide all bank records and client files on the basis that all client bank records and client files were protected by lawyer/client privilege.

21. (C27)In October 2011, Petitioner emailed all client files of E and W to the investigator.

22. (C28)In October 2011, Petitioner met with the investigator again to discuss the complaints. The investigator placed a sheet before Petitioner of his personal bank account records and began asking him about every deposit made into that account. The investigator informed Petitioner that he had obtained his bank records from his bank because he was entitled to do that without a court order. Again, Petitioner objected to answering questions about other clients and deposits into his account, and also objected to the investigator obtaining his account information without hearing or a court order.

23. (C29)Petitioner was not informed how the investigator obtained his bank account information, and whether he had been given authority to investigate all matters about both clients. He was ". . . adamant that neither Petitioner nor his clients had any rights limiting searches by him of bank records, and that his police powers of search were absolute and untampered by any laws of restraint or objections of privilege. He stated that there was no privilege available to lawyers or clients that

were the subject of a Law Society investigation." The issue of the investigator's authority was raised with the High Court on appeal, and was brushed aside.

24. (30)On June 19, 2013, 2013 the Standards Committee filed charges against Petitioner alleging 12 rule violations relating to two client complaints in addition to Petitioner's failure to fully cooperate with the Standards Committee.

25. (C31)Recalling that he had changed his email address with the Law Society in 2011, Petitioner waited until he was contacted at that email address, promptly responded and accepted service by mail.

26. (C32)In an email to the Standards Committee case officer dated 14 October 2013, Petitioner stated "having reviewed the panel, I would object to the inclusion of Wayne Chapman as a member, as his presence would make me uncomfortable." The Petitioner stated " . . . I learned that he had been disciplined and had since taken it upon himself to campaign vigorously and unreasonably against any lawyer accused of disciplinary violations." There was no response to that objection and it was not further pursued.

27. (C33)On November 6, 2013 Respondent filed responses to the charges with an affidavit reciting facts in support of his denials.

28. (C34)On January 31, 2014, the Tribunal held a conference call with the parties to discuss the case. Petitioner stated that he was unable to

attend the hearing in person because he could not afford to travel to New Zealand. He also requested that the hearing take place by telephone, which was refused. The prosecution suggested that the hearing take place on the papers. Petitioner was uncertain whether there were evidential issues. It can request witnesses be called, but it did not. The Petitioner filed an affidavit in the High Court regarding this meeting and disagreements about evidence and the law were both raised at that meeting.

29. (C35)His application to be present was denied because a person must, according to the rules, be physically present at the substantive hearing.

30. (C37)The prosecution stated in its 'Submissions' regarding E that Petitioner was disingenuous and dishonest, and that his actions were disgraceful and dishonourable. Petitioner was not charged with being disingenuous and dishonest. The prosecution alleged that Petitioner had done no work for W, and that it bordered ". . .on cynical and dishonest offending . . ."

31. (C38)In their judgment, the panel found that Petitioner's 'position' with regard to E was 'disingenuous and dishonest' and 'dishonourable and disgraceful,' agreeing with the prosecution's submissions.

32. (C39)The panel also agreed with prosecution's dishonesty submissions regarding W, stating that he had behaved in a similar manner.

33. (C43)Petitioner applied to file an affidavit containing further information, which was granted.

34. (C45)The High Court upheld the findings of the Disciplinary Tribunal, but did not allow costs against the Petitioner.

35. (C47)Prior to the Bar hearing the Petitioner discovered an email sent to the Law Society investigator in 2011 which included several items proving that he had done a significant amount of work for W and that he had prepared a Property Affidavit based on significant communications with the client by email and using Skype.

36. (C48)The affidavit of W stated that Petitioner had not communicated with the client about the Property Affidavit, and had not worked on his case, except for a conference with the Court.

37. (C50)Mr MacKenzie, in his Submissions to the Tribunal, alleged that the facts were the same surrounding E and W, that the Petitioner had treated both clients in the same fashion, and that, like E, he had done no work for W.

