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   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date by logging in to your member portal at member.floridabar.org.

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   5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
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17. If I have questions, whom do I call?
   You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

   While online checking your CLER, don’t forget to check your Basic Skills Course Requirement status.
PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

**CLER CREDIT**
(Maximum 0.0 hours)

General ............................................. 4.0 hours  Ethics .............................................. 3.0 hours  Technology ....................................... 1.0 hours

**CERTIFICATION CREDIT**
(Maximum 0.0 hours)

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date you will be sent a Reporting Affidavit (must be returned by your CLER reporting date). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

**CLE COMMITTEE MISSION STATEMENT**

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

**COURSE CLASSIFICATION**

The Steering Committee for this course has determined its content to be INTERMEDIATE.
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LECTURE PROGRAM

8:00 a.m. – 8:10 a.m.  Introductory Remarks
8:10 a.m. – 9:05 a.m.  Cybersecurity

Speaker: Steven Teppler

9:05 a.m. – 10:35 a.m.  Intersection of Ethics and Lawyer Health and Wellness

Speakers: John Berry, Richard Bush, Dori Foster-Morales, Ken Landis, and Judy Rushlow

10:35 a.m. – 10:55 a.m.  Break

10:55 a.m. - 11:50 a.m.  Defending Lawyers in Grievance Proceedings

Speaker: Henry Paul

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John T. Berry

John T. Berry serves as The Florida Bar’s Legal Division Director supervising the lawyer regulation and professionalism efforts.

Prior to returning to The Florida Bar, he served as Executive Director of the State Bar of Michigan from 2000 - 2006. Before joining the State Bar of Michigan in November 2000, he served as Director of the Center of Professionalism at the University of Florida’s Levin College of Law. He has held previous positions as Assistant Executive Director of the State Bar of Arizona (1998-2000), and as Staff Counsel and Legal Division Director of The Florida Bar (1983-1998). Staff Counsel duties included supervision of lawyer regulation, unauthorized practice of law, ethics, professionalism and the advertising departments. He served for seven years as Florida Assistant State Attorney for the Ninth Judicial Circuit Fraud Division, Orlando, Florida handling white collar and organized crime cases.

Mr. Berry was trained and approved by the Florida Supreme Court as an instructor for judicial education. He is a frequent lecturer throughout the nation and the world, on ethics and professionalism. In addition, Mr. Berry is responsible for the establishment of The Florida Bar’s and the State Bar of Arizona’s Professional Enhancement Program (ethics school) where he participated as a main lecturer. He also was a member of over 15 consulting teams to other states evaluating their ethics and professionalism efforts. He served as liaison for the State Bar of Arizona to the ABA Ethics 2000 Commission and ABA Multijurisdictional Practice Commission.

Mr. Berry served as chair of the ABA’s Professionalism Committee (2003-2006) and has served on the McKay Commission that evaluated lawyer regulation nationwide. He also has served on the ABA’s Discipline Committee, Model Definition of Law Task Force and Bioethics Committee.

Mr. Berry has been a member of the ABA House of Delegates since 1990. He is an Officer of the National Organization of Bar Counsel and served as the organization’s president in 1990.

Mr. Berry was the 2001 recipient of the American Bar Association’s Michael Franck Award. This award is the highest award given nationally by the ABA for achievement in the field of lawyer ethics, professionalism and conduct.

In 2002 Mr. Berry was part of a two person Justice Department team sent to Nigeria to aid the country in dealing with corruption within its government, corporations and businesses.

Mr. Berry received his B.A., magna cum laude, in political science from the University of Florida in 1973 and his J.D. from Stetson University College of Law in 1976.
Richard Bush

Mr. Bush is the senior partner of Bush & Augspurger, P.A. with offices in Tallahassee and Orlando, Florida. He has been practicing law for 36 years in Florida, as well as throughout the Southeastern United States and the U.S. Virgin Islands. Mr. Bush focuses on actions involving the conduct of licensed professionals. In that role, he defends lawyers, allied health care providers, accountants, real estate professionals, and architects and engineers.

Mr. Bush is a nationally recognized lecturer on lawyer conduct, and writes on the subject matter frequently. He has been cited as an authority on the subject in two (2) Law Review Articles. Mr. Bush has been recognized as a “Legal Elite” in Florida Trend Magazine, historically the premier annual listing of Florida lawyers, as well as a “SuperLawyer” in Florida, by that magazine. He has been recognized by the Wall Street Journal and Miami Magazine as a “Top Lawyer in Florida,” and has attained an “A-V Preeminent” rating by Martindale-Hubbell, the highest ratings possible by his peers and judges.

Mr. Bush is an editor and co-author of Professional Liability of Lawyers in Florida, chapter on Litigation. He is a member of The ABA’s Legal Malpractice Data Center. He is a member of the Professional Liability Underwriting Society (PLUS), and chaired the Southeast Chapter of PLUS for two years. Mr. Bush is a member of the Professional Liability Defense Federation (PLDF) and chairs the Lawyer Claims Committee. In addition to his professional work, Mr. Bush is the proud father of two daughters and a son, and honored to be married to Stacey Allen. He is a Leave No Trace (LNT) Master Educator, and in that capacity, serves as the LNT Coordinator for the Suwannee River Area Council of The Boy Scouts of America.

Education

Legal

Juris Doctor, University of Florida, Spessard P. Holland College of Law, Gainesville, Florida, 1979

Undergraduate

Bachelor of Arts, College of Social & Political Sciences, University of South Florida, Tampa, Florida 1976

Judicial Clerkship

District Court of Appeal, State of Florida, First District, Judicial Clerk, Judge Anne Cawthon Booth, 1979-80

Areas of Practice

Admitted to Practice

United States Supreme Court
Florida Supreme Court
U.S. District Court, Northern District of Florida
U.S. District Court, Middle District of Florida
U.S. District Court, Southern District of Florida
U.S. District Court, United States Virgin Islands
Territorial Court, United States Virgin Islands
U.S. Court of Appeals, Eleventh Circuit

Associations

The American Bar Association, Legal Malpractice Data Resource Center
The Florida Bar, Member, Trial Lawyers Section

Publications


Coauthor, "Certified Legal Assistants Study Guide," Chapter on Ethics, 1993

Academic Appointments

Visiting Lecturer (Civil Trial Advocacy)

- University of Florida, School of Law
- Florida State University, School of Law
- Stetson Law School
- Tulane Law School
- University of Illinois at Urbana-Champaign

Academic Position

Mr. Bush is an Honorary Associate Professor at The Florida State University's Center for Biomedical & Toxicological Research; and, the Institute for Central and Eastern European Cooperative Environmental Research. In that capacity, Mr. Bush has served on The Executive Committee and The Technical & Advisory Committees for The International Symposia and Exhibitions on Environmental Contamination in Central and Eastern Europe in Budapest, Warsaw & Prague, from 1992-2002
Dori Foster-Morales

DORI FOSTER-MORALES, ESQ. is a board certified marital and family law attorney, a member of the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers. And is board certified by the National Board of Trial Advocacy in the area of family law. She practices law with the law firm of Foster-Morales Sockel-Stone, LLC. Foster-Morales Sockel-Stone, LLC, a xi lawyer boutique family law firm.

Ms. Foster-Morales has been very involved bar leadership both locally and statewide. She currently serves on the Board of Governors of the Florida Bar since her election to the Board in 2008. She currently Chairs the Florida Bar’s Special Committee on Mental Health and Wellness of Florida Lawyers and the Certification Plan Appeals Committee of the Bar and has previously served as chair of the Florida Bar’s annual convention. She also currently serves on both the Communications Committee and the Legislative Committee of the Board of Governors as well as the ABA’s Commission on Lawyer Assistance Programs’ Working Group to Advance Well-Being in the Legal Profession. Previously, she has served on the Executive Council of the Family Law Section of the Florida Bar and numerous other committees within the Family Law Section and chaired the Dade County Bar's Family Law section.

