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Attorney Disciplinary Cases: The Toll on Lawyer Respondents

By Megan Zavieh

Part of our job as lawyers is to emotionally detach ourselves from our clients' situations. Without the ability to detach, we cannot effectively do our jobs—we cannot see legal arguments objectively, analyze evidence, or strategize how to handle weaknesses in a case (or even see those weaknesses). Yet, recognizing the emotional toll their cases take on our clients is critical to effective representation.

I recently took a case to trial and through appeal in the attorney discipline system, and it struck me many times through the life of this case (which lasted longer than usual) that a less-resilient attorney client would have given in at a number of points along the way. I am so grateful that my client didn't because he was fully exonerated at trial, and that exoneration was upheld on appeal. Yet, that exoneration was not free. The financial, time, and emotional resources spent defending his good name were significant.

All Discipline Matters Bring Tremendous Stress

Thousands of lawyers deal with state bar investigations every year. A bar letter strikes fear in the hearts of the respondent lawyers. From the very start, an investigation impugns the lawyer's integrity. It calls into question everyday actions, many of which are often office policies. So, lawyers begin to think that all their cases will lead to more complaints. Put simply, bar investigations are downright terrifying.

Factors Impacting How Bad It Gets

Many factors impact the emotional toll of a disciplinary case:

How Far It Goes

When investigations are not closed and proceed to full-blown prosecution, the emotional toll quickly mounts. Lawyers can no longer explain to themselves that the bar will close the case once it sees the truth. The bar has seen their side, and it didn't close the case. In fact, it heard their side and still thought the facts were so bad that prosecution was the next step. So, for the case that proceeds to prosecution, the stress skyrockets.

The Length of Time a Discipline Case Can Live

In our trial, the case began many years ago. In fact, the last act for which the lawyer was being prosecuted took place in 2011. The trial was in 2021. The California Supreme Court denied the State Bar of California's petition for review at Thanksgiving 2022. For more than ten years, this lawyer was aware that his actions had upset people. Even knowing he had done nothing wrong, it was stressful to recognize that people—including powerful organizations—disliked what he had done.

In fact, he was first sued for the very same actions, and that case dragged on for years. He never got to go to trial; in fact, he never even got to conduct discovery. He dealt with the allegations against him on motions to dismiss—when the facts are assumed to be true. Like most civil litigation, the case was settled without admission of wrongdoing. Insurance companies like to settle cases, and lawyers who are being sued like to have the case be over.

But, once that case was finally over, the state bar swooped in and began a prosecution. Having allowed the civil case to settle without any findings of fact, he was right back where it all began—facing ugly allegations of wrongdoing with no evidentiary rulings to rely on. Even worse, the parties to the civil case are not parties to a disciplinary action. There is no right to discovery from those individuals. So, we were left defending state bar charges relating to actions taken against people we could not question or seek documents from, whereas the prosecution did have access to those same people.

The discipline case lingered for years, too. The investigation was not quick, and once the state bar decided to pursue charges, COVID-19 intervened and delayed the case. Between COVID-19 and two motions to dismiss, including an interlocutory appeal, the original filing of disciplinary charges was 18 months before trial. (California State Bar Court rules provide for trial within four months of filing the charges, so this was exceptionally long.)

By the time we got to trial, it had been ten years since his last purported "bad" act. For more than ten years, he lived with the allegations of wrongdoing, with no trial to exonerate him. For 18 months, he lived with discipline charges posted to his state bar profile and publicized by his political enemies.

Multiple Opportunities to Give Up

A discipline case hands the lawyer many opportunities to throw in the towel. In most cases, we view these positively as multiple opportunities to settle the case, but when the lawyer is being prosecuted unfairly and truly believes the charges cannot be proven, these are devilishly tempting opportunities to give up.

In this case, the original offer to settle was disbarment. No lawyers with any shred of a chance of obtaining a result short of disbarment should stipulate to disbarment. Why would they? It is akin to a criminal defendant pleading to the state's highest punishment, be it the death penalty or life in prison. The worst possible result at trial is disbarment. Why give that to the state bar without a fight?

The offer did slightly improve at some point along the way. Once we provided the state bar with dozens (as in upward of 40) good character letters, the state bar relented and offered a two-year actual suspension.