38. (C51)Mr. MacKenzie also alleged that Petitioner's pleadings, in stating he had done no work for W, were disingenuous, and that Petitioner's statements bordered on being dishonest.

39. (C52)The Tribunal accepted the submissions of Mr. MacKenzie in their entirety, and stated, "We agree with counsel's submission that it borders on cynical and intentional dishonesty that Mr. Skagen, having

concluded his conduct in respect of Mr. Edmeades, went on to behave in a similar manner towards Mr. Wolvetang." which reflected his submissions almost exactly.

40. (C53)Subsequent to the Bar hearing, Petitioner filed a Motion to Amend Answer which was ignored by the Bar and the adjudicator.

Based on evidentiary discoveries, which lay the foundation for prosecutorial fraud, the Petitioner filed an appeal in the New Zealand Court of Appeals, case no CA2672020, within the six year limit for requesting a rehearing.

1. FIRST QUESTION – Foreign Judgment

Procedure for recognition of a foreign-country judgement is governed by ORS 24.370.[1] Under subsection (1) the Bar has filed an original action, and in subsection (2) the Petitioner has raised as an affirmative defense. In order for a judgment to be enforced, the originating statute must state 'and a court of a foreign country,' and not just state 'judgment,' as in BR 3.5(a), but it must, therefore the judgment from New Zealand cannot be enforced reciprocally. Neither BR 3.5 (a), nor RPC 5.5 define jurisdiction or include a judgment from a foreign country jurisdiction, or meet the requirement of

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[1] ORS 24.370. Procedure for recognition of a foreign-country judgment.

(1) If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment.

(2) If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim or affirmative defense.

Small v. United States, 544 U.S. 385 (2005); cf *In re Wilde*, 68 A.3rd 749 (D.C. 2013).

The plain meaning of 'jurisdiction' is intended to refer to State and Federal jurisdictions, but not the expansive rule covering jurisdictions over the entire planet. RPC 1.2, Authority, the Bar rules do not grant authority over the entire planet. The Oregon Supreme Court distinguished the Petitioners arguments. Its analysis of this question extends to over three pages (Appendix A, pages 14-17). Disciplinary and criminal judgments can result in disbarment. The effect of disciplinary judgments is, like criminal matters, a life-long judgment of shame on a lawyer/person. The standards of New Zealand's disciplinary system are reflected in all the questions presented, and they are lacking compared to the United States. Acceptance of this reduced standard of evidence in disciplinary proceedings is a national concern for lawyers and clients.

2. QUESTION TWO – lesser standard of evidence

The statutory standard of evidence in New Zealand is 'on the balance of probabilities.' This standard is not sufficient to allow a finding in the United States, which requires a higher standard of evidence. The Court erred in stating that such evidence standard was sufficient to uphold a disciplinary violation in Oregon.

The standard of evidence required to pass judgment on a lawyer in New Zealand is 'on the balance of probabilities,' pursuant to Section 241 of

the *Law Practitioners Act* 2006, whereas the standard of evidence in Oregon disciplinary proceedings, which are considered *sui generis*, is 'clear and convincing evidence.' In all the cases involving 'clear and convincing evidence,' it is required that the prosecution not just make an inference, but that the lawyer knowingly and deliberately violated a rule without justification. Throughout, Petitioner has alleged privilege as his basis and justification for refusing to divulge client information, and he disagreed with important factual assessments because they omitted key facts.

In *Attorney Grievance Comm'n of Md. v. Wilde*, No. 25749–M (Md.Cir.Ct. Mar. 30, 2011), the Maryland court did not recognize the foreign country judgment, but instead found that the Bar had not proved criminal behavior of the lawyer "by clear and convincing evidence." That court did not advance to consider the judgment itself. This case is significant because in a criminal case the test is 'beyond a reasonable doubt,' and South Korea does not use such an evidentiary test in criminal matters. Both attorney discipline and criminal matters are treated with a test that is much more than just 'on the balance of probabilities.'

To accept this lower standard of evidence in Oregon inflates the proceeding in a foreign country to a rehearing in Oregon of the original matter, in that it applies a radically different evidentiary standard to matters sought to be accepted as proven from a jurisdiction that possesses lesser standards of evidence.