Ms. Foster-Morales actively speaks on legal issues within the State on a variety of topics, and has spoken on diverse issues affecting family lawyers including Using the Rules of Evidence in Family Law Cases; Writing the Perfect Prenuptial Agreement; Modification of Alimony and Child Support; and Insurance Issues in Family Law Cases. Ms. Foster-Morales has been as one of Florida's Super Lawyers since 2007, one of Florida Trend's Florida Legal Elite since 2006 and a Top Lawyer in South Florida's Legal Guide since 2001.

Ms. Foster-Morales has a diverse legal background. Prior to practicing in the arena of marital and family law, Ms. Foster-Morales practiced law at the United States Environmental Protection Agency (in Washington, D.C and New York City) and as an Assistant State Attorney in the Eleventh Judicial Circuit of Florida, where she prosecuted career felony offenders for the last three years of her tenure there.

Ms. Foster-Morales received both her Bachelor of Arts (1986) and Juris Doctor (1989) from the University of Florida.
**Ken Landis**

KENNETH R. LANDIS, ESQ.
VICE PRESIDENT—SENIOR LOSS PREVENTION COUNSEL
ALAS, INC.

Ken Landis received his undergraduate degree with high honors from the University of Pittsburgh in 1986. He graduated with honors in 1992 from the George Washington University Law School, where he served as a Student Articles Editor of the Law Journal. Ken spent the next 13 years as a commercial litigator and partner with two major Chicago law firms. His experience included jury and non-jury trial and appellate work in state and federal courts in Illinois and elsewhere, as well as arbitration and mediation proceedings.

In January 2005, Ken joined the Attorneys’ Liability Assurance Society, Inc., a Risk Retention Group, and currently serves as Vice President—Senior Loss Prevention Counsel. ALAS is a mutual insurance company providing lawyers’ professional liability insurance to over 200 large law firms located throughout the United States. Ken’s duties include extensive writing and speaking on topics related to professional responsibility and lawyer liability.

**Henry Paul**

Henry Lee Paul served as Bar Counsel in the Tampa Branch of The Florida Bar from 2005 until January 2012. His duties included all matters related to the enforcement of The Rules Regulating The Florida Bar. Paul was counsel of record for The Florida Bar in 79 cases before the Florida Supreme Court. Paul tried 16 of these cases before a referee. Paul was counsel of record for nine petitions for review before the Florida Supreme Court. Paul has presented three cases in oral argument before the Florida Supreme Court. Paul was counsel of record on behalf of The Florida Bar in four reported Florida Supreme Court cases. Paul served as legal advisor for the two Grievance committees in Fort Myers, to one grievance committee in Tampa and to one grievance committee in Pinellas County. Paul has also appeared as Bar Counsel in confidential proceedings before the Board of Governors of The Florida Bar. Paul has also advised fellow Bar Counsel on numerous cases in which he was not counsel of record.

Bar Counsel is responsible for all legal functions in disciplinary cases including litigation and review before the Florida Supreme Court. Bar Counsel serves as counsel to grievance committees and is responsible for investigating and prosecution of complaints alleging violations of the Rules Regulating The Florida Bar.

Prior to providing public service as Bar Counsel for The Florida Bar, his initial legal experience involved primarily criminal law. He assisted his partner Bennie Lazzara, Jr, and also served as lead counsel, on numerous criminal cases and criminal appeals. Paul’s practice evolved into criminal/civil crossover complex litigation cases involving allegations of fraud, as well as related employee whistleblower cases. Although not counsel of record Paul also worked extensively in defense of respondent in *The Florida Bar v. Vannier*, 498 So. 2d 896 (Fla. 1986). Paul also served as defense counsel for other disciplinary matters prior to serving as Bar Counsel.

Paul was also a founding partner, along with Phil Esposito, of the Tampa Bay Hockey Group that obtained the expansion franchise in 1990. While maintaining a private law practice, Paul also served the Lightning in various capacities from 1990 through 1998, including vice president, general counsel and alternate governor. His responsibilities involved almost all areas of Lightning management including drafting and negotiating business agreements, including television, concession and arena lease agreements, immigration, conducting player contract negotiations and briefing player arbitration cases. His law firm continued to provide limited representation to the Lightning from 1998 until 2005.

Paul continued to represent clients other than the Lightning during the 1990’s. Some of the more notable cases include the following: In the mid 1990’s Paul represented Richard Urso in the highly publicized case of Urso v. Metlife et al. as well as defending Mr. Urso in a federal criminal investigation and a proceeding by the Florida Department of Insurance.

In the late 1990’s Paul defended a loan officer with Barnett Bank in Fort. Myers, Fla. in several related cases involving highly publicized allegations including allegations of civil racketeering against Barnett Bank and its employees. These cases were litigated for several years in federal and state court in Punta Gorda, Tampa and Portland, Oregon. These cases include *Pacific Harbor Capital v Barnett Bank et al*, Middle District of Florida, Case No.: 97-416-CIV FTM-24(D); *Pacific Harbor Capital v Barnett Bank et al*, District of Oregon, Case No.: CV-97-257-JE; *Barnett Bank of Lee County v Sugarmill Springs, et al*, Lee County Circuit Court (20th Circuit), Case No.: 94-985 CA LG.

Paul spent five years representing the Plaintiff in a complex Medicare cost report fraud case, pursuant to the provisions of the federal false claims act. This case was filed in District Court in Tampa in 1998. It was removed to Multi-District Litigation in the District of Columbia (*United States ex rel Joseph “Mickey” Parslow v. HCA – The Healthcare Company et. al.* Case No. 99-3338 – MDL Case No. 01-MS-50 – RCL – D.C. Cir.). A portion of the case was subsequently severed and transferred to the Southern District of New York (*United States ex rel. Francesco Lanni and Joseph “Mickey” Parslow v. Curative Health Services* Case No. 98 Civ. 2501 – RCC– SDNY). These cases did not fully conclude until 2003. Paul has spoken as a presenter at CLE programs: Practicing with Professionalism, sponsored by The Florida Bar (Overview of the Disciplinary System - February 7, 2007, September 1, 2011; Panel Member, December 11, 2014), (Ethical Issues Inherent in the New Computer Age – Webinar - May 15, 2013); Paul was a presenter at a CJE program presented to the Conference of County Court Judges “Local Professionalism Panels” (Orlando, Fl., July 13, 2017); Law School programs sponsored by The Florida Bar YLD –Balancing Life and Law – Stetson College of Law, April 5, 2013; The Winning Edge – Stetson College of Law, March 12, 2015 and WMU Cooley Law School, November 11, 2015; CLE programs sponsored by the Lee County Bar Association - How to Avoid a Grievance (May, 2010, June 18, 2013); Professionalism in the 20th Circuit (February 20, 2015); Ethics and Professionalism in Dependency Mediation (April 11, 2016); Ethical Issues in Social Media (September 22, 2016); Professionalism in Florida Courts/Ethics (Program included
Justice R. Fred Lewis as a presenter (December 16, 2016); a CLE sponsored by the Office of the Judges of Compensation Claims, Standards of Professionalism in Florida Workers’ Compensation Claims (March 11, 2016); and a CLE sponsored by Office of Criminal Conflict and Civil Regional Counsel, 5th District, Juvenile Law Update, Dependency and Delinquency (Orlando, Fl., June 10, 2016 and June 10, 2017); CLE’s sponsored by the Office of Criminal Conflict and Civil Regional Counsel, 2d District – Professionalism in Florida Courts/Ethics/Dependency (Bartow, Fl. August 19, 2016); Professionalism in Florida Courts (New Port Richey, Fl., December 1, 2016); 2016 Child Protection Summit, Professionalism in Dependency Practice: Become an Effective Member of the Dependency Court Team! (Orlando, Fl., September 8, 2016); Educational Seminar on Professionalism/Ethics/Criminal/Dependency (Tampa, Fl. June 27, 2017); Educational Seminar on Professionalism/Ethics/Criminal/Dependency (Sarasota, Fl. August 11, 2017); Professionalism in Florida Courts – Appellate Issues (Bartow, Fl., November 17, 2017); A CLE program sponsored by the Lee County Legal Aid Society “Understanding the Florida Bar Grievance Process – Panel Discussion” (Fort Myers, Fl., October 20, 2017); Paul was a copresenter at a 4-hour presentation “Ethics in the Sunshine” on October 8, 2013 for the Florida Association of City Clerks. Paul was a co-presenter in a 1-hour program, “Avoiding Legal Malpractice and Bar Grievance issues,” at the 18th Annual Florida Liability Claims Conference on June 6, 2014. Paul has also served as a panel member on a CLE presentation to the Cheatwood Inn of Court in Tampa (Rule 4-1.6 and Confidentiality - February 10, 2009). Paul was formerly a member of the Cheatwood Inn of Court and served as moderator of a panel including Justice Peggy Quince and Gwynn Young, then President Elect of The Florida Bar, in a CLE presentation to the Inn (FDR and Court Packing – November 8, 2011).

