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RESEARCH MEMORANDUM

To:

From:

Date:

Re: Attorney Discipline Board Panel Requirement – Due Process Michigan

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QUESTIONS PRESENTED

I. Are attorney disciplinary proceedings "quasi criminal"?
II. Should the same three-member hearing panel that decided the issue of misconduct be subsequently constituted for the sentencing hearing? OR will the absence of one member in the subsequent sentencing hearing vitiate the trial?
III. Will a panel member's absence in the sentencing hearing and subsequent participation in the sentencing decision and voting be a ground for a new trial?

SHORT ANSWERS

I. Yes, attorney disciplinary proceedings are considered as quasi-criminal as it also involves disbarment, a penal provision. However, the rules of civil trial and standard of proof of preponderance of evidence is applied in these proceedings.
II. The rule states that the hearing panel shall conduct a separate sanction hearing for sentencing. The rule does not mention specifically that the same panel or same members of the panel should be constituted for the sentencing hearing. No on -point authority related to the misconduct and subsequent sentencing hearing is found to say that the absence of one panel member in the subsequent hearing would vitiate the trial. In any case, the enquiry here is for any prejudicial error caused due to the absence of the panel member in the hearing panel.
III. The main enquiry by a court while reviewing a hearing panel's decision is whether the "preponderance of the evidence" standard of proof was correctly applied. If a panel member was absent in the hearing, the court shall determine any prejudicial error in the decision that violated defendant's right. No on-point authority on a panel

member's absence in the sentencing hearing and subsequent participation in the decision requiring a new trial is found in Michigan or in other state jurisdictions. If the hearing panels constituted for the two hearings were not consistent with the rule, the defendant may be able to seek a new trial by showing an actual prejudicial error in the proceeding because of the absence of one panel member during the witness testimony.

Relevant Facts:

A three-member panel held a hearing at the Attorney Discipline Board per MCR 9.115. The process involved two separate hearings by the same panel. The first hearing involved issue of possible misconduct before three judges. As misconduct was found on one count, a second hearing was held as per the rule before the same three panel members on "sentencing." Like the first hearing, second hearing had live witnesses, exhibits, etc. Just before the second hearing, the panel chair announced his decision to go forward with the hearing with just two members declaring that he "has a quorum." After hearing some live witnesses, the panel chair announced that he will get the paper transcript reviewed by the third panel member and involve him as well in the decision. Is this a violation of due process and a ground to order new trial?

Relevant Statutes:

MCR 9.111 Hearing Panels

> (A) Composition; **Quorum.** The board must establish hearing panels from a list of volunteer lawyers maintained by its executive director. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. Following appointment, the board may designate the panel's chairperson, vice-chairperson and secretary. Thereafter, a hearing panel may elect a chairperson, vice-chairperson and secretary. A hearing panel must convene at the time and place designated by its chairperson or by the board. **Two members constitute a quorum**. A hearing panel acts by a majority vote. If a panel is unable to reach a majority decision, the matter shall be referred to the board for reassignment to a new panel.

MCR 9.115 Hearing Panel Procedure

> (A) Rules Applicable. Except 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**. . . . **All other pleadings must be served on the opposing party and each member of the hearing panel**. . . .
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> (F) Prehearing Procedure.
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> (2) Motion to Disqualify.
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> (c) The board must assign a substitute for a **disqualified member** of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.

(J) Decision.

(2) **Upon a finding of misconduct, the hearing panel shall conduct a separate sanction hearing to determine the appropriate discipline**. The sanction hearing shall be conducted as soon after the finding of misconduct as is practicable and may be held immediately following the panel's ruling that misconduct has been established.