The Oregon Supreme Court dealt with this issue by stating there is no prescribed standard of evidence, and that they routinely allow judgments from states using less than the 'clear and convincing' standard, and support this with a footnote of cases allowed.[2] No state using the 'balance of probabilities' test is provided by the Bar or the Oregon Supreme Court, and because no state apparently uses this lesser evidentiary standard, it is compelling evidence that due process in lawyer disciplinary proceedings in the United States require a higher standard. Using the standard of 'balance of probabilities' is anathema to United States disciplinary proceedings and use of it was a violation of due process.

The higher standard of proof required of disciplinary proceedings has the same effect on a lawyers as criminal proceedings in that a disciplinary is a lifelong judgment of disgrace.

The Due Process violations alleged by the Petitioner are several, and they collectively represent a system that is not a compatible with the equivalent United States standards. The lower standards of New Zealand disciplinary prosecution in general are outlined in most of these questions. The lesser standard of evidence is a violation of the United States Constitution, Fifth Amendment; Fourteenth Amendment.

3. QUESTION THREE – Vagueness – Substantive Due Process

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[2] Appendix A, page 19, lines 5-12 and footnote 10.

The Petitioner invoked the substantive due process argument of vagueness which embodies the definition of misconduct in New Zealand. The statutory definition of misconduct contained within the *Lawyers and Conveyancers Act* 2006, Section 7(1)(a)(ii), is autocratic, subjective and majoritarian, violating the United States and Oregon constitutional standards of substantive Due Process.

The New Zealand meaning of 'misconduct' is unlimited in its description of human behavior, creating a vague and uncertain legal environment, allowing a disciplinary body to prosecute on a whim for anything that they decide. Allowing a judgment from New Zealand for misconduct that is based on a vague law would be a violation of the Petitioner's right to due process and opportunity to be heard. The *Lawyers and Conveyancers Act* 2006, defines misconduct, in part, in Section 7(1)(a)(ii) as, "that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable." This is an example of majoritarian enactments that exceed the limits of governmental authority, and its supporting provisions are replete with vagueness. It cannot be enforced. These laws are prohibited in the United States, and the Bar is seeking enforcement of this law.

Charges may be brought under Section 241 of the Act. Section 242 allows for any orders to be made. The Law Society found that Petitioner's failure to pay a costs bill was disgraceful and dishonourable, and yet they

were violating New Zealand law by demanding full payment of the Costs Order, which was a property lien on his property right to practice law, which is illegal in New Zealand and in Oregon.

The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 states a broad and vague addendum to the meaning of misconduct.[3] The plain meaning of misconduct is so expansive and vague that it violates the principles of substantive due process. It relies on a select few lawyers to make the law. In other words, misconduct can be based on anything the disciplinary tribunal wants, regardless of whether there is a rule, the Law Society can make up the rules as they go along, constructing new charges and issuing judgment without due process, which is what happened in this case. The rules are vague and entitle the Law Society to prosecute a lawyer under any imaginable circumstance.

Section 152 of the *Lawyers and Conveyancers Act* 2006 requires notice of a disciplinary charge to a lawyer. Section 158 requires notice of the determination. Part 7 of the Act includes Sections 120 to 272 outlining the powers of the tribunal. Use of the New Zealand standards of Due Process in the United States or Oregon would be a violation of the Petitioner's Due Process rights.

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[3] "The rules are not an exhaustive statement of the conduct expected of lawyers. They set the minimum standards that lawyers must observe and are a reference point for discipline. A charge of misconduct or unsatisfactory conduct may be brought and a conviction may be obtained despite the charge not being based on a breach of any specific rule, nor on a breach of some other rule or regulation made under the Act."

Due process is undefined in the *New Zealand Bill of Rights Act.* 1990, but requires notice and hearing, as defined in *Observance of Due Process of Law Statute* 1368.[4] The appropriate measure of due process is that contained in the Law Society rules, whether notice and hearing according to Oregon standards is contained therein, and also whether the New Zealand proceedings complied with United States and Oregon standards of Due Process.

