Trying an Attorney Discipline Case

By Kenneth M. Mogill

To some attorneys, the process for prosecuting and defending attorney discipline cases is of no concern. Their lack of interest may well be based on the assumption that they will never be confronted with this process. Even reputable, ethical attorneys can find themselves forced to deal with such proceedings, however; there is value for all attorneys in knowing how these proceedings are conducted and understanding how trial advocacy skills are just as important in these cases.

When an attorney is charged with professional misconduct, the case—unless the parties settle before trial—is tried before a hearing panel appointed by the Attorney Discipline Board. While the substantive and procedural rules in play are in some ways unique, at its core the process is much like the process in play in any other type of trial. Regardless of the nature of a case, the trial lawyer's tasks are the same: (1) identify the legal and factual issues, (2) decide which witnesses to call and the scope of examination of each, (3) identify what physical evidence to present, (4) determine what to attempt to elicit on cross-examination of the other side's witnesses, (5) understand and articulate the overall case themes, while (6) preparing for every eventuality that might possibly occur in the course of the trial.

However, many aspects of an attorney discipline trial are unique. Even litigators who will never try such a case can gain deeper insights into their trial processes by understanding the differences between how they try cases in their regular venue and how trials of another type are conducted.

Attorney discipline is within the province of the Michigan Supreme Court.[1] The Court promulgates the substantive and procedural rules governing the profession and has created a bifurcated system to administer it. The substantive rules are the Michigan Rules of Professional Conduct. The Attorney Grievance Commission is the investigation and prosecution arm of the Court for attorney discipline matters,[2] and the Attorney Discipline Board is the Court's adjudicative arm.[3] The Attorney Grievance Commission's day-to-day functioning is carried out by the grievance administrator and a staff of attorneys and investigators. The Attorney Discipline Board functions as a quasi court of appeals, with its trial-level work carried out by hearing panels of three volunteer attorneys.[4]

Attorney discipline cases are quasi criminal.[5] Unlike criminal cases, however, the standard of proof is preponderance of the evidence, not beyond a reasonable doubt,[6] and an accused can be defaulted if he or she fails to answer the formal complaint in a timely manner.[7] A hearing panel's decision does not have to be unanimous, an indigent attorney is not entitled to appointed counsel, and while an attorney who is found to have engaged in professional misconduct has an appeal of right to the Attorney Discipline Board, there is no appeal of right to any court.[8] Thus, the full strength of counsel's trial advocacy skills must be in play before the hearing panel.

With respect to the substantive rules governing attorneys, some have withstood constitutional challenge even though they would clearly be considered unconstitutionally vague or overbroad if applied in a criminal case.[9]

Moreover, even though attorney discipline cases are quasi criminal, MCR 9.115(A) provides that "[e]xcept as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel." To complicate matters further, hearing panels are loathe to consider motions for summary disposition, and other specific rules applicable in civil cases can be found to have been trumped by MCR 9.102(A), which provides in relevant part that the rules in subchapter 9.100 are "to be liberally construed for the protection of the public, the courts, and the legal profession…."

Until a 2011 amendment to MCR 9.115(F)(4), discovery in attorney discipline proceedings was also extremely restricted. While still far narrower than the scope of discovery available in civil cases, the scope of discovery available in attorney discipline cases is now comparable to that available in Michigan criminal cases; the attorneys for the parties in an attorney discipline action are now, at long last, entitled to disclosure of each other's witness statements. As in any other type of litigation, proper preparation for trial will almost always require counsel to go beyond what has been provided in discovery and further investigate witnesses and physical evidence.

Quirks aside, when a formal complaint is filed and timely answered, the issues are joined as in any other proceeding and the ensuing trial is conducted much like a nonjury civil trial. Hearing panelists function as the triers of the facts and law, and the rules of evidence apply. Some cases largely depend on records, with very little at issue in the way of credibility, but others deal with interpretation of a rule, issues of witness credibility, the respondent attorney's state of mind, or the overall sufficiency of the proofs.

Just as in any other kind of trial, an attorney trying an attorney discipline case is well-advised to know what to concede

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and what to contest. Like judges and juries in civil and criminal actions, an attorney who argues matters that are not really at issue loses credibility and the listeners' interest and patience. In a proceeding in which the fact of certain conduct is not at issue, but the respondent attorney's state of mind is—e.g., Was the attorney acting negligently or knowingly in a case in which certain acts constitute misconduct only if engaged in knowingly?—it would make no sense to split hairs about the facts and circumstances of the underlying conduct *except* as those facts and circumstances bear on the issue important to your case, meaning your client's state of mind at the time of the act(s). Similarly, in an action in which the facts themselves are not at issue but the scope of any applicable rules is, counsel should be as cooperative as possible in allowing the relevant record to be made to focus as strongly as possible on the rule interpretation issues of the case.