Under the rules as they existed at the time, a suspension of 90 days or more in California required the lawyer to essentially shut down his law practice or at least withdraw from it if he has an office operating with multiple lawyers. This is due to the requirements of California Rule of Court 9.20, which requires withdrawal from all cases, the filing in court of notices of the lawyer's suspension, sending certified letters to clients and opposing counsel notifying them all of the suspension, and taking the lawyer's name off the firm and all advertising. (Recent changes impose these requirements on all suspensions no matter the length.) The lawyer also cannot share in the legal fees generated by his or her firm during the suspension. Compliance with Rule 9.20 can kill a lawyer's practice. An actual suspension of two years can easily mean the end of the lawyer's career (and, by necessity, the start of a new one in another field so the lawyer can survive). So, a two-year actual suspension is not much of an offer.

Still, there is a bit of temptation in an offer of less than disbarment after the bar has pressed to take your license for life. Terrible as the offer is, there is a little voice in your head asking, "Will I regret saying no?"

Sleepless nights quickly ensue. Clients tell me about regret-filled nightmares of disbarment. They start planning for a lengthy suspension, all the while feeling resentful that they did nothing wrong and should not be looking at a new career or how to survive on their spouse's income. They ask questions like, "What am I allowed to do while suspended?" and feel sucker-punched by the answer. My client worked far too hard to get to where he is to just give up, but it sure was tempting.

The Stress of Trial

The magnitude of trial begins to really sink in as it inches closer on the calendar and preparation takes over. Even for represented lawyers, such as my client, there is significant trial prep for the respondent to do. It is hard for lawyer clients to sit back entirely. Some do, particularly when the process is too overwhelming, but most want to be involved. It can actually be calming to see the case presentation come together, to speak to their witnesses and organize the schedule.

Despite their training and understanding of the legal system, lawyer clients still find a public trial of their own upsetting. The lawyers' emails are trial exhibits, read into the public record (and on Zoom screens shared and blown up for the world to see). The lawyers' professional choices are called into question; they are interrogated not only for their actions but also for their motives in taking those actions.

The lawyer's worst enemies are paraded through the witness stand to testify to their most horrible beliefs about the lawyer. In a discipline proceeding, the rules of evidence are loosely applied, and often testimony is allowed that would never be seen in traditional civil court. The lawyer sits and listens, taking it all in.

It seems to be worse for trial lawyers, who want to use their lawyer skills and object or cross-examine the witnesses.

The lawyer as witness is both the best and the worst part of the trial. Being on the witness stand is incredibly hard for lawyers; with all their knowledge of the facts and the legal process, their role is purely as witness against and for themselves. They have no right against self-incrimination, as an attorney discipline matter is not a criminal case. They must answer the questions, and those questions from the bar are phrased to a hostile witness. Facts are assumed that may not be in evidence, assumptions are made (especially as to motives), and judgment has already been rendered by the prosecutor questioning him. Yet, they know the facts better than the prosecutor ever can; they lived the case. Although they are being questioned, it is also an opportunity to put forth their version of the facts, so long as they can keep their wits about them.

The respondent's phase of a trial can be heartwarming with a dose of humiliation. In our trial, we put on more than a dozen live supporting witnesses. While my client was clearly touched by their testimony, particularly as to his character, there is a tremendous amount of guilt and frustration when you see your friends, clients, colleagues, and sometimes even family members being put through cross-examination.

Then, there is the audience. In a live trial in a courtroom, the doors are unlocked, the proceeding is noted on the court docket, and members of the public can come in to watch. The reality is that most people do not choose to spend their day traveling to the court to watch a trial in which they have only a passing interest. But a Zoom trial is another world. It is easy to click a public link and have a Zoom trial playing while you straighten the office, catch up on emails, or otherwise achieve some level of productivity. In our trial, the General Counsel of the State Bar of California and several lawyers for powerful organizations in the state chose to log in (and presumably watch) for days on end.

Thank Goodness for Hanging Tough

I am eternally grateful to my clients who can stomach seeing a case through to the end. This particular client was exceptionally strong and resilient, and his mental and emotional toughness showed. It also helped that he was not alone. Having a strong support system was critical to being able to weather the stress. He had the strength of his family backing him, a legion of clients who believed in him, and a law firm full of loyal employees who stood by him. Not all respondent lawyers are so lucky.

In the end, the court came back with total exoneration. Thank goodness he did not give in at any point along the way.

A key lesson I learn over and over when handling attorney discipline matters is that once the investigation ends and the bar decides to prosecute, the facts are secondary in determining the outcome of the case. The lawyer's fortitude in facing the charges is a stronger indicator of where the case will go. This must be true for defense attorneys in all practice areas as our clients face the worst parts of their lives in the matters for which they seek our help. It is crucial that we, as attorneys, understand the emotional toll on our clients so that we may faithfully guide them through the process.

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