Section 250 allows making their own hearing rules, and Section 252 allows its own procedures. The procedures are contained in *Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations* 2008.

A tribunal at hearing can at any time by its own motion amend or add to charges without notice.[5] The tribunal hearing should have been adjourned because it surprised the Petitioner and 'prejudiced the conduct of the case' in that it changed the evidentiary balance by marginalizing, and hence reducing

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[4] None shall be put to answer without due process of law ITEM, at the request of the Commons by their petitions put forth in this Parliament, to eschew the mischiefs and damages done to divers of his Commons by false accusers, which oftentimes have made their accusations more for revenge and singular benefit, than for the profit of the King, or of his people, which accused persons, some have been taken, and sometime caused to come before the King's Council by writ, and otherwise upon grievous pain against the law: It is assented and accorded, for the good governance of the Commons, that no man be put to answer without presentment before Justices, or matter of record, or by due process and writ original, according to the old law of the land: And if any thing from henceforth be done to the contrary, it shall be void in the law, and holden for error.

[5] 24 Amendment of or addition to charge

(1) At the hearing of a charge, the Disciplinary Tribunal may of its own motion or on the application of any party, amend or add to the charge if the Tribunal considers it appropriate to do so.

his credibility by alleging dishonesty in him raising defenses and using acceptable legal rationale by way of explanation.[6] They found that Petitioner was cynical,' disingenuous and 'dishonest.' They used their ability to expand or add to charges and did it without notice or a hearing, which is their right . They had the right to dispense with requirements of due process at the hearing, and they did that. The Petitioner was not present to request an adjournment.

The Oregon Supreme Court stated that, "Therefore, the fact that the New Zealand disciplinary rules include some terms that, on their face, may appear vague, does not persuade us that, as a whole, the New Zealand attorney discipline system does not provide lawyers with notice of what is expected."[7] The Court considered this question briefly (Appendix A, Page 19, line 13 – Page 20, line 9). The laws of prosecution are vague and a violation of substantive due process. The Court considered judgment on six charges as justification to ignore this argument, which eliminated the need apparently to address the vagueness arguments. As argued above, and contrary to that pointed out by the Oregon Supreme Court, what is expected is chaos and unfairness. The Petitioner has provided substantial evidence of vagueness

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[6] 24 (2) The Disciplinary Tribunal must adjourn the hearing if it considers that the amendment or addition would—
(a) take the person charged by surprise; or
(b) prejudice the conduct of the case.

[7] Appendix A, pages 19-20, the quote is at page 20, lines 6-9.

beyond that of the originating statute that was not considered by the Oregon Supreme Court, and therefore the United States constitutional standard of substantive due process has not been met. The New Zealand judgment violated the United States Constitution, Fifth Amendment; Fourteenth Amen dment.

4. QUESTION FOUR – First and Fourteenth Amendments – free speech at trial and in pleadings.

The tribunal and the High Court used the defenses and factual and legal arguments in Petitioner's pleadings as a means of questioning Petitioner's honesty and inflaming the proceedings. Petitioner's honesty and integrity were criticized, and his evidence was marginalized and ignored. This was a violation of procedural due process and a violation of his substantive due process rights under the First and Fourteenth Amendments of the United States constitution. Statement of Facts 26-34.

The disciplinary Tribunal found that Petitioner's defense prior to, and in the proceedings were 'arrogance,' 'cynical,' 'disingenuous,' and 'dishonest,' saying it "borders on cynical and intentional dishonesty" and "We have referred to practitioner's cynical and dishonest conduct, which was sustained. We have also had regard to the practitioner's arrogance in response to the investigation." The High Court did not repeat the word 'arrogance.'

Viewed from United States and Oregon standards of due process, such findings were a violation of the Petitioner's right to due process and an opportunity to be heard. Although he was not charged with dishonesty, they in effect created a new charge (which they are entitled to do) and found him guilty without charge or hearing on that matter. These were due process violations of Free speech under the First, and Fourteenth Amendments of the United States Constitution.

