Docket Call
Vol. 23 No. 2
Fall 2006
Christopher E. Gatewood, Ed.

The newsletter of the Young Lawyers Conference of the Virginia State Bar

in this issue
pages 6–11
A complete guide to the activities, people to contact, and opportunities to become active in the work of the Young Lawyers Conference in the coming year. So if you have an interest, the YLC invites you to make a call, or send an email, and get involved.
find it inside

Representing Whistleblowers

Jason M. Zuckerman

Editor's note:
This article is one in an occasional series about Young Lawyers Conference members who have taken their practice in unusual or interesting directions, written in their own words. A few years ago, Jason Zuckerman left a job at a large firm in Washington, D.C. to open his own firm, specializing in whistleblower retaliation and *qui tam* claims under the False Claims Act. Here are his thoughts about that career move and his current practice. —CEG

Eleven years ago, I was contemplating a response to a law school application essay about what inspired me to become a lawyer. I wrote my essay about Atticus Finch, the attorney in Harper Lee's *To Kill a Mockingbird* who stands up for justice by defending an African American falsely accused of raping a Caucasian woman in the Depression-era South. Going into law school, I hoped to become a civil rights lawyer.

While I was fortunate to do a lot of volunteer legal work in law school for prison inmates, I did not go into public interest law immediately after law school. The opportunity to get good training and pay off law school loans led me to practice at a big firm in D.C. While I had a much better experience at a big firm than I would have ever expected, I realized five years out of law school that I wanted my practice to focus more on serving the public interest. About a year and a half ago, I started my own practice focused on representing whistleblowers in retaliation claims and in *qui tam* actions. As I read about recent surveys showing record associate dissatisfaction, despite record salaries, I feel fortunate to have found a practice that is very satisfying and rewarding. The following are some of the reasons to consider practicing whistleblower law:

Exposing Fraud

Representing whistleblowers is about more than just pursuing a client's pecuniary interest. Litigating whistleblower cases serves a public interest by exposing and in some cases, rectifying fraud and threats to public health and safety. In just the past year, I represented individuals who blew the whistle on lax security at a nuclear power plant, unsafe work conditions, deficient aircraft maintenance, predatory lending, billing fraud in a government contract, Medicare fraud, accounting fraud, and securities fraud. Many of my clients' disclosures resulted in government investigations or in some instances, caused their employers to rectify unlawful conduct without the need for government intervention. It is invigorating to perform work that benefits more than just my clients.

Most of the whistleblowers cases I have worked on are defended by large firms, with several attorneys assigned to the case. Despite their resources, I endeavor to stay ahead of the game and to litigate each case as though my client is represented by a big firm. The hours can be long, but I am inspired to litigate aggressively because I have tremendous respect for the courage and integrity of my whistleblower clients.

While their colleagues looked the other way or remained silent, my clients risked their careers to stay faithful to their values and their professional responsibilities, and I owe it to them to ensure that they are made whole. Somewhat naively, my clients thought they would get a pat on the back for reporting fraud or health and safety violations. Instead, they suffered both express and subtle forms of retaliation, including diminishment of job responsibilities, demotions, harassment, and in some instances, termination. One of my clients suffered the type of retaliation that I thought was a thing of the past. Her car windows were smashed, she received voice mails threatening her life, and her husband received calls falsely alleging that she was having an affair at work. Worst of all, the company suspended her and deemed her unfit to work because she was feeling anxious (as would any normal person under these circumstances), and never took disciplinary action against the employees who retaliated against her. Representing clients who stand up for what is right, often at personal cost, is a privilege.

Challenging Issues

One of the reasons I enjoy my work so much is that the cases often entail complex issues and difficult choices. In many of the cases I

continued on page 4

legal ethics corner

Jeffrey Hamilton Geiger

You Make the Call

Looking at her e-mail message from Don, Juanita realizes that he is asking for her to represent him in a professional liability action. Sighing, Juanita thinks to herself that she is having another "they sure didn't teach you this in law school" moment. Handling the litigation is, of course, not the problem. Instead, Juanita wonders whether she can represent Don, when she is romantically involved with him.

In Virginia, the rules governing conflicts do not contain an express provision governing sexual relations between a lawyer and a client. It is not safe to assume, however, that the absence of language dealing with sexual relationships connotes their approval. While not adopted in Virginia, Rule 1.8(j) of the ABA Model Rules of Professional Conduct states that: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced." Thus, Juanita may be heartened in believing that because her relationship with Don preceded any legal representation of him, no ethical strictures apply. The absence of a prohibition, however, does not equate to a license. In highlighting some of the concerns associated with such relationships, the comment to Model Rule 1.8 cmt. [17] states that:

> The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

Juanita should, at a minimum, resolve whether her independent professional judgment and the emotional involvement of the client would conflict in her representation of Don. The bottom line: Juanita can likely both represent Don and continue her sexual relationship with him. But, as a practical matter, she should be very wary of doing so given the heightened disciplinary and professional liability issues surrounding lawyer-client sexual relationships.

Jeff Geiger is a shareholder in the Richmond office of Sands Anderson Marks & Miller, P.C. You may reach him at jgeiger@sandsanderson.com.