In a given year, the Attorney Grievance Commission receives close to 3,000 requests for investigation; it is unusual, however, for more than 150 formal complaints to be filed.[10] When a formal complaint is filed, the staff attorney assigned to a file stays with it and becomes the prosecutor in the case. In many proceedings, the parties are able to agree on the appropriate sanction, subject to the hearing panel's approval. When the parties agree on the appropriate disposition of a case, they enter into a stipulation that is submitted to the hearing panel for approval. (The agreement of counsel for the grievance administrator is subject to the approval of the Attorney Grievance Commission before a stipulation is submitted to a hearing panel.) Sometimes, the parties' agreement will be partial; they will agree that the respondent engaged in particular misconduct but disagree as to the appropriate sanction. For example, the respondent's counsel may believe that a reprimand (with or without conditions) or only a short suspension is warranted, while the attorney for the Grievance Commission believes that a longer suspension is required. In such a case, the liability portion of the trial can be truncated or avoided altogether by a stipulation as to the facts, with the appropriate level of sanction as the only issue to be tried.

A sanction hearing, which is almost always conducted separately from a liability hearing,[11] is in many ways the functional equivalent of a sentencing hearing in a criminal proceeding. In determining the sanction to impose, a hearing panel looks to a series of factors set out in the American Bar Association Model Standards for Imposing Lawyer Sanctions to determine the likely—but not presumptive—category of sanction. Application of the ABA Model Standards is mandatory.[12] The applicable framework considers (1) the nature of the duty violated, (2) the offending lawyer's state of mind at the time of the misconduct, (3) whether the misconduct caused injury or potential injury, and (4) the existence of any aggravating or mitigating factors.[13]

Mitigating evidence that can properly be considered at a sanction hearing includes, inter alia, the respondent attorney's testimony regarding acceptance of responsibility and expression of remorse, evidence of good character offered through witnesses, evidence of personal or emotional problems that affected the lawyer's judgment at the time, evidence of treatment for personal or emotional problems, and evidence of remedial measures the lawyer has taken in the wake of the misconduct.[14]

The ABA Model Standards are not sentencing guidelines like those applicable in federal and state criminal actions; they merely describe when a reprimand, suspension, or disbarment is generally appropriate without creating a presumption or, for example, addressing the appropriate length of a suspension in a case falling within the suspension category. The standards nevertheless provide a useful framework for a hearing panel's consideration. Counsel for a respondent attorney is also well-advised to supplement the Model Standards assessment with a presentation to the panel of comparable prior discipline actions and the specific level of discipline imposed in each.

At the risk of stating the obvious, because attorney discipline cases are tried before panels of lawyers, counsel's argument should focus on facts, law, and logic. Appeals to sympathy or other emotions that might be persuasive before a jury are almost certainly ill-advised in this setting. However, while appeals to emotion are inappropriate in attorney discipline actions, the truism that every case involves a human story applies here as well. Ultimately, counsel for an attorney charged with professional misconduct should keep in mind the importance of identifying the human story of a given case and the necessity of conveying that story clearly and efficiently. ■

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ENDNOTES

1. Const 1963, art 6, § 1.
2. MCR 9.108.
3. MCR 9.110.
4. MCR 9.111.
5. Cf. *In re Ruffalo*, 390 US 544; 88 S Ct 1222; 20 L Ed 2d (1968); *In re Woll*, 387 Mich 154, 161; 194 NW2d 835 (1972); *In re Clink*, 117 Mich 619, 620; 76 NW 1 (1898); *Matter of Baluss*, 28 Mich 507, 508 (1874).
6. MCR 9.115(J)(3).
7. MCR 9.115(D)(2). In practice, setting aside a default in an attorney discipline case is much more difficult than in a civil case even though the rule is the same.
8. MCR 7.302(B)(6); MCR 9.122(A)(1).
9. See *Grievance Administrator v Fieger*, 476 Mich 231; 719 NW2d 123 (2006); cf., e.g., MRPC 6.5(a) (requiring an attorney to "treat with courtesy and respect all persons involved in the legal process") and MRPC 8.4(c) (prohibiting an attorney from "engag[ing] in conduct that is prejudicial to the administration of justice").
10. See State of Michigan Attorney Discipline Board, 2011 Annual Report, available at <http://www.adbmich.org/download/2011_ANNUALRPT.pdf> (accessed February 18, 2014)
11. MCR 9.115(J)(2).
12. *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000).
13. ABA Standards for Imposing Lawyer Sanctions, Standard 3.0, available at <http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf> (accessed February 18, 2014).
14. ABA Standard 9.32(a)–(m).