As his own advocate at his trial, the tribunal judged his presentation of defenses as arrogant, dishonest and cynical. A fundamental principle of defense is the freedom to use any defenses, argue fully, and present it with decorum. To raise the Petitioner's defense to a level approaching contempt, with its ability to lay new charges without notice or an opportunity to be heard, and without an ability to present sentencing arguments, is a violation of the First and Fourteenth Amendments in violation of his due process rights and an opportunity to be heard. Section 24 of the *Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations* 2008 allows amendment or addition to charges at hearing without notice.

The Oregon Supreme Court did not address this issue.

5. FIFTH ASSIGNMENT OF ERROR – Due Process – suspension and cancellation of membership with the Law Society without adequate notice and no hearing.

The Law Society suspended Petitioner from the practice of law without adequate notice or any hearing (Statement of Facts, paragraphs 9-16) This resulted in his inability to appear for W and resulted in several alleged disciplinary violations. This was a violation of due process. The High Court eliminated facts surrounding his nonrenewal which resulted in his inability to use it as a defense to his failure to appear in court for W, which was also a violation of due process.

The Oregon Supreme Court cited the factual details of non-renewal in a manner different than the Petitioner (Appendix A page 4, line 6, to Page 5, line 20). The Petitioner's Statement of Facts, reflect a different view of the facts. The Petitioner was given little notice, was prosecuted, disciplined and prevented from practice without a hearing. The Oregon Supreme Court did not address this question, but noted that the Petitioner did not pay his renewal fee (Appendix A Page 5, line 20 and footnote 4), also noting in the footnote that "In August 2011 the New Zealand Law Society informed respondent that it had declined to renew his licence, stating that it found his nonpayment of costs "disgraceful and dishonourable," which is grounds for discipline in New Zealand." The Petitioner was not just required to pay his yearly fee for practice, but also the entire costs judgment, which was impossible.

The Law Society can refuse issuance of a practising certificate without due process. There are no due process rules requiring notice and hearing

prior to refusal of a lawyers Practising Certificate. The Petitioner was notified on April 1, 2011 that, due to non-payment on the agreed terms, the entire amount of a costs order was due. On 23 June, 2011, one week before his Law Society membership was due for renewal, the Petitioner was notified that his practising certificate would not be renewed unless he paid the full amount of the costs order demanded. The Petitioner was not sent a renewal notice until after his practising certificate had lapsed. The Petitioner objected that he had not been given fair notice, and that before suspending his right to practice law, he was entitled to a hearing. The Petitioner had a property interest in maintaining his practising certificate, and his property interest in the practice of law was suspended without notice or opportunity to be heard. Petitioner's right to due process before suspension of his practising certificate was denied. By refusing to issue a practising certificate without proper notice and a hearing, damage was caused to a client, and Petitioner was unable to continue the performance of a contract of services. Petitioner was unable to repay the unearned portion of both client's fees because he was unable to maintain and pursue his property interest in being a lawyer.

The High Court chose not consider the Petitioner's arguments and claims over due process violation of failure to renew his Practising Certificate. Facts about attempts to renew his Practising Certificate were removed from consideration issues remaining in his disfavour, removing many defenses that were available.

As a result of this he was unable to represent a client to file a property affidavit in a divorce matter. He had prepared an affidavit that could have been filed to prevent the costs order against the client, but the Instructing Solicitor refused to allow its filing and service on opposing counsel. The solicitor appeared at the hearing with the Petitioner present, explaining why the failure had happened. (statement of Facts18, page 13)

The Petitioner spent 3 weeks attempting to renew membership and had a Property Affidavit prepared.

Failure to renew Petitioner's Practising Certificate was a violation of due process, the United States Constitution, Fifth Amendment; Fourteenth Amendment.

Evidence suggests that after the Nineteenth Century the American concepts of due process and the British system of parliamentary supremacy diverged radically. It is said, ". . . the great phrases failed to retain their vitality",[8] such attribution being the rise of parliamentary supremacy and hostility to judicial review as an undemocratic foreign invention.[9] This hostility towards due process is mirrored in the actions and judgments of the tribunal and the High Court.

The Oregon Supreme Court did not address this question.

