

On Sanctions and Hubris

BY ARTHUR D. BURGER

Ethics

A letter to the new bar counsel: Remember the difficulty and complexity of lawyers' lives.

Earlier this month, Wallace E. "Gene" Shipp Jr. was sworn in as bar counsel for the D.C. Bar. Shipp has been with the Office of Bar Counsel since 1980 and has served as deputy bar counsel since 1984. I take the occasion of his appointment to present some thoughts in an "open letter" to him. I hope I can offer my perspective as someone who has studied ethics issues and represented lawyers and law firms in such matters.

Dear Mr. Shipp:

Congratulations on your appointment. Many lawyers know you for your lively and informative presentations at the mandatory course for new admittees. I have had the privilege of teaching a D.C. Bar CLE ethics course with you and have witnessed your enthusiasm. Surely, your many years of experience in the Office of Bar Counsel make you well-qualified for this position. I am sure you will do well.

I take this occasion, however, to offer some thoughts to keep in mind in carrying out your duties. I'm attempting to speak on behalf of the many well-intentioned lawyers in this city, some of whom I have had the honor to represent in ethics-related matters. We all do our best to comply with ethics rules.

First and foremost, we want you to pursue aggressively those lawyers who act with corrupt intent or, in their hubris, act with disregard or disdain for their ethical obligation as lawyers. These lawyers—some of whom are highly placed and erudite, with impeccable manners—can cause great harm. You should pursue them with the full resources of your office.

For the rest of us, I humbly suggest that in carrying out your office's duties, you should take into consideration certain factors affecting the practice of law in today's environment. At the same time, I recognize that under D.C.C.A. Rule XI (which is rightly under review) your discretion is limited and your duty is to "investigate all matters involving misconduct as an attorney." Notwithstanding those limitations, your office has significant discretion that can impact a lawyer's career.

You have discretion under Section 8.1 (within certain limits) about when to permit an attorney under investigation to go

into a "diversion program" and avoid having a disciplinary record. When it is not clear that particular conduct violates the rules, you can determine that a case should not be docketed. Or if it is docketed, you can recommend that a case be dismissed. Finally, you have influence in recommending the level of sanction to impose when a lawyer is disciplined. In making these judgments, I suggest that you take the following truths into consideration.

The well-known attorney and writer Jake Stein has said that lawyers earn their living off the disputes of others. The practice of law is a difficult and demanding job, and it is rapidly becoming more difficult and more complex for some of these reasons.

A FEW THOUGHTS

1. Lawyers' duties are expanding to encompass people other than their clients. The Enron collapse and other corporate scandals have changed the landscape for the practice of law. The once nearly unassailable strictures of lawyer-client confidentiality and client loyalty now are more clouded. In enacting Sarbanes-Oxley, Congress found that the ethics rules in many states were inadequate to address the dangers of corporate corruption to investors and third parties. The American Bar Association Model Rules have been similarly amended and those changes are in the process of being considered in the District. These changes create stress on the attorney-client relationship and can present lawyers with difficult or "no-win" choices.

2. As the rules change, different jurisdictions may have inconsistent demands. Since the rules for lawyers are in flux, different jurisdictions could have rules that are inconsistent with each other. At the same time, modern commerce frequently requires lawyers to engage in multijurisdictional transactions. In the case of the Securities and Exchange Commission, federal regulations on lawyer conduct may also conflict with the rules in various states or in the District. Indeed, D.C. Rule 1.6 on confidentiality is not consistent with the SEC rules. This contributes to the difficulties of charting a course that complies with ethical obligations.

3. E-mail, electronic discovery, and Web sites have changed. Technological advances have further complicated the lawyer's role. Electronic evidence and its preservation creates complexities that require lawyers to be familiar with the intricacies of the archiving and destruction of e-mails. Failure to meet the new standards created by these complexities have led to severe discovery sanctions in some cases. Communications by e-mail also serve to quicken the pace of transactions and of client expectations. A client may e-mail a "quick question" and expect a response within an hour or two. The use of Web sites also raises complex issues encompassing multijurisdictional practice, advertising, and personal solicitation.

4. Lawyers migrate more often. It is increasingly common for lawyers to switch jobs or move from one firm to another numerous times during their careers. Each move raises issues, including how to communicate with affected clients, what are the fiduciary duties of lawyers to their firm, what are their plans to take other lawyers or firm employees with them, what is their entitlement to fees for uncompleted matters, and what are the conflict-of-interest issues for the new firm arising from the migrating lawyer's prior representations.

5. Firms are more involved in mergers and acquisitions. More than ever, firms are merging with or acquiring other firms, opening or closing branch offices, or otherwise changing their structures and personnel. This raises issues similar to those of migrating lawyers and indeed can be considered a type of migration.

6. The competitive environment grows. Competition in today's law practice comes from all sides. Firms compete with other firms for clients and to attract rainmaking lawyers or

promising associates. Within firms, lawyers compete with each other for compensation, advancement, or merely survival within the firm. To survive, lawyers must amass impressive numbers of billable hours, attract and satisfy their clients, and please supervisors and colleagues. These demands take a toll on a lawyer's physical and emotional reserves. Look at the studies showing the percentage of lawyers who succumb to abuse of alcohol or drugs or who face depression.

7. Your office will focus on the one dropped ball, not the many touchdowns. Notwithstanding all of the above, a lawyer may handle numerous matters with great skill, satisfying clients, colleagues, opposing parties, and tribunals, and achieving clients' goals with competence and professionalism. Yet, when your office investigates a complaint, the focus may all be on a single error in a single case with very little attention to all that was done right in a long career.

8. Lawyers are human. Like all other people, lawyers have good days and bad days and will inevitably make mistakes and errors of judgment. An error in judgment does not necessarily make a lawyer unethical, only human.

So, Mr. Shipp, I wish you well in your challenging new job. I know of no one more suited for this position than you. I know that it's impossible to handle such a difficult job with perfection. Just remember that it's impossible for us too.

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