RESEARCH FINDINGS

I. Are attorney disciplinary proceedings Quasi-criminal?

It has been held that "attorney disciplinary proceedings are quasi criminal in nature." Grievance Administrator v Fried, 456 Mich 234, 239; 570 NW2d 262 (1997). That is, "attorney discipline matters are neither civil nor criminal cases; they are similar and dissimilar to both." Griev Admr v Atty Discipline Bd, 444 Mich 1218, 1227; 515 NW2d 360 (1994). "For example, attorneys charged with misconduct are not entitled to jury trials--a right given to all civil and criminal trial litigants in the state courts." Id. "The burden of proof in attorney discipline cases is preponderance of the evidence, the same standard as in civil cases." Id. (citing MCR 9.115(J)(4)). "Respondents do not face imprisonment or fines as do defendants in criminal cases." Id. Respondents can be called as witnesses, but cannot be compelled to incriminate themselves. Id. And, the refusal to answer questions on Fifth Amendment grounds cannot be used against a respondent. Id.

The Sixth Circuit has held that "a disciplinary proceeding is not a criminal proceeding, nor is attorney discipline equivalent to criminal punishment." United States v Moncier, 492 F App'x 507, 509 (CA 6, 2012) (citing In re Moncier, 550 F. Supp. 2d 768, 781 (E.D. Tenn. 2008), aff'd, 329 F. App'x 636 (6th Cir. 2009); accord In re Caranchini, 160 F.3d 420, 423 (8th Cir. 1998) ("Although disbarment may be considered punishment 'in common parlance,' . . . attorney discipline, including sanctions and disbarment, is not 'punishment' for purposes of the double

jeopardy clause.").[1] In Moncier, the defendant argued that the disciplinary proceeding was "quasi-criminal" quoting In re Ruffalo, 390 U.S. 544, 551 (1968)[2] (citing In re Gault, 387 U.S. 1, 33 (1967)). Here, the court had affirmed a district court opinion in the defendant's case holding that his disciplinary proceeding is not a criminal proceeding. Id. So, quoting Judge Collier, the Sixth Circuit noted that defendant's conviction did not violate his right against double jeopardy stating:

> According to defendant, double jeopardy prevents an attorney from being both convicted of a criminal offense and disciplined by a federal court in its maintenance of the ethical and professional standards of the members of its bar. If that were true, an attorney convicted of fraud, murder, treason, or any other criminal offense would be protected by double jeopardy from being disbarred for that underlying conduct. The federal court, in turn, might shield such an attorney from being criminally convicted if it disbarred the attorney based upon the same conduct which would support a criminal conviction.

Id. (quoting In re Moncier, 550 F. Supp. 2d 768, 781 (E.D. Tenn. 2008), aff'd, 329 F. App'x 636 (6th Cir. 2009).

In Basquin v Stasson (In re Stasson), 472 BR 748 (Bankr ED Mich, 2012), the plaintiffs conceded that attorney discipline proceedings in Michigan are not criminal proceedings, although they argued that such proceedings are "quasi-criminal." Id. at 753 n 3. Here, the court was "not clear what [quasi-criminal] means," and held that it is clearly "not the same thing as a criminal proceeding, such as the criminal prosecution for larceny. . ." Id.

[1] see also In re Jaffe, 585 F.3d 118, 121 (2d Cir. 2009) ("[s]ince attorney disciplinary proceedings are primarily remedial, the double jeopardy clause of the Fifth Amendment does not apply").

[2] Disbarment proceedings are adversary proceedings of a quasi-criminal nature. The lack of notice to petitioner, prior to the time he and Orlando (a railroad employee) testified, that petitioner's employment of Orlando would be considered a disbarment offense deprived petitioner of procedural due process.

In Williams v Dir, Patuxent Institution, 276 Md 272; 347 A2d 179 (1975), the Maryland Court of Appeals provided a two-pronged test to determine whether a proceeding is criminal. Id. at 300. "Under this two-pronged test a criminal case within the ambit of the Fifth Amendment is one where the State or Federal government seeks to impose a criminal or quasi-criminal sanction upon an individual for a violation of its law." Id. "In other words, a criminal case is one where the pertinent inquiry is into a violation of law and the consequence is a criminal or quasi-criminal sanction." Id.