5. QUESTION SIX – Due Process - Hearing

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[8] John D. Orth, *Due Process of Law: A Brief History* (Lawrence, KS: 2003) 30-31.
[9] Orth, 29.

The Petitioner was unable to appear at the tribunal hearing by audio/video because they are prohibited at a hearing and a defendant is required to appear in person. Pertinent facts are contained in items 24-39 of the Statement of Facts of this writ. He could not subpoena witnesses, nor are witnesses called for hearing. He was unable to confront and cross-examine witnesses. This was a violation of procedural due process. He disagreed on substantial issues of fact throughout proceedings. One witness perjured himself with the assistance of the prosecutor, which was proven by testimony of that prosecutor at the Bar hearing.

New Zealand disciplinary regulations do not allow appearance at a hearing by telephone or video, which is a violation of due process and an opportunity to be heard. Section 33(c) of the *Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations* 2008 does not allow telephone or video at substantive disciplinary hearings. A substantive hearing does not allow telephone or video, Rule 33 which was requested by Petitioner and declined.

The notice and the hearing must "must be granted at a meaningful time and in a meaningful manner." *Armstrong v Manzo* 380 US 545, 552 (1965). The hearing was not granted in a meaningful manner. There were factual disputes over one client affidavit, and those disputes centered around whether Petitioner had done work on the client matter. Client W perjured himself with the knowing assistance of the prosecution. (see Statement of Facts, 30-39, page 17) The hearing was held in the absence of Petitioner,

on the papers, prosecuting counsel was present, and the Petitioner was unable to cross-examine witnesses. The High Court only allowed a further affidavit to be filed by Petitioner with limitations. Due process in the United States requires that a Petitioner be able to confront and cross-examine witnesses. This is not allowed in New Zealand, as the cases are usually conducted 'on the papers,' which include affidavits, unless the tribunal directs otherwise. Whether the New Zealand standards are/were applied is a significant question. The hearing is conducted through affidavits and the person charged is not entitled to cross-examine unless the person charged is present, and the tribunal has asked for witnesses.[10] *Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations* 2008.

Section 24 theoretically does not allow witness evidence at hearing, conflicting with the Section 25 which allows witness evidence. Hearings are allowed, but witnesses are not allowed at substantive hearings unless requested by the panel. A defendant has no right to subpoena or call witnesses.

In New Zealand, a lawyer is forbidden to speak with and assist witnesses, whereas in Oregon it is permitted. In addition, in Oregon disciplinary matters, the judge is entitled to change the proceeding in order

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[10] 25 Evidence

(1)All evidence must be given by affidavit unless the Disciplinary Tribunal directs otherwise.

(2)All witnesses must be available for cross-examination if required by the Disciplinary Tribunal.

to call witnesses, which was effected in the present case. *Goldberg v Kelley* 397 US 254, 269 (1970). The Petitioner has always had evidentiary disputes with the Law Society witnesses. Administrative decisions. *Greene v McElroy* 360 US 474, 496-97 (1959). The Petitioner was unable to subpoena witnesses. If a person is able to subpoena witnesses, then they cannot complain that they were denied due process. *Richardson v Perales* 402 US 389 (1971) cf *Mathews v Eldridge* 424 US 319, 343-345 (1976). The procedural rules carried through to the High Court proceedings.

The Petitioner could not obtain further evidence, but was allowed to file further affidavits from himself. The prosecutor deliberately withheld exculpatory evidence of substantial work done for a client in order to support accusations of dishonesty by the Petitioner. This was a violation of procedural due process. Statement of Facts, item 21, page 13 is the email of client information.

Prosecutorial misconduct with regard to the due process right of confronting witnesses is important as a consideration. In his evidence presented, the Petitioner always disagreed with the affidavit of client W, and the instructing lawyer, Kevin Smith. From the submissions and the supporting client affidavit, the client perjured himself, and because the prosecutor was aware that the Petitioner had done substantial work from evidence given to the investigator, that the prosecutor assisted in that perjury and lied in the proceedings. The perjury related to material evidence

of whether the Petitioner had done substantial work for the client. Through information given in the investigation, these two parties were also aware that the Petitioner had lost all of his emails with that client.