Paul is a master of the Calusa Inn of Court in Fort Myers and serves on the Executive Committee as Vice-President. Paul will serve as the President of the Calusa Inn in the meeting year 2018-2019. Paul is a former member of the Cheatwood Inn of Court in Tampa.


Paul is A/V rated by Martindale Hubbell.

Paul served on the Supreme Court Commission on Professionalism from July 2012 through June 2016 and continues to serve as an ex officio member. Paul was appointed by Justice Lewis to serve on the Confidentiality Subcommittee in 2015 for the Commission. Paul currently serves on the Board of Governors Standing Committee on Professionalism (starting in 2012).

Paul completed his undergraduate studies at Florida State University in 1981 and received his law degree from Stetson University in 1984. He has been a member of The Florida Bar and has actively practiced law since 1985. Paul was employed with the firm that became known as Lazzara & Paul, P. A. from 1984 to 1997. In 1997 Paul started the firm of Paul & Singer, P. A. and practiced with this firm until 2005.
Judy Rushlow

JUDITH RUSHLOW has been the Executive Director of Florida Lawyers Assistance (FLA) since October 2017. Previously she served as Assistant Director for FLA since 1995. She received her Bachelors Degree in Business Administration from the University of Miami and Juris Doctor from Nova Southeastern University. For the past twenty years she has been certified as a Certified Addiction Counselor by the Florida Certification Board.

She has been a member of The Florida Bar since 1980 and is a member of the Broward County Bar Association. She is a member of the American Bar Association and is active in their Commission on Lawyer Assistance Programs (CoLAP) where she has served on its Advisory Committee.

Steven Teppler

Steven W. Teppler is a partner at the Abbott Law Group in Jacksonville, Florida, and leads the firm’s complex litigation and electronic discovery practice, which encompasses security, property and personal injury single event and mass actions arising from emerging technologies. Steven is an adjunct professor at Nova Southeastern University Law School, where he teaches Electronic Discovery and Information Governance. He is the co-chair of the Information Security Committee of the American Bar Association’s Science and Technology Section, past co-chair of the ABA’s Internet of Things Committee (2015-2017), the Discovery and Digital Evidence Committee of the American Bar Association (2008-2015), and past chair and founding member of the Florida Bar’s Business Law Section’s eDiscovery and Digital Evidence Committee, which provided substantial drafting input to the 2012 electronic discovery amendments to the Florida Rules of Civil Procedure. Steven is a member of the Seventh Circuit Electronic Discovery Pilot Program, and a co-author of the ANSI X9F4 financial industry trusted timestamp standard. He holds six patents for the generation of trusted data objects (and has the startup scars to prove it). Steven’s most recent publications include: A Practitioner’s Guide to Electronic Discovery Under the Florida Rules of Civil Procedure, Florida Business Litigation Manual, 9th Edition (Spring 2017), and Testable Reliability: A Modernized Approach to Digital Evidence Admissibility (Ave Maria L. Rev., Fall 2014).
Chapter 1

Cybersecurity

Author and Speaker:

Steven W. Teppler
LAWYERS, CYBERSECURITY, AND ETHICS ISSUES

Florida Bar Professional Ethics Committee
Masters Seminar in Ethics
June 15, 2018

Steven W. Teppler
Abbott Law Group, P.A.
Jacksonville, FL
OPERATING YOUR PRACTICE WITH COMPETENCE

• How you run your practice today requires sufficient technology competency to understand and address cybersecurity risks

• These risks may come from both internal as well as external sources
Competent representation may also entail safeguarding confidential information related to the representation, including electronic transmissions and communications…

Additionally, we add language to the comment providing that, in order to maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including an understanding of the risks and benefits associated with the use of technology.

Effective January 1, 2017:
We amend subdivision (b) (Minimum Hourly Continuing Legal Education Requirements) to change the required number of continuing legal education credit hours over a three-year period from 30 to 33, with three hours in an approved technology program.
TALKING ABOUT TECH USE RISKS: LAWYERS ARE HACKER TARGETS

• Cravath Swaine & Moore 2016
• Weil Gotshall & Manges 2016
• Mossack Fonseca (Panama Papers) 2017
• Wiley Rein – 2012
• DLA Piper – Ransomware attack 2017
• Hundreds of undisclosed attacks on large and smaller firms, including solos
SECURING CLIENT CONFIDENTIAL INFORMATION – OLD
MAINTAINING FIRM AND CLIENT SENSITIVE INFORMATION - TODAY
WHAT IS CYBERSECURITY

• Locking the doors to your digital information
  • Client file information
  • Employee/client health information
  • Payroll information
  • Escrow account access and information
  • Information at rest, in transit, and (in the future) in use
  • Protecting data from unauthorized access, use, or dissemination
CYBERSECURITY RISKS WITH ETHICAL CONSEQUENCES

- Denials of service
- Data breaches
- Ransomware attacks – i.e., extortion and blackmail
- Stealth Cryptocurrency mining programs
- Fraudulent escrow fund transfers

WHY THE RISK OF ETHICS VIOLATIONS?
Florida RPC 4.1-1 – Having and Maintaining Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.
APPLICABLE ETHICS RULES AND ADVISORY OPINIONS

• Florida RPC 4.1-1.6(a) – Client Confidences
  • Attorneys must maintain confidentiality of information relating to a client’s representation
• An attorney must be mindful of, and receive appropriate and sufficient assurances relative to risks inherent to digital information containing confidential information.

• Obtain assurances by the foreign provider that policies and processes are employed to protect the data while in transit, at rest, in use, and post-provision of services should be set forth in sufficient detail for the requesting attorney.

• Be aware of foreign data-breach and identity protection laws and remedies, where such exist at all, may differ substantially in both scope and coverage from U.S. Federal and State laws and regulations.

• “In light of such differing rules and regulations, an attorney should require sufficient and specific assurances (together with an outline of relevant policies and processes) that the data, once used for the service requested, will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service.”