In Michigan, however, "[t]he court rules provide that the general civil rules for non jury cases apply to attorney discipline matters except where the specific discipline rules differ." Griev Admr v Atty Discipline Bd, 444 Mich 1218, 1227; 515 NW2d 360 (1994) (citing MCR 9.115(A)). "Yet, case law describes attorney discipline cases as 'quasi criminal' and disbarment as 'highly penal.'" Id. Respondents in such proceedings are entitled to "the right of fair notice and/or warning." Grievance Administrator v Fried, 456 Mich 234, 239; 570 NW2d 262 (1997). To serve as the basis for an ethical violation, "[a] conduct must be clearly proscribed[.]" Id. Thus, the rules of civil procedure should apply to a disciplinary action in Michigan though it is referred to as quasi-criminal proceedings as disbarment offenses are involved.

II. Will a three-member hearing panel's decision on misconduct be affected by a member's absence in a subsequent sentencing hearing?

A. Attorney Discipline Board and the Hearing Panel:

The Attorney Discipline Board acts as the 'adjudicative arm of the Supreme Court' to supervise Michigan attorneys and appoints hearing panels under MCR 9.110(E)(2) and "reviews a final order of discipline or dismissal issued by hearing panels." Grievance Administrator v Deutch, 455 Mich 149, 158; 565 NW2d 369 (1997) (See MCR 9.110(A); MCR 9.110(E)(4)).

The primary fact-finding responsibility is entrusted to the hearing panel, which is required by MCR 9.111(C)(2) to "[r]eceive evidence and make written findings of fact." The findings of the hearing panel and the Attorney Discipline Board are "reviewed for proper evidentiary support on the whole record." Griev Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991).

B. Two stages of hearing:

The two stages of separate hearings in Michigan's attorney discipline process consists of the initial hearing to establish "the existence of professional misconduct and the second hearing [to] determine[] the level of discipline appropriate in light of any mitigating or aggravating factors in the particular case." Deutch, 455 Mich at 159 (citing MCR 9.115(J)(3)). However, "[t]he power to regulate and discipline members of the bar rests ultimately with this Court pursuant to constitutional mandate." August, 438 Mich at 304 (citing Const 1963, art 6, § 5).

C. Does a panel member's absence violate due process?

The Due Process Clause applies to disciplinary proceedings as well. In re Barach, 540 F3d 82, 85 (CA 1, 2008). "A hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." Crampton v Mich Dep't of State, 395 Mich 347, 351; 235 NW2d 352 (1975). In In re Barach, 540 F3d 82, 85 (CA 1, 2008), the First Circuit analyzed the deprivation of due process in attorney disciplinary proceeding, that is usually defined as a want of notice or opportunity to be heard.

"It suffices to satisfy due process if a state adopts procedures that collectively ensure the fundamental fairness of the disciplinary proceedings." In re Barach, at 85. If a lawyer is granted the right to practice law, "that right cannot be taken away in an arbitrary or capricious manner." Id. Yet, the First Circuit found the Due Process Clause as flexible, because "reasonable minds can differ as to the need for elevated levels of proof in particular situations." Id. "Due process

requires that a sentence must be based on accurate information and that a defendant have a reasonable opportunity to challenge the information." People v Dinkins, ___NW2d___; 1998 Mich. App. LEXIS 2679, at *17 (Ct App, Jan. 13, 1998) (citing People v Zinn, 217 Mich App 340, 348; 551 NW2d 704 (1996)).

Two panel members are sufficient to constitute a quorum as per MCR 9.111. In this case, two members were present for both the misconduct hearing and the sentence hearing. Generally, to challenge a hearing, the defendant must specifically show that the panel member's absence curtailed the fundamental fairness of the disciplinary proceedings by providing specific facts.

D. The use of a preponderance of the evidence standard and due process violation

Mich. Ct. R. 9.115(J) establishes the analytical framework that the hearing panel must use in making its decision regarding attorney discipline and specifies the form of the hearing panel's decision. The hearing panel must find the charge of misconduct as established by a preponderance of the evidence to enter an order. The report and order must be *signed by the panel chairperson* and filed with the board and the administrator.