The issue is whether, in Oregon, withholding important discovery by the prosecution is governed by administrative lawyer misconduct, but this is different because it involves lawyers, and discipline.

In addition, the prosecutor misled the Tribunal by withholding exculpatory evidence, suborning the perjury of W, and referring to Petitioner as disingenuous and dishonest.

The New Zealand case violated due process in the manner explained above, and violated the United States Constitution, Fifth Amendment; Fourteenth Amendment.

7. QUESTION SEVEN – Due Process – objection to trial panel member.

The Petitioner objected to one member of the tribunal panel, and his objection was ignored; there is no formal procedure in New Zealand for such objection. Statement of Facts, number 27, page 15 expresses what happened with the Tribunal.

The Petitioner objected to one member of the disciplinary panel sitting on the basis that he would not be an impartial judge. He was not directed or required to file anything as a formal objection, and in fact this objection was ignored. The Petitioner's factual statement is misleading because the Petitioner shared what he had heard about the member in his affidavit.

There was no response from the panel, so the issue was not explored. Denial, and there being no rule for objecting to a member was a denial of his due process right to object and be heard. The result of this failure is that the case might have gone quite differently with a different member, and the dynamic of the proceedings was set, which is difficult to challenge through the High Court. The New Zealand judgment violates the United States Constitution, Fifth Amendment; Fourteenth Amendment.

The Oregon Supreme Court did not address this question.

8. QUESTION EIGHT – Due Process – client privilege – court orders.

Since the decision by the Oregon Supreme Court in this case, the Bar can demand to see everything a lawyer has in relation to all clients and be charged with failure to cooperate if they refuse on the basis of privilege or any other theory. To have open access to such sensitive information without a court order places the entire power of a lawyer into the hands of the Bar. Probable cause for such investigation would need to be compelling. The Petitioner refused the demanded production of bank statements and the entirety of client files to the investigator on the basis of client privacy and lawyer/client privilege. The investigator obtained his personal bank account details from the bank without a court order and stated that clients and lawyers have no rights in an investigation. This was a violation of due process in that the investigator obtained privileged and private records

without a court order. In both Oregon disciplinary cases,[11] the Petitioner raised his objection to producing client trust account records as being privileged. In Skagen 2 a court order was obtained because of this refusal and he complied. In this case they demanded all client files and bank records. The pertinent facts are set out in items 20-23 of The Statement of Facts.

The Petitioner's privacy interests and those of his clients were ignored. Details of his personal bank account were obtained without court order, for the purpose of having access to all client files over his objection of privilege as contained in Section 271 of the Act, which states "Legal professional privilege. Nothing in this Part limits or affects legal professional privilege." This claim was made repeatedly by Petitioner and ignored repeatedly in all proceedings.

There are privacy disclosure rules in the Act that limit the information that a lawyer can share about non-complaining clients. Reading this subject to Section 271 privilege, the Petitioner was acting within his rights and the rights of his clients.

The investigator was appointed to investigate under Sections 144 -147 of the *Lawyers and Conveyancers Act* 2006, and he had broad powers to investigate. The Bar does not have such extensive powers to override claims of privilege or go directly to obtain personal bank records without notice,

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[11] *In re Skagen* 342 Or 183, 149 P3d 1171 (2006). *In re Skagen*, 22 DB Rptr 292 (2008) Skagen 2.

hearing, and a court order. Under the *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules* 2008, Rules 8.1 to 8.3, there are requirements regarding response to such inquiries with regard to client confidences, and when disclosure is required.

The New Zealand disciplinary judgment that the Bar seeks to enforce found that Petitioner's claims of privacy and privilege in response to the investigator's demands was unacceptable. The investigator, apparently with his authority as an officer of the court, issued a demand that Petitioner produce information to him regarding all his client files and bank records. The Petitioner refused and was prosecuted on the basis that there were no defenses to his refusal to accept this demand. Petitioner, as lawyer and representative of clients, was not given the right to claim privacy and privilege in their behalf; such claims of client protection should be placed before a judge. The High Court held that "Privilege is for the client to claim." This view of privacy and privilege is a violation of the Petitioner and his client's due process notice and right to be heard. The New Zealand judgment violates the United States Constitution, Fifth Amendment; Fourteenth Amendment.