• While the foregoing issues are likewise applicable to domestic service providers, they present a heightened supervisory and auditability concern in foreign (i.e., non-U.S.) jurisdictions, and should be accorded heightened scrutiny by the attorney seeking to use such services.
OFFSHORING AND CONFIDENTIALITY

• Protect Confidences Contained in Digital Evidence
  • Protect client data
    • In transit
    • At rest
    • In use
    • After use
  • Off-shoring entity assurances
    • Policies and processes
    • Auditability
    • Enforceability
• Addresses data (think digital evidence) stored on hard drives and storage media (which are called Devices in the Advisory Opinion)

• Four areas of concern:
  • Confidentiality, competence, the duty to supervise, and sanitizing data from such Devices upon its disposal.

• The Devices include digital scanner/printer/copier/fax machines, which make images of documents and contain a storage chip to hold digital data related to those images, office desktop or laptop computers, cellular telephones, personal digital assistants (PDAs), flash drives, and memory sticks.
Attorneys are "Business Associates" covered by HIPAA

HIPAA requires BA’s to protect the security, confidentiality and integrity of personal health information

A data breach which includes an exfiltration violates a client’s confidences HIPAA (and FL RPC 4.1-1.6(a) )

A data access only (no exfiltration) violates Florida’s Breach Notification Law, and requires notification
RULE 4-1.1 COMPETENCE

A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal knowledge and skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2.
Thoroughness and preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Maintaining competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology, and comply with all continuing legal education requirements to which the lawyer is subject.
RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary:

1. to prevent a client from committing a crime; or
2. to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary:

1. to serve the client's interest unless it is information the client specifically requires not to be disclosed;
2. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
3. to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;
4. to respond to allegations in any proceeding concerning the lawyer's representation of the client;
5. to comply with the Rules Regulating The Florida Bar; or
6. to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) Exhausition of Appellate Remedies. When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.

(e) Inadvertent Disclosure of Information. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(f) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.
Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(c) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of confidential information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based on experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose confidential information except as authorized or required by the Rules Regulating The Florida Bar or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information
by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

**Disclosure adverse to client**

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In this situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer must reveal information in order to prevent these consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the lawyer to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.
Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure this advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (c)(5) permits this disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges complicity, so that the defense may be established by responding directly to a third party who has made the assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. A charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action
to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against a supersession.

Detection of Conflicts of Interest

Subdivision (c)(6) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, for example, when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See comment to rule 4-1.17. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. The disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person’s intentions are known to the person’s spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, subdivision (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer’s fiduciary duty to the lawyer’s firm may also govern a lawyer’s conduct when exploring an association with another firm and is beyond the scope of these rules.

Any information disclosed under this subdivision may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. This subdivision does not restrict the use of information acquired by means independent of any disclosure under this subdivision.
This subdivision also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, for example, when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

**Acting Competently to Preserve Confidentiality**

Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See rules 4-1.1, 4-5.1 and 4-5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forgo security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, for example state and federal laws that govern data privacy or that impose notification requirements on the loss of, or unauthorized access to, electronic information, is beyond the scope of these rules. For a lawyer’s duties when sharing information with nonlawyers outside the lawyer’s own firm, see the comment to rule 4-5.3.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, for example state and federal laws that govern data privacy, is beyond the scope of these rules.

**Former client**

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.
A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing. The lawyer should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties.

Note: This opinion was approved by The Florida Bar Board of Governors on July 25, 2008.

RPC: 4-1.6, 4-5.3, 4-5.5,
OPINIONS: 68-49, 73-41, 76-33, 76-38, 88-6, 88-12, 89-5; Los Angeles County Bar Association 518, City of New York Bar Association 2006-3
CASES: Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980); Florida Bar v. Sperry, 140 So. 2d 587 (Fla. 1962)

A member of the Florida Bar has inquired whether a law firm may ethically outsource legal work to overseas attorneys or paralegals. The overseas attorneys, who are not admitted to the Florida Bar, would do work including document preparation, for the creation of business entities, business closings and immigration forms and letters. Paralegals, who are not foreign attorneys, would transcribe dictation tapes. The foreign attorneys and paralegals would have remote access to the firm’s computer files and may contact the clients to obtain information needed to complete a form. In addition to the facts presented in the written inquiry, the Committee was advised that the outsourcing company employs lawyers admitted to practice in India who are capable of providing much broader assistance to law firms in the U.S. besides outsourcing merely paralegal work, including contract drafting, litigation support, legal research, and forms preparation. The details of the proposed activity are complex, and a number of issues are potentially involved.

The inquiry raises ethical concerns regarding the unauthorized practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing.

Law firms frequently hire contract paralegals to perform services such as legal research and document preparation. It is the committee’s opinion that there is no ethical distinction when hiring an overseas provider of such services versus a local provider, and that contracting for such services does not constitute aiding the unlicensed practice of law, provided that there is adequate supervision by the law firm.

Rule 4-5.5, Rules Regulating The Florida Bar, prohibits an attorney from assisting in the unlicensed practice of law. In Florida Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962), judg. vacated on other grounds, 373 U.S. 379 (1963) the Court found that setting forth a broad definition of the practice of law was "nigh onto impossible" and instead developed the following test to determine whether an activity is the practice of law:
. . . if the giving of [the] advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

When applying this test it should be kept in mind that “the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation.” Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980). The Committee is not authorized to make the determination whether or not the proposed activities constitute the unlicensed practice of law. It is the obligation of the attorney to determine whether activities (legal work) being undertaken or assigned to others might violate Rule 4-5.5 and any applicable rule of law.

Rule 4-5.3, Rules Regulating The Florida Bar, requires an attorney to directly supervise nonlawyers who are employed or retained by the attorney. The rule also requires that the attorney make reasonable efforts to ensure that the nonlawyers’ conduct is consistent with the ethics rules. This is required regardless of whether the overseas provider is an attorney or a lay paralegal. The comment to the rule states:

A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. The measures employed in supervising nonlawyers should take account of the level of their legal training and the fact that they are not subject to professional discipline. If an activity requires the independent judgment and participation of the lawyer, it cannot be properly delegated to a nonlawyer employee.

Additionally, Florida Ethics Opinions 88-6 and 89-5 provide that nonlawyers (defined as persons who are not members of The Florida Bar) may accomplish certain activities but only under the "supervision" of a Florida lawyer.

In Florida Opinion 88-6, which discusses initial interviews that are conducted by nonlawyers, this committee advised that:

the lawyer is responsible for careful, direct supervision of nonlawyer employees and must make certain that (1) they clearly identify their nonlawyer status to prospective clients, (2) they are used for the purpose of obtaining only factual information from prospective clients, and (3) they give no legal advice concerning the case itself or the representation agreement. Any questions concerning an assessment of the case, the applicable law or the representation agreement would have to be answered by the lawyer.
Florida Ethics Opinion 89-5 provides that a law firm may permit a paralegal or other trained employee to handle a real estate closing at which no lawyer in the firm is present if the following conditions are met:

1. A lawyer supervises and reviews all work done up to the closing;
2. The supervising lawyer determines that handling or attending the closing will be no more than a ministerial act. Handling the closing will constitute a ministerial act only if the supervising lawyer determines that the client understands the closing documents in advance of the closing;
3. The clients consent to the closing being handled by a nonlawyer employee of the firm. This requires that written disclosure be made to the clients that the person who will handle or attend the closing is a nonlawyer and will not be able to give legal advice at the closing;
4. The supervising lawyer is readily available, in person or by telephone, to provide legal advice or answer legal questions should the need arise;
5. The nonlawyer employee will not give legal advice at the closing or make impromptu decisions that should be made by the supervising lawyer.

