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VIEWPOINT

Chess not checkers: avoiding obvious risks

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Someone once said that great lawyers, especially trial lawyers, play chess, not checkers. Everyone knows that chess players see beyond the next move, and even beyond that.

A recent newspaper article, "Trump allies look to benefit from pro bono vows by elite law firms" (New York Times, May 25), raises the question of whether the leaders of the law firms who caved to the administration's threats only know how to play checkers. Their inability to see what was coming and the serious consequences to follow became even more obvious by the recent federal court decision declaring the administration's executive order targeting WilmerHale unconstitutional. The settling law firms, which thought they were protecting their businesses, now find themselves between a rock and a hard place.

According to the newspaper report, a conservative media personality requested one of the settling law firms to take on a pro bono case suing a Michigan judge for rulings issued in a divorce case involving the commentator's friend. According to the article, the firm said it could not take the matter but could serve in a "support role." Blasting the firm on X, the journalist called the firm's response a "disgrace" and "tagged" the president.

Suing any judge for rulings made in any case is a risky venture. The agreements the settling law firms made, however, require the firms to represent clients and push causes chosen by the administration. It is not clear that the agreements were in writing.

Some of the firms have said the agreements include an opt-out provision reserving to the firms the absolute right to turn down or withdraw from any assignment given by the administration or by anyone else favored by the administration. But if such an opt-out provision is included in the agreements, why would the administration have signed on and agreed to enter into an illusory contract?

Engaging with the administration on what the pro bono agreements really mean is not an appealing prospect. In addition, the reputations of the settling law firms have already taken a hit. It has come from many directions.

For example, there are many top-notch law firms in this country that a client can choose, including those that rebuffed the administration's threats, keeping their reputations intact.

Law school graduates might decide to join a firm that did not capitulate. Adding to the pain is the fact that some of the settling law firms reportedly have lost some of their most talented and productive lawyers.

Also, the pro bono work that the firms agreed to do likely will be done not by their leaders or senior partners, but by the younger lawyers. Surely, those firms must know that, under the lawyer ethics rules, the firms must permit their lawyers to decline to do the work if they find it "repugnant" or fundamentally disagree with the work. ABA Model Rules of Professional Conduct, Rule 1.16(b)(4).

Finally, it would not be surprising to learn that some of the biggest clients of the settling law firms might decide they prefer to be represented by law firms that have maintained their independence.

A recent illustration of why the settling law firms played checkers not chess and failed to appreciate what would come next is the decision by the federal court for the District of Columbia in favor of WilmerHale, one of the firms that did see beyond the next corner. The decision now makes clear that none of the consequences facing the settling law firms needed to occur.

The decision by the court is an eloquent and powerful statement of the role of lawyers in our society and why their independence is constitutionally protected. The ruling was not a surprise. It is impressive in its sweep, and its analysis of the law appears unassailable by all accounts.

First and foremost, the court ruled that the executive order violates the First Amendment ("WilmerHale represents a range of clients in litigation ... . This advocacy is unquestionably protected conduct under the First Amendment."). It states in the simplest terms that the government's action was in retaliation for WilmerHale's engaging in protected advocacy, and it noted the severity of the punishments. "Taken together, the provisions constitute a staggering punishment for the firm's protected speech! The Order is intended to, and does in fact, impede the firm's ability to effectively represent its clients!"

The court also stated that the order targeted WilmerHale for investigation by the EEOC. On that point, the court wrote: "This is the President, in essence, wielding the investigative and prosecutorial powers of the State to punish and suppress WilmerHale's advocacy."

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Finally, using somewhat of a shocking example, the court criticized attempts to suppress WilmerHale's speech indirectly "by pressuring the firm's federal contractor clients to terminate their relationships with the firm or face cancellation of their contracts."

The court also struck down the administration's attempt to operate its own bar discipline system and to sanction lawyers. It comes as no surprise that bar discipline is within the exclusive jurisdiction of the judicial branch. The court wrote that "[t]his attempted usurpation 'threatens severe impairment of the judicial function' by 'sift[ing] out' certain challenges and cases. [citation omitted] An informed, independent judiciary presumes an informed, independent bar."

The executive order targeting WilmerHale was struck down on constitutional grounds. Had the settling law firms looked around the corner, they also would have realized that the agreements forced on them by the administration run afoul of the laws and ethics rules governing lawyers.

For more than a century, the law governing lawyers, as promulgated by the American Bar Association and adopted by the highest courts of every jurisdiction, provides that lawyers must remain independent and that no one can dictate to them whom to represent, what positions to take, or what judgments to make during the representation of a client. ABA Model Rules of Professional Conduct, Rule 2.1; 3.1; 5.4.

Also, attorneys are permitted to decline a representation or withdraw from one already established if they are asked to take actions that the lawyer, and only the lawyer, considers "repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule1.16(b)(4). This time-honored law ensures a lawyer's independence.

The risks inherent in the pro bono deals that a handful of mega-law firms made with the administration were obvious from the start. By failing to play chess, they failed to anticipate that it was all so unnecessary since the attacks were clearly unconstitutional from the start.

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