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FEATURE ARTICLE

What Do We Do When Our Institutions Fail Us?

I have been a lawyer for 43 years, and there has not been a day when I doubted my choice of profession. I have held many legal jobs—as a practitioner, a teacher, and a law school dean. While there have been a few times when I worried about the law and the legal profession, I always believed that law was the bedrock upon which our republic was built, and that Americans generally venerated the law and legal institutions. As a teacher of contracts, ethics, and legal history, I am keenly aware of the critical role that trust plays in making the law, legal institutions, and the legal profession function effectively. The essence of the lawyer-client relationship is fiduciary responsibility, which is built on trust. Similarly, as is often pointed out, our courts do not possess sufficient enforcement assets to force the American people to follow their decisions. Americans obey the law because we believe in it. When too many people lost faith in the law, we fought a civil war—something I pray will never happen again.

It is within this context that I find myself becoming seriously troubled at what is now happening in the United States. I am seeing what seem to be multiple breakdowns in the law, the legal profession, and legal and law-related institutions. I see so many that I fear that the underlying societal compact by which our republic survives may be at risk.

Every lawyer swears an oath to obey the law and uphold the Constitution of the United States. As part of that, every lawyer becomes subject to the *Rules of Professional Conduct* as they are adopted in each jurisdiction. These rules are wide ranging and, more importantly, are the principal means of regulating the profession and insuring not only that the legal system works, but, also, that the public retains its trust in the system and the profession. The various state *Codes of Judicial Conduct* and the *Federal Code of Judicial Conduct* are the analogue of the *Rules of Professional Conduct*. They regulate judicial conduct on and off the bench. In many respects, they are even more important than the rules that regulate lawyers.

At the moment, I think that the public trust in lawyers, courts, and the law in general is unraveling. The post-2020 election litigation and the subsequent trials and disciplinary hearings against a number of lawyers have been all over the media, and the image of lawyers portrayed is not flattering. One can say to people that the lawyers who are in trouble are not typical lawyers and that their actions are not those most lawyers would take, but it is a hard argument to make with lawyer misconduct on the front pages every day.

The post-2020 post-election fallout is, of course, not the only highly publicized news these days. It has recently been revealed that New York failed to put its most recent bar examination results online when promised. I remember when I took the New York Bar that on the day the results were released in the New York Times, I went to the local newsstand at 5:00 a.m. to buy a copy of the paper to discover whether I had passed. There were a fair number of others doing the same thing. I cannot even begin to imagine the trauma experienced by exam takers in New York when they discovered that the results had been published but they could not access them. I have a strong feeling that many of those young lawyers will now have serious trust problems as regards the New York court system.

The biggest legal ethics issue in the media today concerns Justice Clarence Thomas and the trips he took as gifts from billionaire real estate developer Harlan Crow. It appears that these trips cost hundreds of thousands of dollars, went on for decades, and were not disclosed on the disclosure forms Supreme Court Justices are required to file annually. Justice Thomas has responded to the public and media concerns about this non-disclosure by citing advice he was given by another unidentified Supreme Court Justice early in his career. Both Justice Thomas and Mr. Crow have quite strenuously stated that they are personal friends, and that having Justice and Mrs. Thomas on trips was simply something that Mr. Crow does for close friends. Mr. Crow has also asserted that he and Justice Thomas never discussed Supreme Court cases and that Mr. Crow has never had a case before the Court while Justice Thomas was sitting. One media organization has challenged this statement and claims have found evidence of one case in which Mr. Crow had an indirect interest and suggested that Justice Thomas did not recuse himself, but this has not been proved as of the time of writing this column.

The larger issue here seems not to be whether Justice Thomas failed to disclose gifts he and his family received, but rather that Supreme Court Justices are not subject to any formal rules of ethics as other federal judges are. Therefore, regardless of whether Justice Thomas acted unethically—assuming we should measure his actions against the ethical codes which regulate lower court judges—the matter of public trust is at stake.

In the past few years, the Court has had to face rather considerable challenges to its legitimacy in the eyes of many Americans. First have been its decisions, which have aroused the ire of millions of Americans in our highly partisan political and social environment. Since the Supreme Court takes on the most critical legal issues that shape our nation, it is not at all surprising that their opinions give rise to public anger, even outrage.

Second, the unprecedented leak of a draft of the Court's decision in *Dobbs* and the failure of the Court's investigation to uncover its source has raised significant

questions about the effective functioning of the Court and Chief Justice Roberts' administration of it. This continues to be a concern for many lawyers and the public.

Third, as Justice Thomas has become a more active and assertive Justice and a real force in shaping the Court's decisions and the shape of American society, his and his wife's actions have come under greater media scrutiny. This latest issue about his relationship with Harlan Crow has, again, placed him in the public limelight and stimulated discussion of whether there needs to be an ethics code for Supreme Court Justices. More fundamentally, it has again led to questions about the Court's legitimacy and whether the Court is a neutral arbiter of the country's most critical legal issues.

The decisions over whether the Court needs an ethics code and whether Justice Thomas or other Justices have acted improperly are transcended by the question of whether the Court is losing its legitimacy in the eyes of the American public. That must be part of any discussion about the future of the Court. If the public loses faith in the Supreme Court and its decisions, as it did in the eyes of millions in the 1850s, then the results could shake the very foundations of the Republic. One has to remember that the purpose of ethical codes is not simply to regulate, but to assure the public that they can trust lawyers, judges, and the legal system. When we lose that trust, we lose our nation of laws.