The First Circuit considered whether using the preponderance of the evidence standard in bar disciplinary proceedings offend the due process and found it does not. The Court reasoned that several "important property rights typically rest, in contested proceedings, on proof by preponderant evidence." In re Barach, at 85-86. Also, several jurisdictions use a preponderance standard in attorney disciplinary matters, including Michigan. *See, e.g.,* In re Robson, 575 P.2d 771, 776 (Alaska 1978); In re Crane, 400 Mich. 484, 255 N.W.2d 624, 627 (Mich. 1977); Weems v. Supreme Court Committee on Professional Conduct, 257 Ark. 673, 523 S.W.2d 900, 904 (Ark. 1975). Thus, the use of a preponderance standard was accepted as not so arbitrary or

irrational as to render state disciplinary proceedings that use it fundamentally unfair. Id. at 86 (citing In re Friedman, 51 F.3d 20, 22 (2d Cir. 1995).

Thus, the "hearing panel is empowered to enter an order of discipline only where it finds the charges have been established by a preponderance of the evidence." In re McWhorter, 407 Mich 278, 290-91; 284 NW2d 472 (1979). A reviewing court's function is to review the findings of the board to determine whether there exists proper evidentiary support on the whole record to sustain the findings. Id.

Thus, the use of a preponderance of the evidence standard in civil trials was not found to offend the due process in bar disciplinary proceedings.

E. Does a hearing panel less than a quorum violate respondent's due process?

Research shows that due process violation occurs only if there is an actual prejudicial error and not for any nonprejudicial irregularity, or for any error not resulting in a miscarriage of justice. In re Grubbs, 396 Mich 275 (1976), the court analyzed the due process violation for not having three members of the hearing panel hear the case. Likewise, in In re Crane, 400 Mich 484, 493; 255 NW2d 624 (1977), one of the panel members was absent to hear a portion of the testimony.

In re Grubbs, however, the Supreme Court of Michigan found against due process violation before a State Bar Grievance Board hearing panel where a quorum of two of the three panel members were present and unanimously voted for the order of discipline. Id. at 276. The order suspended the attorney's practice for 60 days and the State Bar Grievance Board affirmed. The attorney did not challenge the panel's findings of fact related to his failures in representing a client. On appeal, the alleged denial of due process of law.

Like in the instant case, the panel chairman responded that two members constitute a quorum and that the third member of the panel was in trial. Id. at 277. The attorney relied on rule 16.3.2 to argue that a "hearing panel shall act by vote of a majority," and a panel of only two denies him a majority vote. Also, he was improperly denied the possible dissent of the third member which would still allow for a majority vote. The Court, here, found the presence of a quorum of two and the vote was unanimous. While the Court acknowledged the potential for difficulty provided by the use of a panel with only two members present, e.g., a tie vote, the Court found no prejudicial error in this instance and affirmed the order of the State Bar Grievance Board.

Here, the court found the unanimous decision of the two members sufficient to constitute majority because even if the third member voted against the decision a majority vote is attained and so no prejudicial error was found. (*See* In re Crane, 400 Mich 484, 493; 255 NW2d 624 (1977) ("Respondent was not denied due process because a member of the hearing panel was not present for a portion of the testimony. A quorum of two was present and the vote of the panel was unanimous. Therefore, no prejudice occurred."). In re Crane, is like the present case where one of the panel members was not present for a portion of the testimony. Here, the court found the "preponderance of the evidence" standard of proof employed by the panel and grievance board as correct. Id. at 493 (citing Grievance Board Rule 16.13 and State Bar Grievance Administrator v Posler, 390 Mich 581, 583; 213 NW2d 133 (1973).

Jagger v Coon, 5 Mich 31 (1858), was the only one decision where the Court held that in cases where *less than a quorum of the court* has heard the argument, there is no authority to

render judgment.[3] However, this relates to quorum of a *court* and, not a hearing panel, and no other case law was found in line with this decision related to a hearing panel or a disciplinary hearing for misconduct or a subsequent sentencing hearing.

