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THE RECORDER

Sometimes Bar discipline too aggressive

Richard Zitrin

Part two in a series of three articles about the State Bar of California's lawyer discipline system.

In my last column about State Bar discipline, I cited three examples of how the Bar had abjectly failed to adequately discipline three bad lawyers. Incredibly, though, the Bar's Office of Trial Counsel (OTC) has a history of both *under*-prosecuting cases, such as those I cited, while at the same time *over*-prosecuting others.

How can this be? First, prosecutions of lawyers who have seriously and serially harmed clients, while hardly daunting, can be fact-intensive. Prosecutors must prove that a manifestly unfair transaction with a client was "really" theft or embezzlement, or that apparent abandonment of the client was not something else — an uncooperative client, miscommunication or change of address. None of these proofs involves rocket science, but they do require competent trial lawyers. And they are far more difficult than technical trust-fund violations, where the rules are applied strictly and the proof is readily at hand through bank records. No wonder OTC loves prosecuting those slam-dunk violations.

Second, the Bar has always been highly sensitive to how it's perceived. Or, more accurately, how *it perceives* it's being perceived. So if a judge complains about a lawyer, even if OTC doesn't see a violation it will likely examine the case closely. If there is political pressure — or lots of publicity — then even more scrutiny is likely.

Third, the highly insular State Bar does not like it when lawyers act outside the box — or, more accurately, outside their box. It has long been primed to go after people it considers outliers. Too often, OTC resorts to the "catch-all" discipline provided not in the ethics rules but in the State Bar Act, originally enacted in the 1930s. Particularly appealing to prosecutors are Business & Professions Code §6106 ("The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a [crime] or not, constitutes a cause for disbarment or suspension") and §6068(a) ("It is the duty of an attorney to do all of the following: (a) To support the Constitution and laws of the United States and of this state.") Sound OK? Sure, until you see how it's applied.

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Overzealous prosecution of outliers is nothing new. In the early 1970s, the Bar went after the famous and flamboyant Melvin Belli, then known as "the King of Torts," on charges of improperly soliciting clients because he spoke at his "Belli Seminars," appeared on TV and radio, and even "starred" in a print ad for Glenfiddich Scotch. Belli received a one-year suspension and appealed.

In *Belli v. State Bar*, 10 Cal.3d 824 (1974) (a fascinating read, by the way), the California Supreme Court concluded that most of the Bar's charges violated free speech: "Were we to rule [for the State Bar], many attorneys might refrain from participating in public forums, a result which is hardly acceptable." The court did find that one press release and one of three Glenfiddich ads formed a reasonable basis of discipline, but lowered the suspension to 30 days. Clearly, the justices felt that the Bar had wasted the court's time, or as dissenting Justice William Clark put it: "Mr. Belli's flamboyant life style has no doubt offended many a lawyer and judge. But while the facts before us may affront our sense of professional dignity," that affront does not warrant discipline.

A couple of years later, the Bar tried to discipline the original Jacoby & Meyers, which thumbed its nose at the established bar by calling itself a "legal clinic" instead of a "law office." By then, the Supreme Court had had enough. Citing "the triviality of the misleading name charge," Justice Stanley Mosk wrote that it was "difficult to comprehend why 'legal clinic' is more misleading than the permissible designation of 'law office" [when] 'legal clinic' may actually be more descriptive. ... Certainly the use of 'legal clinic' appears less misleading than ... retaining in the title of a law firm the name of partners long since deceased." *Jacoby v. State Bar*, 19 Cal. 3d 359 (1977). Case dismissed, with the Bar looking foolish and stodgy. But the Bar still tends towards such prosecutions and investigations, as these examples show:

Example No. 1: MQ, San Francisco. "MQ" had done some things that the State Bar just didn't like, but which didn't violate any ethical rules. So when a fellow lawyer sued MQ over a fee dispute, the Office of Trial Counsel jumped into action. I was brought in by MQ's counsel, an excellent lawyer who was shocked by OTC's overreaching.