The committee has specifically addressed the employment of law school graduates who are admitted in other jurisdictions in Florida Opinions 73-41 and 68-49. These opinions state that a law firm may employ attorneys who are not admitted to the Florida Bar only for work that does not constitute the practice of law.

Attorneys who use overseas legal outsourcing companies should recognize that providing adequate supervision may be difficult when dealing with employees who are in a different country. Ethics opinions from other states indicate that an attorney may need to take extra steps to ensure that the foreign employees are familiar with Florida’s ethics rules governing conflicts of interest and confidentiality. See Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518 and Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2006-3. This committee agrees with the conclusion of Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518, which states that a lawyer's obligation regarding conflicts of interest is as follows:

[T]he attorney should satisfy himself that no conflicts exist that would preclude the representation. [Cite omitted.] The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company.

Of particular concern is the ethical obligation of confidentiality. The inquirer states that the foreign attorneys will have remote access to the firm’s computer files. The committee believes that the law firm should instead limit the overseas provider's access to only the information necessary to complete the work for the particular client. The law firm should provide no access to information about other clients of the firm. The law firm should take steps
such as those recommended by The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Opinion 2006-3 to include “contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality.”

The requirement for informed consent from a client should be generally commensurate with the degree of risk involved in the contemplated activity for which such consent is sought. It is assumed that most information outsourced will be transmitted electronically to the legal service provider. If so, an attorney must be mindful of, and receive appropriate and sufficient assurances relative to, the risks inherent to transmittal of information containing confidential information. For example, assurances by the foreign provider that policies and processes are employed to protect the data while in transit, at rest, in use, and post-provision of services should be set forth in sufficient detail for the requesting attorney. Moreover, foreign data-breach and identity protection laws and remedies, where such exist at all, may differ substantially in both scope and coverage from U.S. Federal and State laws and regulations. In light of such differing rules and regulations, an attorney should require sufficient and specific assurances (together with an outline of relevant policies and processes) that the data, once used for the service requested, will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service. While the foregoing issues are likewise applicable to domestic service providers, they present a heightened supervisory and auditability concern in foreign (i.e., non-U.S.) jurisdictions, and should be accorded heightened scrutiny by the attorney seeking to use such services.¹

The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client’s interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services. For example, in Opinion 88-12, we stated that a law firm’s use of a temporary lawyer may need to be disclosed to a client if the client would likely consider the information to be material.

In addition to concerns regarding the confidentiality of client information, there are concerns about disclosure of sensitive information of others, such as an opposing party or third party. In outsourcing, there is the possibility that information of others will be disclosed in addition to the disclosure of client information. Lawyers should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties, particularly where the information concerns medical records or financial information.

Additionally, in Consolidated Opinion 76-33 and 76-38, regarding billing for nonlawyer personnel, the committee stated:

[T]he lawyer should not in fact or effect duplicate charges for services of nonlawyer personnel, and if those charges are separately itemized, the salaries of such personnel employed by the lawyer should in some reasonable fashion be excluded from consideration as an overhead element in fixing the lawyer's own fee. If that exclusion cannot, as a practical matter, be accomplished in some rational and reasonably accurate fashion, then the charges for nonlawyer time should be credited against the lawyer's own fee.

As to whether knowledge and specific advance consent of the client as to such uses of nonlawyer personnel, and charges therefor, are necessary, the Committee majority feels that it is in some instances and is not in others. For example, it would not seem appropriate for a lawyer to always have to seek the consent of the client as to use of a law clerk in conducting legal research. And under EC 3-6 and DR 3-104 the work delegated to nonlawyer personnel should be so much under the lawyer's supervision and ultimately merged into the lawyer's own product that the work will be, in effect, that of the lawyer himself, who presumably has entered into a "clear agreement with his client as to the basis of the fee charges to be made." EC 2-19. However, we feel that such "clear agreement" could not exist in many situations where the lawyer intends to make substantial use of nonlawyer personnel, and to bill directly or indirectly therefor, unless the client is informed of that intention at the time the fee agreement is entered into.

Therefore, if there is a potentiality of dispute with, or of lack of clear agreement with and understanding by, the client as to the basis of the lawyer's charges, including the foregoing elements of nonlawyer time, whether or not the nonlawyer personnel time is to be separately itemized, the lawyer's intention to so use nonlawyer personnel and charge directly or indirectly therefor should be discussed in advance with, and approved by, the client. This would seem especially the case where substantial use is to be made of any kind of such nonlawyer services. See also EC 2-19 as to explaining to clients the reasons for particular fee arrangements proposed.

The Committee suggests that the potentiality of such dispute or lack of clear agreement and understanding referred to in the foregoing paragraph may exist in the case of work to be done by nonlawyer personnel who are employed by the lawyer and who perform services of a type known by the lay public to be
regularly available through independent contractors, e.g., investigators. The Committee feels that such potentiality especially may exist where the lawyer enters into a contingent fee arrangement with the client and then separately itemizes charges to the client for the time of nonlawyer personnel who are full-time employees of the lawyer; the arrangement may be susceptible of interpretation as involving charging the client for such nonlawyer services and at the same time, in fact or effect, duplicating the charges by including the salaries of such personnel as overhead and an element of the lawyer's own fee, as proscribed hereinabove.

The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client’s own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third party provider.

In sum, a lawyer is not prohibited from engaging the services of an overseas provider, as long as the lawyer adequately addresses the above ethical obligations.
A lawyer who chooses to use Devices that contain Storage Media such as printers, copiers, scanners, and facsimile machines must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition, including: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility for sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.

**RPC:** 4-1.1, 4-1.6(a), 4-5.3(b)

The Professional Ethics Committee has been asked by the Florida Bar Board of Governors to write an opinion addressing the ethical obligations of lawyers regarding information stored on hard drives. An increasing number of devices such as computers, printers, copiers, scanners, cellular phones, personal digital assistants (“PDA’s”), flash drives, memory sticks, facsimile machines and other electronic or digital devices (collectively, “Devices”) now contain hard drives or other data storage media\(^1\) (collectively “Hard Drives” or “Storage Media”) that can store information.\(^2\) Because many lawyers use these Devices to assist in the practice of law and in doing so intentionally and unintentionally store their clients’ information on these Devices, it is important for lawyers to recognize that the ability of the Devices to store information may present potential ethical problems for lawyers.

For example, when a lawyer copies a document using a photocopier that contains a hard drive, the document is converted into a file that is stored on the copier’s hard drive. This document usually remains on the hard drive until it is overwritten or deleted. The lawyer may choose to later sell the photocopier or return it to a leasing company. Disposal of the device without first removing the information can result in the inadvertent disclosure of confidential information.

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1. As used in this opinion, Storage Media is any media that stores digital representations of documents.
Duty of Confidentiality

Lawyers have an ethical obligation to protect information relating to the representation of a client. Rule 4-1.6(a) of the Rules Regulating the Florida Bar addresses the duty of confidentiality and states:

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

The comment to the rule further states:

The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law.

A lawyer must ensure confidentiality by taking reasonable steps to protect all confidential information under the lawyer’s control. Those reasonable steps include identifying areas where confidential information could be potentially exposed. Rule 4-1.1 addresses a lawyer’s duty of competence:

Competence A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The comment to the rule further elaborates:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

(emphasis added).

If a lawyer chooses to use these Devices that contain Storage Media, the lawyer has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to maintaining confidentiality. The lawyer must learn such details as whether the Device has the ability to store confidential information, whether the information can be accessed by unauthorized parties, and who can potentially have access to the information. The lawyer must also be aware of different environments in which confidential information is exposed such as public copy centers, hotel business centers, and home offices. The lawyer should obtain enough information to know when to seek protection and what Devices must be sanitized, or cleared of all confidential information,
before disposal or other disposition. Therefore, the duty of competence extends from the receipt, i.e., when the lawyer obtains control of the Device, through the Device’s life cycle, and until disposition of the Device, including after it leaves the control of the lawyer. Further, while legal matters are beyond the scope of an ethics opinion, a lawyer should be aware that depending on the nature of the information, misuse of these Devices could result in inadvertent violation of state and federal statutes governing the disclosure of sensitive personal information such as medical records, social security numbers, criminal arrest records, etc.

