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THE RECORDER

Bar discipline: How bad? Really bad

Richard Zitrin

California's lawyer discipline system has been broken for as long as I can remember. It's long past time to fix it. After the short and not-very-sweet reign of Chief Trial Counsel James Towery — the highly respected former State Bar president who resigned just nine months into his watch — and the recent appointment of yet another interim chief, former Bar prosecutor Jayne Kim, there will never be a better opportunity than now.

So here's my advice to Ms. Kim. Don't let these things happen on your watch:

1. Don't let unethical lawyers get away with hurting their clients because your investigators don't understand the ethics rules, or your prosecutors don't know how to put in evidence.

2. Don't let bad-actor lawyers get away with their behavior because, supposedly, "the client wasn't really harmed."

3. Don't let unethical lawyers get away with second, third and fourth offenses, even if they're going through hard times or suffering from addiction. We should be sympathetic to illness, but we must remember that the rules are designed to protect clients first, not the lawyers who victimize them.

4. Don't go after lawyers because you don't like their behavior and feel justified in prosecuting them for "rules violations" that simply don't apply.

5. Don't waste valuable time investigating highly publicized lawyer behavior unless there's really something wrong with it.

I don't generally represent lawyers before the State Bar, so I don't deal with the discipline system that often. But when I do I've often been sorely disappointed, in some cases just flat-out angry. In this column and the next, I'll offer examples from my own experience of each of these five "don'ts." Here are the first three:

Example No. 1: GH, San Francisco. The Bar Association of San Francisco received so many complaints about "GH" from clients referred through its Lawyer Referral Service that the bar took the unusual step of removing him (after a full due-process hearing) from its panel of attorneys. Then it took an even more unusual step: With the help of some of his former associates who were appalled by his conduct, BASF put together a series of his "greatest hits" — and there were many — and filed its own complaint with the State Bar, co-signed by the clients, as well as by me and other volunteer lawyers.

In perhaps the most egregious case, GH represented a woman in a family law matter. As part of the settlement, the husband made out a six-figure check to the client and handed it to his attorney, who in turn gave it to GH, who in turn ... did not give it to his client but deposited it in his trust account. He then took the vast majority of the money out of trust to pay himself fees he claimed he was owed (and which his client disputed).

I was delegated to talk to GH to find out why he had done that. He told me, flatly, that his retainer agreement authorized him to take his client's check and deposit it in his trust account even though his name wasn't on it. I asked his lawyer for a copy of the retainer; it said no such thing. No surprise: No valid retainer agreement could say that.

The case dragged on for a year and a half in the investigation stage, with some State Bar prosecutors complaining that the number of charges we'd submitted made the case too complicated. "Maybe you should have just picked one case," said one deputy. Was I hearing this right? That seemed like a district attorney with evidence of six robberies who only wants to charge one count.

Finally, though, there was a complaint — and a good one. And then, sadly, there was the trial.

As a percipient witness to GH's false claim that his fee contract justified his depositing the check, I was prepped on three occasions by the two prosecutors assigned to try the case. Unfortunately, the lead prosecutor had no clue how to present evidence. Instead of simply asking me what I had asked GH and what he had said — obviously not hearsay, since it was not being introduced to show the truth of the statement he made to me, but its falsity — he tried to admit an after-the-fact letter I had written to GH describing the conversation, which *was* hearsay. It was a disaster!

When it was all done, the prosecution of GH had cratered due to the incompetence of the prosecutors, and GH was able to "plead out" to a "private reproval," discipline that is not publicly noted or published in the bar journal or California Lawyer.

Worse, GH is still practicing his wiles in San Francisco.

Example No. 2: MC, Modesto. "MC" represented a fellow I'll call Gene, a nice guy who ran his own small construction-related business. Gene was up on the roof of a house and fell from an improperly shortened ladder, leaving him permanently unable to continue his business. His case went to trial, and MC got a great result — in excess of $400,000.

So what was the problem? Well, several, actually, bad enough that Gene never got his share and wound up having to declare bankruptcy.

First, on the eve of trial, MC told Gene that because his case was tough, MC needed to raise his fees from 40 percent to 50 percent. Feeling he had no choice, Gene reluctantly agreed. Second, after trial, MC never gave Gene a distribution statement showing their respective shares of the judgment, and doled out money to Gene only in dribs and drabs. Gene finally got $125,000, not enough to pay off his debts and medical expenses. Third, after we got involved in the case and demanded a distribution statement, what finally arrived was a document that showed all manner of fictitious expenses "recovered" by MC — including thousands to an ex-

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pert who had never been retained, and almost $10,000 of associates' overtime pay — on a contingency fee case where a lawyer never bills for attorney time.

After taking his case pro bono, I sent a comprehensive complaint to the State Bar, with Gene and me as co-complainants. Somehow, the State Bar investigators couldn't figure out why paying associates overtime out of the client's recovery was essentially theft. They didn't appreciate that raising fees on the day before trial was extortive. They closed the file without taking action, noting that MC got a great trial result and therefore, Gene wasn't harmed.

Furious, I demanded a review and brought the matter to the attention of Allen Blumenthal, one of the Office of Chief Trial Counsel's supervisory lawyers. Blumenthal, a strong-minded prosecutor and believer in doing justice for clients, saw to it that the file was reopened and a complaint issued against MC. But by then so much time had passed that the OTC deputies negotiating the case settled for yet another "private reproval." Their reasoning: Gene's case was too old.

Example No. 3: FA, Southern California: "FA" had been disciplined by the State Bar twice previously when he was charged with 13 counts of "failing to perform legal services competently, communicate with clients, tell clients about significant developments in their cases or cooperate with the bar's investigation, misus[ing] his client trust account and [withdrawing] from representation without protecting his client's interests."

FA's most egregious conduct was his complete failure to defend poor "Charles Janot" in an arbitration proceeding over ownership of a Los Angeles theater. After one brief administrative conference call, FA did nothing more on the arbitration, which proceeded without FA's participation. He told his client, Janot, that the arbitration had been canceled.

The plaintiff obtained a default award against Janot of more than $7 million. Janot found out only when he was thrown out of his own theater, unable even to retrieve his own papers. And when Janot's new lawyers asked FA to help set aside the arbitration award obtained through FA's abandonment, FA, according to the State Bar, claimed "he had no recollection of receiving any correspondence from the arbitrator and offered no explanation" for his failures.

Janot's case comprised only five of the 13 counts against FA. Other counts involved serious charges of abandoning other clients. So what was the punishment for this three-time loser charged with ruining these clients' cases — and their lives? Disbarment? Being drawn and quartered (a punishment that crossed my mind)? No: A 90-day suspension from practice, in part becaus — even though he initially refused to cooperate — he enrolled in a substan abuse/mental health program. (Withi months of his suspension, FA had vio lated his probation and became subje at last, to disbarment.)

Meanwhile, Janot found himself dev astatingly in debt. That's when I hearc about his situation and volunteered tc help pro bono. I requested compensation for Janot from the State Bar's Clie Security Fund, but was turned down b cause his case did not comply with its victim reimbursement standards. And because FA has no insurance, Janot wi likely receive nothing for his loss.

This is a system that is simply not working.

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