OTC had already decided to file a complaint against MQ for illegally dividing a fee, and the only issue was whether he wanted an "Early Neutral

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Evaluation," the term they use for a pre-filing plea-bargaining conference. But my colleague was not satisfied and wanted to meet with the prosecuting attorney face-to-face to try to persuade her to abandon her case, with me in attendance as the ethics expert.

It was an extraordinary meeting. We explained to the prosecutor that the rule only prohibited "dividing" a fee, not agreeing to divide a fee, and this fee had not yet been divided. The prosecutor disagreed, despite a published case directly on point. "Anyway," she explained, "we have other charges — moral turpitude, not supporting the laws. ... He was sued by his co-counsel; since he's a defendant in a lawsuit we have enough to charge him with unlawful conduct."

As my co-counsel's jaw dropped open, my blood pressure rose. "So," I asked, "if my contractor sues me for unpaid invoices and I defend because he didn't finish the job, could you prosecute me?"

"Yes," she replied without hesitation, "although I would exercise my discretion not to."

My blood pressure spiked. I had just been told by a prosecutor in the Office of Trial Counsel that any lawyer could be brought up on discipline charges based merely on a civil complaint. I could contain myself no longer. "Well, you're wrong!" I exclaimed, totally blowing my neutral expert cover. Her boss, the same Allen Blumenthal mentioned in my last article, had her pull back the complaint and MQ's case was never brought.

Example No. 2: Cindy Ossias, San Francisco. In 2000, Ossias, a senior lawyer with the California Department of Insurance, became convinced that she had proof that Insurance Commissioner Chuck Quackenbush was intentionally letting insurance companies get away with cheap settlements on Northridge earthquake claims. At the same time Quackenbush asked insurers to pay $12 million into an illegal campaign slush fund.

Since she could hardly take her information to the top dog, Quackenbush, Ossias divulged her documentation to the Assembly Committee on Insurance, which was charged with oversight of her department. At about the same time, an enterprising *LA Times* reporter, Virginia Ellis, wrote a series of exposés about Quackenbush and his slush fund, though she got no information from Ossias. Eventually, Quackenbush resigned and fled the state.

With Cindy's name on the front pages and knowing OTC reads the newspapers, too, I called Cindy, who I knew as a public-spirited lawyer, and volunteered to help pro bono with the State Bar. I contacted the then-chief deputy trial counsel, whom I knew well enough to get a meeting without saying why. When we met, I told him, "I'm here on behalf of Cindy Ossias."

It was no surprise when he told me that even though the Bar had received no complaints about her, two of his most senior people were investigating Cindy vigorously. Jeffrey DalCerro, now the head of the San Francisco Office of Trial Counsel, is a prosecutor long committed to busting bad guys. But back then, he was ordered to investigate whether a state lawyer acting in the public interest could be disciplined for exposing the frauds of the commissioner who ran her office but was not her individual client. What a waste of time.

Ultimately, thank goodness, OTC decided that Ossias had done nothing wrong. They actually wrote her a pat on the back: "We have determined that Ms. Ossias' conduct should not result in discipline because: (1) It was consistent with the spirit of the Whistleblower Protection Act; [and] (2) it advanced important public policy considerations."

The State Bar as a whole, including the OTC, has long operated out of fear and self-protection, rather than simply doing what's right for the people of California. Therein lies perhaps the biggest problem. Afraid that a front-page story could raise questions in some quarters, OTC sent two valuable senior prosecutors on a wild goose chase when they could have been doing their real jobs. Meanwhile, afraid of those who even slightly push the envelope, OTC can react without much thought to protect their own world view.

But fear-based prosecutors don't get the worst offenders off the streets: here, those who seriously and serially harm clients. Fear-based approaches create a reactive organization where tough, principled prosecution takes a backseat to short-term expediency and how things will "look" to others. That's no way to run a disciplinary system.

The Recorder *welcomes submission to Viewpoint. Contact Sheela Kamath at skamath@alm.com*