Whistleblowers, continued from page 1

am litigating, there is a government investigation being conducted while the parties are litigating the civil retaliation claim. The interplay between these proceedings raises a host of interesting issues, including the waiver of privilege when a party submits documents to a government agency, the use of confidential informants, and the admissibility of the findings of a government investigation to prove the merit of the issues that the whistleblower raised. Lately, I have represented several in-house attorneys who suffered retaliation when they raised concerns internally about actual or potential violations of SEC rules. Representing attorneys raises complex issues of confidentiality and attorney-client privilege.

Whistleblower cases, however, also have some downsides. The clients require a lot of hand-holding to deal with the psychological trauma they have suffered, and to their credit, they are fixated on ensuring that the wrongdoing they exposed is adequately addressed and resolved. It is difficult to explain to whistleblowers why government agencies take so long to investigate and prosecute the wrongdoing they exposed.

Whistleblower cases tend to drag on for years, and some companies defend these claims by making false allegations against the whistleblower. In a recent case, my client had a well-documented record of stellar performance, consistently receiving excellent performance evaluations and never having been subject to any disciplinary action. The company, however, tried to portray her as the worst employee in the company's history. Fortunately, however, the company kept offering shifting and contradictory explanations for terminating my client, thereby providing my client with strong evidence of pretext.

In addition to making false allegations about whistleblowers, some companies are inclined to

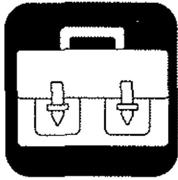
continued on following page

continued from previous page

defend whistleblower claims aggressively, sometimes resorting to intimidation tactics to try to convince a whistleblower to back down. Just recently, I had a case in which the employer threatened to blacklist my client if he would not dismiss his claim, and another case in which the employer filed frivolous counterclaims for breach of fiduciary duty and breach of the duty of loyalty. These tactics, however, almost always backfire and ultimately advance the whistleblower's position. In a wrongful discharge case, electronic discovery enabled me to prove that documents purportedly evidencing my client's poor performance were drafted after her termination and backdated. Once I had clear proof that the documents were backdated, the company was more reasonable about the value of the case. In a Sarbanes-Oxley retaliation case, the employer's counsel alleged in a motion that I had engaged in unethical conduct by obtaining certain documents. Unbeknownst to this lawyer, I had obtained the documents from a public entity in response to my request under the Freedom of Information Act. The attorney's haste in attacking my credibility therefore undermined his own credibility before the judge.

At a time when too many attorneys are reportedly dissatisfied with their work, I feel fortunate to have found a practice niche that I enjoy and that I hope will advance the public interest.

Jason M. Zuckerman is Principal of the Law Office of Jason M. Zuckerman, PLLC and Of Counsel at The Employment Law Group.



corporate corner

R. Willson Hulcher, Jr.

Issues of Interest for Virginia Transactional Attorneys

Leaky Directors Can Happen to Anyone:

HP's Boardroom Drama Provides Food for Thought

Hewlett-Packard has been in the news recently for its investigation into leaks that were traced to its board of directors. Coverage has primarily focused on HP's methods, and has glossed over the nature of the information leaked and the treatment of the director identified as the leaker (he has agreed to resign). Putting HP's methods aside, the content and consequences of a leak emanating from the boardroom raise special issues that should be considered by any company faced with one.

The impulse to treat a leak traced to the board aggressively is understandable. Since the board is privy to much of the most sensitive information at a company, and at the most sensitive times, an indiscrete director can do significant damage. Even if an initial disclosure is not particularly damaging, the knowledge that a member of the board is willing to disclose confidential information and could do so again can undermine the trust among directors and between management and the board.

Despite the damage that may have been caused by a particular disclosure, and the implied threat of future leaks, there are reasons to treat a leak that can be traced to board with a level of sensitivity and candor that might not be extended to a leak that has been traced to another source. First, practically speaking, directors are difficult to remove. In Virginia and Delaware, and generally, directors can only be removed by a shareholder vote – in some circumstances only for cause. Depending on the circumstances – and the reaction of the accused director and the shareholders – it is possible an aggressive response could escalate the situation without succeeding in removing the director.

More fundamentally, directors have fiduciary duties to the company and its shareholders that require them to think and act independently of a company's management, and can lead to disagreement among the directors as to the appropriate course of action. A board member may have leaked information for any number of reasons, but if the director felt his or her fiduciary duty required that some dispute or other information be made public then it is likely that an aggressive response to the leak that seeks to remove or otherwise reprimand the perpetrator will only result in more disclosures and embarrassment.

There are a number of other legal issues that may be implicated by a director's leak and should be considered when faced with one. For instance, it may violate a confidentiality agreement or the corporation's code of conduct, or trigger securities or listing standard requirements. Such additional considerations will be fact sensitive.

Ultimately, it may be necessary for the leaker to leave the board, but before that occurs it is probably in the best interests of the board and the company to try to understand what the underlying issues are, whether they are legitimate and if they can be addressed. By doing this in an upfront manner, meeting with the board and individually with each director, it is more likely that any real problem will be found and addressed and that any necessary changes can be made with the minimum amount of bitterness and embarrassment.

Will Hulcher is an associate in the Business and Corporate Finance & Securities sections at Williams Mullen. He can be reached at whulcher@williamsmullen.com