The Oregon Supreme Court did not address this question.

9. QUESTION NINE – Due Process – constructing new charges.

The Bar has brought ten charges of violation of disciplinary rules, of which 9 were found violated, while there are only two Oregon closely

compatible charges that were brought and succeeded in New Zealand. To place those New Zealand charges within the Oregon context is inappropriate and a violation of due process under the Fifth and Fourteenth Amendments of the United States Constitution. BR 1.2 prohibits this Court and the Bar from going beyond the rules for Oregon.

Dealing with the ten charges made against Petitioner by the Oregon State Bar, which grew from New Zealand charges based on two recognizable violations of the disciplinary system is a stretch of art, or exercise of legal imagination. As stated above, New Zealand is a foreign country jurisdiction possessing different rules for Barrister, and Barrister and Solicitor. Failure to cooperate with an investigation is an Oregon allegation that requires deeper inquiry in the Oregon context because the Petitioner has spent the last 17 years engaged in disciplinary defence, in large part, because of his belief in a foundation of legal representation, which is the protection of client information, and is called 'privilege.'

Also, the New Zealand violations were based 'on the balance of probabilities' test which as stated above is a lighter evidentiary step than 'clear and convincing evidence.' To dig into a plethora of Oregon charges of marked dissimilarity is an unfair exercise of prosecutorial powers in that the prosecution is asking of this tribunal that it ignore the Oregon and United States principles of due process, which is notice and a fair hearing of the charges. Of the twelve charges made against the Petitioner in New Zealand,

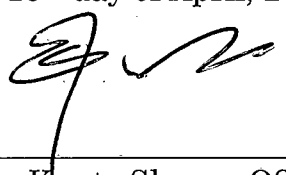
only six charges were proven and four were dismissed by the prosecution at hearing (excessive fees). Of those six charges, only two have a roughly equivalent rule or statute in Oregon (RPC 1.4(a); RPC 8.1(a)(2). Some or all of the questions presented could apply to any one charge. Arguments regarding due process are a valid defense to any one charge.

The Oregon State Bar wishes to expand their rules to include the disciplinary rules of a foreign country jurisdiction, which is an inappropriate extension of its jurisdiction, and outside the ambit of these proceedings, except where noted. To extend its jurisdiction into that of another country would in effect allow it to bring charges in Oregon for factual and legal issues that were uncharged overseas and extant in that jurisdiction.

The two enumerated equivalent Oregon sanctions, individually or collectively would not subject the Petitioner to disbarment in Oregon, considering Petitioner's history of discipline. The Oregon Bar has asked that the Petitioner be disbarred, and according to cited cases, these violations are insufficient to establish a coherent pattern of offending, and the combination cannot rise to the level of disbarment. Also, an Oregon finding of lesser discipline would not be appropriate because none of the current Oregon charges were considered by New Zealand in making their decision to strike the Petitioner off the list of Barristers. The Oregon Supreme Court did not

address this question, except as an aside in sentencing (Appendix A, Page 21, lines 8-10).

Dated this 16th day of April, 2019



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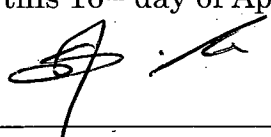
COMBINED CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS, AND CERTIFICATES OF FILING AND SERVICE

(1) I certify that this brief complies with the word-count limitation and page count limitation.

(2) I certify that the size of the type in this brief is not smaller than 12 point for the text of the brief and ten point for the footnotes.

(3) I certify that the brief was mailed by UPS under their three day delivery policy and picked up for delivery to the United States Supreme Court, and a copy was sent to the Respondent on 16 April, 2021 in the same manner. I certify that service of a copy of this brief will be accomplished on the following participants in this case by email upon SCournoyer@osbar.org.

DATED Dated this 16th day of April, 2019



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