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Viewpoint: Solutions Elusive in Bar Discipline Problems

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Third of a three-part series of articles about the State Bar of California's lawyer discipline system.

In my first two articles about the State Bar's discipline system, I cited the many troubles with the Bar's ability to prosecute disciplinary cases properly. But I readily admit that it's far easier to criticize than to come up with workable solutions.

Let's start with some facts. Of the Bar's 580 full-time positions, 230 are held by members of the Office of Trial Counsel, of whom 60 are lawyers. More employees work in discipline through the State Bar Court and probation office. As best as I can compute, based on the State Bar's third-quarter 2011 financial report, the disciplinary system costs about $52 million per year, or more than 80 percent of the State Bar's general fund expenditures. However, the Bar also receives restricted funds that are used for other dedicated purposes. Taking those into account, it appears that discipline makes up somewhat over half the State Bar budget not dedicated to pay-for-itself matters such as admissions, practice sections and the like.

THE BAR MAKES ITS PITCH

Both State Bar President Jon Streeter and the Bar's deputy executive director, Robert Hawley, are quite persuasive in arguing that OTC should be given the chance to get the job done right under new leadership. Both emphasize that OTC is making a concerted effort to reduce the case backlog that handicaps timely prosecution, a point also emphasized by former San Mateo County DA James Fox, who was brought in as a consultant to professionalize the office.

More significantly, both acknowledge that Acting Chief Trial Counsel Jayne Kim has a mandate to raise the morale of the office and to institute vigorous training designed to improve staff performance and weed out deadweight personnel. "Law firm cultures can be changed," said Streeter, who flatly stated that OTC would be a "good, well-run professional office" within 18 months. Hawley, who is in charge of labor matters at the Bar, told me that "there is no obstacle to dealing with problem employees if there's a case to be made. ... Management needs to step up to the plate and hold employees accountable."

Sounds good. But Streeter, while impressive, serves only a year. And when I asked whether Kim or Fox would discuss their substantive priorities, I couldn't get an answer from either. Instead, I heard from Hawley, who retreated to platitudes: "[T]he priority of the State Bar, not just OCTC, is public protection. ... Processing complaints, investigating cases, and prosecuting misconduct effectively, consistent with the governing authorities ... is the ongoing priority." And, he might have added, the State Bar favors Mom and apple pie.

The only person who gave me a clear vision of priorities was former Chief Trial Counsel James Towery, whose brief tenure ended under bizarre circumstances this summer. "Focus the resources on the small number of lawyers who are causing the greatest amount of harm to the public." What about the backlog? Reducing it is important, said Towery, so long as "judgment is exercised before the case takes on a life of its own." And, he added, reducing the backlog should not come at the expense of fast-tracking those offenders who do the most damage. Now that sounds like a plan.

SHOULD THE BAR AND OTC KEEP THE DISCIPLINARY FUNCTION?

It's not my first choice, but I suppose that given the lack of realistic and immediate alternatives, I'd give OTC two years to see if it can really reform from within, but only two years. After 30 years of talk but little concrete change, I remain skeptical. Here's why.

First, the State Bar has a proven track record of mediocrity in dealing with discipline. Even with the advent of the professionalized State Bar Court, OTC's modus operandi has not appreciably changed: too many serious cases falling through the cracks; too many "easy" prosecutions resulting in harsh discipline; too many of the worst offenders still in practice.

Second, even assuming that staff can be improved and professionalized from within, changing OTC's law firm culture will be far more daunting. There's no reason to think that the State Bar's insularity and opacity will change; no one I talked to within the Bar showed the slightest interest in that.

Third, the troubling interrelationship between the administrative and prosecutorial sides of the Bar will remain. While OTC's prosecutions are supposed to be independent of the general bar, with the Chief Trial Counsel reporting directly to the Bar's Board of Governors and then to the Supreme Court, this seems to exist only in theory. In realty, the OTC reports to the board's committee on "Regulation, Admissions, and Discipline" (given the unfortunate acronym "RAD").

RAD is composed of volunteers, almost all of whom, according to several former board members, join that committee with little idea that discipline is the Bar's single most important function, and virtually no idea of how the disciplinary system works.

As a result, the wall between the general Bar and OTC looks more like a thin and porous membrane. After Towery resigned this summer, new Bar Executive Director Joe Dunn appointed his deputy, the ubiquitous Hawley, as acting head of OTC. While the Bar claimed that the wall of separation was being maintained, within days four senior managers were fired from OTC's Los Angeles office. Whether the board's committee on discipline approved of this firing or not — something else no one will talk about — this hardly looks like the separation of prosecutorial and general Bar functions intended by law.

The same standards of prosecutorial independence should apply to OTC as they would to any district attorney's office. Imagine a San Francisco DA's office in which the mayor or the city attorney has the power to meddle in high-level personnel decisions. It's unthinkable.

The problem, succinctly stated by Towery, is that "the present system is dysfunctional, but all the other alternatives appear to be worse." And so they appear to be. Turning discipline over to the State Department of Consumer Affairs, which regulates doctors, would result in lawyers being disciplined independently from the court system. Unlike physicians, lawyers' work is directly and ultimately supervised by the courts. The solution in New York, putting the appellate courts in charge, even with $50 million a year to set and manage a prosecutor's office, seems unwieldy and would fractionalize discipline among our six appellate districts, twice the number in New York.

THE BEST SOLUTION? ABOLISH THE DEATH PENALTY

No, I'm not being facetious or cavalier, though I'm perhaps a mite optimistic. But a lot can change in two years.

Whether one believes in the death penalty or doesn't (I don't), the simple fact is that so much of our Supreme Court's time is taken up with death cases that the court has little — almost no — time for its administrative duties.

The importance of these duties cannot be understated. For instance, next year the court will have to sift through a wholesale revision of the state's legal ethics rules, 67 proposed changes in all. With death penalty cases on the docket, it will be almost impossible to give this issue the full attention it deserves. The same, of course, is true of the disciplinary system. But give the court an extra $50-plus million, add in the court's considerable authority and reputation, and there is little question that a disciplinary system administered directly by the Supreme Court — perhaps with some help from the Administrative Office of the Courts — would be far more successful than the current system administered through the State Bar.

If only the court had the time ....

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