NEW AUTHORITY

Colorado Bar Ethics Committee Opinion 146

One of the most frequently heard complaints from lawyers, young and old, is that they work far too much. Large firms may expect lawyers to bill anywhere from 2,000 to 2,500 hours per year. Legal services lawyers and public defenders often carry enormous caseloads because of budgetary constraints. From the human perspective, these overwhelming workloads are untenable. They can destroy lawyers' health, families, and peace of mind. Working long hours for long periods also can affect a lawyer's ability to perform to a standard required under the *Rules of Professional Conduct*. It is this problem that is addressed in Colorado Bar Ethics Committee Opinion 146.

In November 2022, the Colorado Bar Ethics Committee issued the opinion titled, "A Lawyer's Duty to Maintain an Appropriate Workload." The opinion provides a well-reasoned account of how a number of the *Rules of Professional Responsibility* regulate workload:

> Colorado's Rules of Professional Conduct (the Rules or Colo. RPCs) impose the duties of competence, diligence, communication, and appropriate supervision. These duties affirmatively require lawyers to manage their workload to ensure proper client representation. Lawyers who manage or supervise lawyers – whether in a private law firm or other comparable setting – are also obligated to make reasonable efforts to ensure that subordinates' workloads are suitably controlled…
>
> Determining when a workload is excessive under the rules of professional conduct is necessarily fact specific. This opinion discusses some considerations relevant to that inquiry but does not attempt to draw, nor should it be understood to offer, any bright-line rules. This opinion also presents opinions from other jurisdictions and the American Bar Association (ABA) addressing the risks of excessive workloads for public defenders, prosecutors, legal aid lawyers, and private practitioners. Those authorities uniformly agree that a lawyer's workload must be such that the lawyer can competently and diligently handle the matters assigned and recognize the supervising lawyer's concomitant obligations in this regard.

The fundamental basis for the Colorado opinion is that Rule 1.1 imposes a requirement of competence on all lawyers and that Rules 5.1-5.3 require that supervising lawyers must make "reasonable efforts" to ensure that those they supervise are complying with the ethics rules. The combination of Rule 1.1 and Rules 51.–5.3 imposes an ethical responsibility for individual lawyers to ensure their own competence in their practice and for supervising lawyers to ensure this competency level in the lawyers that they supervise.

The Opinion also notes that an "unmanageable workload" may create a concurrent conflict of interest for the lawyer trying to do too much in too little time:

> An unmanageable workload may create a concurrent conflict of interest under Colo. RPC 1.7(a)(2) ("A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one of more clients will be materially limited by the lawyer's responsibilities to another client[.]"); *see also In re Edward S*., 173 Cal. App. 4th 387, 414 (Cal. App. 2009) ("[A] conflict of interest is inevitably created

> when [a lawyer's excessive workload forces the lawyer] to choose between the rights of the various [clients] he or she is defending."). Whether such a "significant risk" is created by a lawyer's workload necessarily requires assessing not just how many matters for which a lawyer is responsible, but also the complexity of those matters, whether the lawyer is handling the representation solely or jointly, the lawyer's familiarity with the area of the law, any limitations discussed with the client, any prior representation of the client by the lawyer, and any other factors relevant to determining whether each client is being represented competently and diligently.

The Opinion then goes on to discuss its applicability to lawyers in various roles in the profession and provides a plethora of citations and examples.

Opinion 146 concludes:

> All lawyers "have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently." ABA Opinion 06-441, p. 4; see also Colo. RPC 1.3, cmt. [2]. This duty extends beyond the individual lawyer to supervisory and managerial lawyers within the firm. This duty applies equally to private and public sector lawyers. In Colorado, this obligation is underpinned by the requirements of competence, diligence, proper communication and (where applicable) sufficient supervision of subordinate lawyers and non- lawyer assistants as part of every lawyer's ethical duties.

Colorado Opinion 146 is timely and useful. It reminds us all that an "unmanageable workload" can not only destroy lawyers' health and families, but also lead to serious ethical problems. It is worth reading.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *The Current Index of Legal Periodicals*

This month, the LEMR suggests one new article in the hope that readers will devote some of their precious time (see the new column in this issue of the LEMR on the importance of workload management). There is no issue more controversial to legal practice management today than the use of the new AI-based chatbots like those already released by OpenAI. Last month's lead column discussed some of the ethical issues involved. A new student note in the Georgetown Journal of Legal Ethics explores in detail one aspect of the ethical challenges in using AI:

> Brooke K. Brimo, "How Should Legal Ethics Rules Apply When Artificial Intelligence Assists Pro Se Litigants?," 35 Geo. J. Legal Ethics 549 (Fall 2022).

This is really worth a read, and is available for free online at https://www.law.georgetown.edu/legal-ethics-journal/in-print/volume-35-issue-4-fall-2022/how-should-legal-ethics-rules-apply-when-artificial-intelligence-assists-pro-se-litigants/.

A BLAST FROM THE PAST

From Julius Henry Cohen, *The Law Business of Profession* (1924), p. xiv, quoting the *Canons of Ethics*, National Association of Credit Men (1912):

> It undermines the integrity of business for business men to support lawyers who indulge in unprofessional practices. The lawyer who will do wrong things for one business man injures all business men. He not only injures his profession, but he is a menace to the business community.

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