**Duty to Supervise**

The lawyer must regulate not only the lawyer’s own conduct but must take reasonable steps to ensure that all nonlawyers over whom the lawyer has supervisory responsibility adhere to the duty of confidentiality as well. Rule 4-5.3(b) states:

**(b) Supervisory Responsibility.** With respect to a nonlawyer employed or retained by or associated with a lawyer or an authorized business entity as defined elsewhere in these Rules Regulating The Florida Bar:

(1) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(2) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(3) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(A) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(B) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

A lawyer’s supervisory responsibility extends not only to the lawyer’s own employees but over entities outside the lawyer’s firm with whom the lawyer contracts to assist in the care and maintenance of the Devices in the lawyer’s control. If a nonlawyer will have access to confidential information, the lawyer must obtain adequate assurances from the nonlawyer that confidentiality of the information will be maintained.
Sanitization

A lawyer has a duty to obtain adequate assurances that the Device has been stripped of all confidential information before disposition of the Device. If a vendor or other service provider is involved in the sanitization of the Device, such as at the termination of a lease agreement or upon sale of the Device, it is not sufficient to merely obtain an agreement that the vendor will sanitize the Device upon sale or turn back of the Device. The lawyer has an affirmative obligation to ascertain that the sanitization has been accomplished, whether by some type of meaningful confirmation, by having the sanitization occur at the lawyer’s office, or by other similar means.

Further, a lawyer should use care when using Devices in public places such as at copy centers, hotel business centers, and outside offices where the lawyer and those under the lawyer’s supervision have little or no control. In such situations, the lawyer should inquire and determine whether use of such Devices would preserve confidentiality under these rules.

In conclusion, when a lawyer chooses to use Devices that contain Storage Media, the lawyer must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition. These reasonable steps include: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility for sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.
Chapter 2

Intersection of Ethics and Lawyer Health and Wellness

Speakers:

John T. Berry
Richard B. Bush
Dori Foster-Morales
Kenneth R. Landis
Judith Rushlow
NATIONAL TASK FORCE ON LAWYER WELL-BEING
Creating a Movement To Improve Well-Being in the Legal Profession

August 14, 2017

Enclosed is a copy of The Path to Lawyer Well-Being: Practical Recommendations for Positive Change from the National Task Force on Lawyer Well-Being. The Task Force was conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL). It is a collection of entities within and outside the ABA that was created in August 2016. Its participating entities currently include the following: ABA CoLAP; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Wellbeing Committee; The National Organization of Bar Counsel; Association of Professional Responsibility Lawyers; National Conference of Chief Justices; and National Conference of Bar Examiners. Additionally, CoLAP was a co-sponsor of the 2016 ABA CoLAP and Hazelden Betty Ford Foundation’s study of mental health and substance use disorders among lawyers and of the 2016 Survey of Law Student Well-Being.

To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being. The two studies referenced above reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers’ basic competence. This research suggests that the current state of lawyers’ health cannot support a profession dedicated to client service and dependent on the public trust.

The legal profession is already struggling. Our profession confronts a dwindling market share as the public turns to more accessible, affordable alternative legal service providers. We are at a crossroads. To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members’ state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.
This report’s recommendations focus on five central themes: (1) identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession, (2) eliminating the stigma associated with help-seeking behaviors, (3) emphasizing that well-being is an indispensable part of a lawyer’s duty of competence, (4) educating lawyers, judges, and law students on lawyer well-being issues, and (5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

The members of this Task Force make the following recommendations after extended deliberation. We recognize this number of recommendations may seem overwhelming at first. Thus we also provide proposed state action plans with simple checklists. These help each stakeholder inventory their current system and explore the recommendations relevant to their group. We invite you to read this report, which sets forth the basis for why the legal profession is at a tipping point, and we present these recommendations and action plans for building a more positive future. We call on you to take action and hear our clarion call. The time is now to use your experience, status, and leadership to construct a profession built on greater well-being, increased competence, and greater public trust.

Sincerely,

Bree Buchanan, Esq.
Task Force Co-Chair
Texas Lawyers Assistance Program
State Bar of Texas

James C. Coyle, Esq.
Task Force Co-Chair
Attorney Regulation Counsel
Colorado Supreme Court

“Lawyers, judges and law students are faced with an increasingly competitive and stressful profession. Studies show that substance use, addiction and mental disorders, including depression and thoughts of suicide—often unrecognized—are at shockingly high rates. As a consequence the National Task Force on Lawyer Well-being, under the aegis of CoLAP (the ABA Commission on Lawyer Assistance programs) has been formed to promote nationwide awareness, recognition and treatment. This Task Force deserves the strong support of every lawyer and bar association.”

David R Brink*
Past President
American Bar Association

* David R. Brink (ABA President 1981-82) passed away in July 2017 at the age of 97. He tirelessly supported the work of lawyer assistance programs across the nation, and was a beacon of hope in the legal profession for those seeking recovery.
THE PATH TO LAWYER WELL-BEING:
Practical Recommendations For Positive Change

THE REPORT OF THE NATIONAL TASK FORCE ON LAWYER WELL-BEING

August 2017
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   20.2 Modify the Rules of Professional Responsibility to Endorse Well-Being as Part of a Lawyer’s Duty of Competence.
   20.3 Expand Continuing Education Requirements to Include Well-Being Topics.
   20.4 Require Law Schools to Create Well-Being Education for Students as an Accreditation Requirement.

   21.1 Re-Evaluate Bar Application Inquiries About Mental Health History.
   21.2 Adopt Essential Eligibility Admission Requirements.
   21.3 Adopt a Rule for Conditional Admission to Practice Law with Specific Requirements and Conditions.
   21.4 Publish Data Reflecting Low Rate of Denied Admissions Due to Mental Health Disorders and Substance Use.

22. Adjust Lawyer Regulations to Support Well-Being.
   22.1 Implement Proactive Management-Based Programs (PMBP) That Include Lawyer Well-Being Components.
   22.2 Adopt a Centralized Grievance Intake System to Promptly Identify Well-Being Concerns.
22.3 Modify Confidentiality Rules to Allow One-Way Sharing of Lawyer Well-Being Related Information from Regulators to Lawyer Assistance Programs.

22.4 Adopt Diversion Programs and Other Alternatives to Discipline That Are Proven.

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   25.2 Actively Combat Social Isolation and Encourage Interconnectivity.

   26.1 Emphasize a Service-Centered Mission.
   26.2 Create Standards, Align Incentives, and Give Feedback.

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   27.3 Provide Mental Health and Substance Use Disorder Resources.


29. Empower Students to Help Fellow Students in Need.

30. Include Well-Being Topics in Courses on Professional Responsibility.


32. Facilitate a Confidential Recovery Network.

33. Provide Education Opportunities on Well-Being Related Topics.
   33.1 Provide Well-Being Programming During the 1L Year.
   33.2 Create a Well-Being Course and Lecture Series for Students.

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35. Conduct Anonymous Surveys Relating to Student Well-Being.