The aforesaid cases show that the most important factor that the courts determine while challenging a decision rendered by a hearing panel is whether the panel was able to apply the "preponderance of the evidence" standard of proof correctly. In other words, whether there was any prejudicial error in the panel's decision that violated defendant's right because a panel member was absent in the hearing. Also, in the instant case, as per the rule, two members were present throughout the hearing to constitute a quorum. Therefore, the issue depends on whether the defendant can show clear prejudicial error in the decision-making process that deprived defendant's right.

Discussion on similar Cases:

In Fieger v Thomas, 872 F Supp 377 (ED Mich, 1994), it was held that a significant violation of plaintiff's constitutional right to due process and a justification for federal court intervention occurred, when the ADB disciplined plaintiff, and the State Supreme Court refused plaintiff's petition for leave to review any sanction imposed. Id. at 379.

In People v Aceval, 282 Mich App 379; 764 NW2d 285 (2009), the court noted the well-established legal position that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. Id. at 389. But the court noted that the conviction will only be reversed, and a new trial will be ordered, only if the tainted evidence is material to the defendant's guilt or

punishment. Id. Thus, the court entirely focused on the "misconduct's effect on the trial" to analyze the fairness of the trial which is the crucial inquiry for due process purposes and not the blameworthiness of the prosecutor or the court's culpability. Id. at 389-90.

In In re Geralds, 402 Mich 387; 263 NW2d 241 (1978), however, no miscarriage of justice was found in a case when there was denial of a last-minute request for an amendment of the answer. Id. at 391. Here, the Court held that "No investigation or proceedings hereunder shall be held invalid by reason of any nonprejudicial irregularity, nor for any error not resulting in a miscarriage of justice. Grievance Board Rule 16.34(c)." Id.

Lott v Dep't of Pub Safety & Corrections, Office of the La State Police, 98-1920 (La 05/18/99); 734 So 2d 617, is a Louisiana case where the defendant state police appealed a decision of the First Circuit, Court of Appeal, State Police Commission (Louisiana), which held that the employee was denied due process during the appeal against his termination by State Police because a constitutional quorum of the State Police Commission was not in attendance on a hearing date. Id. at 617. The employee claimed violation of due process as there was absence of a quorum. The court of appeal agreed and stated that the failure of the Commission to seat a quorum of its members to weigh the credibility of testimony resulted in a denial of due process rights. State Police appealed and the court reversed holding that the plaintiff employee had no right to a specified mode of procedure because he was ultimately afforded notice and a meaningful opportunity to be heard, and so the lack of a quorum at one hearing did not violate of his due process rights. Id.

In Lott, the essence of plaintiff's argument was that the participation in the decision-making process by one who has not actually heard the testimony results in a deprivation of due process. Id. at 620. The Louisiana Court citing the U.S. Supreme Court in Morgan v. U. S., 298

U.S. 468 (1936), noted "that the decision making authority had neither heard nor read evidence or argument, held that in quasi-judicial proceedings, the decision-making duty must be performed by one who has considered the evidence or argument." Id. at 620-21. Thus, no due process violation was noted as the plaintiff was otherwise afforded notice and a meaningful opportunity to be heard.

In another case before the Superior Court of Rhode Island the Appellant attacked the constitutionality of G.L. 1956 § 5-37-5.2(e)(3) as the statute does not require the members of a hearing committee to observe personally all testimony during a hearing to determine whether a medical professional has engaged in unprofessional conduct. Aubin v Gifford, 2007 R.I. Super. LEXIS 5, at *51 (Super Ct, Jan. 9, 2007). The Appellant alleged that the statute violates his right to due process of law, because the "Hearing Committee members charged with making credibility determinations can only duly evaluate witness testimony by attending all hearing sessions." Id. Appellants argued that procedural due process required the personal presence of the hearing committee members at all sessions of the hearing and only one member of the three-member panel observed all twelve sessions of the hearing. Id. at *53. The remaining two members each only observed one session personally the testimony of one patient and so appellant claimed that having all three members together at only one of the sessions deprived him of his right to due process. However, the record did not show that appellant argued the issue of his due process rights before the hearing committee. Id. Because of this, the Rhode Island Supreme Court initially stated that it "will not consider on appeal an issue that was not raised before the trial court." Id. But as the appeal implicates an important constitutional right to fair hearing the court addressed the ramifications of appellant's constitutional challenge. Id. at *53-54.

