



Lawyer Well-Being and Proactive Regulation

ON AUGUST 14, 2017, the National Task Force on Lawyer Well-Being issued a report recommending significant changes to the philosophy behind lawyer regulation. The task force, consisting of entities within and outside the American Bar Association, concluded that regulators, through their actions, should meaningfully communicate that lawyer well-being is a priority. In other words, to be a good lawyer, one has to be a healthy lawyer, and disciplinary authorities should adopt regulatory objectives that place a priority on lawyer well-being rather than discipline only.

In working thousands of lawyer disciplinary actions over the years, it has become apparent that substance abuse, stress, and depression, among other disorders, frequently go hand-in-hand with attorney misconduct, such as inattention, neglect of clients, and misappropriation of client property. Under current rules, the bar can refer affected attorneys to lawyer assistance programs as a condition of discipline after there has been an adjudication of misconduct. There is no authority, however, for the bar to refer confidential complaint information to lawyer assistance programs ahead of time in an attempt to intervene and prevent attorney misconduct. Pertinent rules provide that complaints and investigations are confidential and shall not be disclosed, with limited exceptions.

Modifications Recommended

The Lawyer Well-Being Report recommends the modification of such rules to allow for the one-way sharing of lawyer

well-being information by disciplinary authorities with lawyer assistance programs. Doing so would allow the bar to ask, for example, Lawyers Helping Lawyers to reach out to an attorney who appears to be suffering from a substance abuse or mental health disorder. The idea is to facilitate help for lawyers who may be suffering from such disorders promptly rather than waiting for the conclusion of a disciplinary investigation. Doing so could prevent further misconduct by affected attorneys in addition to improving their well-being. Unfortunately, confidentiality rules do not allow for this kind of proactive intervention by the bar at this time.

Lawyers Helping Lawyers and other lawyer assistance programs, such as the Virginia Bar Association's Committee on Substance Abuse, provide an invaluable service to lawyers without risk of repercussion from disciplinary authorities. Comment 5 to Rule 8.3 of the Rules of Professional Conduct (RPC) provides that the duty to report attorney misconduct does not apply to information about a lawyer or judge's misconduct or fitness received by a lawyer in the course of participation in an approved lawyer assistance program. The comments to RPC 8.3, which carry the weight of law, provide that such information is protected to the same extent as lawyer confidences and secrets.

Lawyers Helping Lawyers is well-equipped to identify and address the maladies that may affect lawyers. A common misconception is that it addresses substance abuse issues only.

To the contrary, its staff will address a range of mental health issues such as depression, age-related cognitive decline, and many other problem areas that affect lawyers. Its staff will assess a lawyer's needs and, depending upon what it determines, provide intervention, peer support, and referral to other sources, such as a therapist, rehabilitation program, Alcoholics Anonymous, Narcotics Anonymous, or Gamblers Anonymous, for example. Our observations indicate a prevalence of substance abuse, depression, and cognitive decline among lawyers, and one cannot overemphasize the importance of these lawyer assistance programs.

Alternatives Work

With respect to lawyer discipline, other states have found that alternatives to discipline, such as education, financial monitoring, and objective testing, are working very well. The Colorado Bar describes it as a culture shift from discipline to helping lawyers do better. It reports that when its regulators address misconduct with alternatives to discipline, those lawyers do not tend to reappear in the discipline system. Proactive Management Based Regulation (PMBR) is a term used to describe approaches and programs that try to prevent lawyer problems from occurring, rather than addressing alleged misconduct after it occurs, and after complaints are filed. Most if not all jurisdictions use at least some proactive regulation tools. The Virginia State Bar,

Well-Being continued on page 19

Well-Being continued from page 16

for example, has several, such as the Ethics Hotline, Mandatory Continuing Legal Education, non-disciplinary resolution of minor misconduct cases, and the Professionalism Course.

The Lawyer Well-Being Report encourages us to “Transform the pro-

fession’s perception of regulators from police to partner.” In doing so, it offers several recommendations to ensure that the regulatory process “proactively” fosters a healthy legal community and provides resources to rehabilitate impaired lawyers. As the report indicates, discipline alone does not make an ill lawyer well. The Standing Committee

on Lawyer Discipline and other committees of the Virginia State Bar are studying the report and its recommendations in the hope that we can affect positive change, and reduce the anxiety and distrust that may accompany interactions with regulators. We will see what the future holds.