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INTRODUCTION

THE PATH TO LAWYER WELL-BEING: Practical Recomendations For Positive Change

Although the legal profession has known for years that many of its students and practitioners are languishing, far too little has been done to address it. Recent studies show we can no longer continue to ignore the problems. In 2016, the American Bar Association (ABA) Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation published their study of nearly 13,000 currently-practicing lawyers [the “Study”]. It found that between 21 and 36 percent qualify as problem drinkers, and that approximately 28 percent, 19 percent, and 23 percent are struggling with some level of depression, anxiety, and stress, respectively.¹ The parade of difficulties also includes suicide, social alienation, work addiction, sleep deprivation, job dissatisfaction, a “diversity crisis,” complaints of work-life conflict, incivility, a narrowing of values so that profit predominates, and negative public perception.² Notably, the Study found that younger lawyers in the first ten years of practice and those working in private firms experience the highest rates of problem drinking and depression. The budding impairment of many of the future generation of lawyers should be alarming to everyone. Too many face less productive, less satisfying, and more troubled career paths.

Additionally, 15 law schools and over 3,300 law students participated in the Survey of Law Student Well-Being, the results of which were released in 2016.³ It found that 17 percent experienced some level of depression, 14 percent experienced severe anxiety, 23 percent had mild or moderate anxiety, and six percent reported serious suicidal thoughts in the past year. As to alcohol use, 43 percent reported binge drinking at least once in the prior two weeks and nearly one-quarter (22 percent) reported binge-drinking two or more times during that period. One-quarter fell into the category of being at risk for alcoholism for which further screening was recommended.

The results from both surveys signal an elevated risk in the legal community for mental health and substance use disorders tightly intertwined with an alcohol-based social culture. The analysis of the problem cannot end there, however. The studies reflect that the majority of lawyers and law students do not have a mental health or substance use disorder. But that does not mean that they’re thriving. Many lawyers experience a “profound ambivalence” about their work,⁴ and different sectors of the profession vary in their levels of satisfaction and well-being.⁵

Given this data, lawyer well-being issues can no longer be ignored. Acting for the benefit of lawyers who are functioning below their ability and for those suffering due to substance use and mental health disorders, the National Task Force on Lawyer Well-Being urges our profession’s leaders to act.

¹P. R. Krill, R. Johnson, & L. Albert, The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, 10 J. ADDICTION MED. 46 (2016).
REASONS TO TAKE ACTION

We offer three reasons to take action: organizational effectiveness, ethical integrity, and humanitarian concerns.

First, lawyer well-being contributes to organizational success—in law firms, corporations, and government entities. If cognitive functioning is impaired as explained above, legal professionals will be unable to do their best work. For law firms and corporations, lawyer health is an important form of human capital that can provide a competitive advantage.

For example, job satisfaction predicts retention and performance. Gallup Corporation has done years of research showing that worker well-being in the form of engagement is linked to a host of organizational success factors, including lower turnover, high client satisfaction, and higher productivity and profitability. The Gallup research also shows that few organizations fully benefit from their human capital because most employees (68 percent) are not engaged. Reducing turnover is especially important for law firms, where turnover rates can be high. For example, a 2016 survey by Law360 found that over 40 percent of lawyers reported that they were likely or very likely to leave their current law firms in the next year. This high turnover rate for law firms is expensive—with estimated costs for larger firms of $25 million every year. In short, enhancing lawyer health and well-being is good business and makes sound financial sense.

Second, lawyer well-being influences ethics and professionalism. Rule 1.1 of the ABA’s Model Rules of Professional Conduct requires lawyers to “provide competent representation.” Rule 1.3 requires diligence in client representation, and Rules 4.1 through 4.4 regulate working with people other than clients. Minimum competence is critical to protecting clients and allows lawyers to avoid discipline. But it will not enable them to live up to the aspirational goal articulated in the Preamble to the ABA’s Model Rules of Professional Conduct, which calls lawyers to “strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.” Troubled lawyers can struggle with even minimum competence. At least one author suggests that 40 to 70 percent of disciplinary proceedings and malpractice claims against lawyers involve substance use or depression, and often both. This can be explained, in part, by declining mental capacity due to these conditions. For example, major depression is associated

Reasons to Improve Attorney Well-Being

✓ Good for business
✓ Good for clients
✓ The right thing to do

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with impaired executive functioning, including diminished memory, attention, and problem-solving. Well-functioning executive capacities are needed to make good decisions and evaluate risks, plan for the future, prioritize and sequence actions, and cope with new situations. Further, some types of cognitive impairment persist in up to 60 percent of individuals with depression even after mood symptoms have diminished, making prevention strategies essential. For alcohol abuse, the majority of abusers (up to 80 percent) experience mild to severe cognitive impairment. Deficits are particularly severe in executive functions, especially in problem-solving, abstraction, planning, organizing, and working memory—core features of competent lawyering.

Third, from a humanitarian perspective, promoting well-being is the right thing to do. Untreated mental health and substance use disorders ruin lives and careers. They affect too many of our colleagues. Though our profession prioritizes individualism and self-sufficiency, we all contribute to, and are affected by, the collective legal culture. Whether that culture is toxic or sustaining is up to us. Our interdependence creates a joint responsibility for solutions.

DEFINING “LAWYER WELL-BEING”

We define lawyer well-being as a continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others. Lawyer well-being is part of a lawyer's ethical duty of competence. It includes lawyers’ ability to make healthy, positive work/life choices to assure not only a quality of life within their families and communities, but also to help them make responsible decisions for their clients. It includes maintaining their own long term well-being. This definition highlights that complete health

“Well-Being”: A Continuous process toward thriving across all life dimensions.
is not defined solely by the absence of illness; it includes a positive state of wellness.

To arrive at this definition, the Task Force consulted other prominent well-being definitions and social science research, which emphasize that well-being is not limited to: (1) an absence of illness, (2) feeling happy all the time, or (3) intra-individual processes—context matters. For example, the World Health Organization (WHO) defines “health” as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” It defines “mental health” as “a state of well-being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community.”

Social science research also emphasizes that “well-being” is not defined solely by an absence of dysfunction; but nor is it limited to feeling “happy” or filled with positive emotions. The concept of well-being in social science research is multi-dimensional and includes, for example, engagement in interesting activities, having close relationships and a sense of belonging, developing confidence through mastery, achieving goals that matter to us, meaning and purpose, a sense of autonomy and control, self-acceptance, and personal growth. This multi-dimensional approach underscores that a positive state of well-being is not synonymous with feeling happy or experiencing positive emotions. It is much broader.

Another common theme in social science research is that well-being is not just an intra-personal process: context powerfully influences it. Consistent with this view, a study of world-wide survey data found that five factors constitute the key elements of well-being: career, social relationships, community, health, and finances.

The Task Force chose the term “well-being” based on the view that the terms “health” or “wellness” connote only physical health or the absence of illness. Our definition of “lawyer well-being” embraces the multi-dimensional concept of mental health and the importance of context to complete health.

**OUR CALL TO ACTION**

The benefits of increased lawyer well-being are compelling and the cost of lawyer impairment are too great to ignore. There has never been a better or more important time for all sectors of the profession to get serious about the substance use and mental health of ourselves and those around us. The publication of this report, in and of itself, serves the vital role of bringing conversations about these conditions out in the open.

In the following pages, we present recommendations for many stakeholders in the legal profession including the judiciary, regulators, legal employers, law schools, bar associations, lawyers' professional liability carriers, and lawyer assistance programs. The recommendations revolve around five core steps intended to build a more sustainable culture:

1. **Identifying stakeholders and the role that each of us can play in reducing the level of toxicity in our profession.**

2. **Ending the stigma surrounding help-seeking behaviors.** This report contains numerous recommendations to combat the stigma that seeking help will lead to negative professional consequences.