The Aubin Court noted the Connecticut Supreme Court's case, Pet v. Dept. of Health Servs., 228 Conn. 651, 638 A. 2d 6, 19-20 (Conn. 1994), where it was held that an agency hearing satisfies a respondent's right to due process when each hearing committee member has either heard all the evidence or read the transcript in its entirety. Id. at 58. Per the Aubin Court, "Administrative hearings are not held to the same evidentiary standards as criminal or even judicial civil proceedings. Hearsay is quite acceptable in administrative hearings." Id. at *65. Based on this, the court held the hearing officer acted with reasonable prudence and within her expertise, considered their testimony necessary to ascertain facts about the complaint and the circumstances surrounding the incident. Thus, the court found no abuse of discretion by the hearing officer in admitting the testimony of the three witnesses, and held that her admission of the alleged hearsay testimony was not affected by error of law. Id. at *66-67.

Analysis of present case:

In Michigan, per MCR 9.111, two panel members are sufficient to constitute a quorum in a panel for attorney disciplinary hearing. The rule dealing with conducting a separate sanction hearing by the "hearing panel," does not suggest that the same hearing panel or same members should be present. Likewise, MCR 9.115(F) (2) (c) deals with assigning a substitute for a disqualified member in the panel or reassigning the complaint to another panel in case a member is disqualified. The facts here do not suggest any issue related to disqualifying a panel member and so it is inapplicable in this case. In addition, even though the proceedings are quasi-criminal, civil trial procedures are adopted to a disciplinary action in Michigan.

The specific issue in this case is that the panel member who was absent in the sentencing hearing was permitted later to involve in the decision making and the deliberations and vote without having the chance to see any witness testify. Presuming that the defendant did not object

the sentencing hearing to proceed without the third panel member, the composition of the second hearing was not the same as the first hearing. So, in this case, a three member decided the issue of misconduct, but only a two-member panel was fully involved in deciding the sentencing.

Per the rule, the hearing panel that conducted the misconduct hearing must hear the sentencing. Therefore, defendant can argue that the composition of the panel was not consistent with the rules. Here, the rule was sidelined by the panel chair as the same hearing panel did not fully attend the sentencing hearing. So, the defendant should be able to show clear prejudice because one panel member was absent in hearing the testimony of the witnesses and so did not have the opportunity to see the witnesses testify or observe their body language while giving the testimony. Without this opportunity, the panel member may not be properly able to participate fully in the process of decision making by just reading the transcript testimony. This is against the rule that the hearing panel that conducted the misconduct hearing should conduct a sentencing hearing. This should ultimately prejudice the deliberations and voting especially if the third member's decision becomes the deciding factor in the outcome of the case. That is, if the two other panel members differ in their decision and the third panel member's decision becomes the deciding factor in the case.

However, there is no on point authority similar to the case and the ultimate enquiry by the court is not just for any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice, but for an actual prejudicial error. Therefore, any nonprejudicial irregularity or any error not resulting in a miscarriage of justice may not be sufficient to seek a new trial.

CONCLUSION

The ultimate enquiry in a case where there was lack of quorum or deficiency of panel in hearing cases is if the defendant has been afforded notice and a meaningful opportunity to be

heard and whether the panel was able to apply the "preponderance of the evidence" standard of proof correctly. The court would specifically determine if the defendant is able to show clear prejudice without just focusing on the procedural irregularity.

In the instant case, the two hearing panels constituted for conducting misconduct and sentencing hearing was not consistent with the rule in its composition. The sentencing hearing panel was deficient when compared to the first panel constituted for misconduct hearing. Therefore, the procedure was not in compliance with the rule. Here, the defendant can seek a new trial by showing an actual prejudicial error in the proceeding because of the absence of the panel member during the witness testimony. Mere nonprejudicial irregularity without a miscarriage of justice may not suffice a new trial.