3. **Emphasizing that well-being is an indispensable part of a lawyer’s duty of competence.** Among the report’s recommendations are steps stakeholders can take to highlight the tie-in between competence and well-being. These include giving this connection formal recognition through modifying the Rules of Professional Conduct or their comments to reference well-being.

4. **Expanding educational outreach and programming on well-being issues.** We need to educate lawyers, judges, and law students on well-being issues. This includes instruction in recognizing mental health and

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14 The WHO's definition of “health” can be found at: http://www.who.int/about/mission/en. The definition of “mental health” can be found at: http://www.who.int/features/factfiles/mental_health/en/


substance use disorders as well as navigating the practice of law in a healthy manner. To implement this recommendation effectively, more resources need to be devoted to promoting well-being.

(5) Changing the tone of the profession one small step at a time. This report contains a number of small-scale recommendations, such as allowing lawyers to earn continuing legal education (CLE) credit for well-being workshops or de-emphasizing alcohol at bar association social events. These small steps can start the process necessary to place health, resilience, self-care, and helping others at the forefront of what it means to be a lawyer. Collectively, small steps can lead to transformative cultural change in a profession that has always been, and will remain, demanding.

Historically, law firms, law schools, bar associations, courts, and malpractice insurers have taken a largely hands-off approach to these issues. They have dealt with them only when forced to because of impairment that can no longer be ignored. The dedication and hard work of lawyer assistance programs aside, we have not done enough to help, encourage, or require lawyers to be, get, or stay well. However, the goal of achieving increased lawyer well-being is within our collective reach. The time to redouble our efforts is now.

**RECOMMENDATIONS**

Below, the Task Force provides detailed recommendations for minimizing lawyer dysfunction, boosting well-being, and reinforcing the importance of well-being to competence and excellence in practicing law. This section has two main parts. Part I provides general recommendations for all stakeholders in the legal community. Part II provides recommendations tailored to a specific stakeholder: (1) judges, (2) regulators, (3) legal employers, (4) law schools, (5) bar associations, (6) lawyers’ professional liability carriers, and (7) lawyer assistance programs.
“None of us got where we are solely by pulling ourselves up by our bootstraps. We got there because somebody bent down and helped us pick up our boots.” — Thurgood Marshall

First, we recommend strategies for all stakeholders in the legal profession to play a part in the transformational process aimed at developing a thriving legal profession.

1. ACKNOWLEDGE THE PROBLEMS AND TAKE RESPONSIBILITY.

Every sector of the legal profession must support lawyer well-being. Each of us can take a leadership role within our own spheres to change the profession’s mindset from passive denial of problems to proactive support for change. We have the capacity to make a difference.

For too long, the legal profession has turned a blind eye to widespread health problems.

For too long, the legal profession has turned a blind eye to widespread health problems. Many in the legal profession have behaved, at best, as if their colleagues’ well-being is none of their business. At worst, some appear to believe that supporting well-being will harm professional success. Many also appear to believe that lawyers’ health problems are solely attributable to their own personal failings for which they are solely responsible.

As to the long-standing psychological distress and substance use problems, many appear to believe that the establishment of lawyer assistance programs—a necessary but not sufficient step toward a solution—has satisfied any responsibility that the profession might have. Lawyer assistance programs have made incredible strides; however, to meaningfully reduce lawyer distress, enhance well-being, and change legal culture, all corners of the legal profession need to prioritize lawyer health and well-being. It is not solely a job for lawyer assistance programs. Each of us shares responsibility for making it happen.

2. USE THIS REPORT AS A LAUNCH PAD FOR A PROFESSION-WIDE ACTION PLAN.

All stakeholders must lead their own efforts aimed at incorporating well-being as an essential component of practicing law, using this report as a launch pad. Changing the culture will not be easy. Critical to this complex endeavor will be the development of a National Action Plan and state-level action plans that continue the effort started in this report. An organized coalition will be necessary to plan, fund, instigate, motivate, and sustain long-term change. The coalition should include, for example, the Conference of Chief Justices, the National Organization of Bar Counsel, the Association of Professional Responsibility Lawyers, the ABA, state bar associations as a whole and specific divisions (young lawyers, lawyer well-being, senior lawyers, etc.), the Commission on Lawyer Assistance Programs, state lawyer assistance programs, other stakeholders that have contributed to this report, and many others.

3. LEADERS SHOULD DEMONSTRATE A PERSONAL COMMITMENT TO WELL-BEING.

Policy statements alone do not shift culture. Broad-scale change requires buy-in and role modeling from top

leadership.17 Leaders in the courts, regulators’ offices, legal employers, law schools, and bar associations will be closely watched for signals about what is expected. Leaders can create and support change through their own demonstrated commitment to core values and well-being in their own lives and by supporting others in doing the same.18

4. FACILITATE, DESTIGMATIZE, AND ENCOURAGE HELP-SEEKING BEHAVIORS.

All stakeholders must take steps to minimize the stigma of mental health and substance use disorders because the stigma prevents lawyers from seeking help.

Research has identified multiple factors that can hinder seeking help for mental health conditions: (1) failure to recognize symptoms; (2) not knowing how to identify or access appropriate treatment or believing it to be a hassle to do so; (3) a culture’s negative attitude about such conditions; (4) fear of adverse reactions by others whose opinions are important; (5) feeling ashamed; (6) viewing help-seeking as a sign of weakness, having a strong preference for self-reliance, and/or having a tendency toward perfectionism; (7) fear of career repercussions; (8) concerns about confidentiality; (9) uncertainty about the quality of organizationally-provided therapists or otherwise doubting that treatment will be effective; and (10) lack of time in busy schedules.19

The Study identified similar factors. The two most common barriers to seeking treatment for a substance use disorder that lawyers reported were not wanting others to find out they needed help and concerns regarding privacy or confidentiality. Top concerns of law students in the Survey of Law Student Well Being were regarding privacy or confidentiality. The two most effective; and (10) lack of time in busy schedules.

Research also suggests that professionals with hectic, stressful jobs (like many lawyers and law students) are more likely to perceive obstacles for accessing treatment, which can exacerbate depression. The result of these barriers is that, rather than seeking help early, many wait until their symptoms are so severe that they interfere with daily functioning. Similar dynamics likely apply for aging lawyers seeking assistance.

Removing these barriers requires education, skill-building, and stigma-reduction strategies. Research shows that the most effective way to reduce stigma is through direct contact with someone who has personally experienced a relevant disorder. Ideally, this person should be a practicing lawyer or law student (depending on the audience) in order to create a personal connection that lends credibility and combats stigma.22 Viewing video-taped narratives also is useful, but not as effective as in-person contacts.

The military’s “Real Warrior” mental health campaign can serve as one model for the legal profession. It is designed to improve soldiers’ education about mental health disorders, reduce stigma, and encourage help-seeking. Because many soldiers (like many lawyers) perceive seeking help as a weakness, the campaign also has sought to re-frame help-seeking as a sign of strength that is important to resilience. It also highlights cultural values that align with seeking psychological help.23

5. BUILD RELATIONSHIPS WITH LAWYER WELL-BEING EXPERTS.

5.1. Partner With Lawyer Assistance Programs.

All stakeholders should partner with and ensure stable and sufficient funding for the ABA’s Commission on Lawyer Assistance Programs (CoLAP) as well as

RECOMMENDATIONS FOR ALL STAKEHOLDERS

20Krill, Johnson, & Albert, supra note 1, at 50.
21Organ, Jaffe, & Bender, supra note 3, at 141.
23Wade, Vogel, Armistead-Jehle, Meit, Heath, Strass, supra note 19. The Real Warrior website can be found at www.realwarriors.net.
for state-based lawyer assistance programs. ABA CoLAP and state-based lawyer assistance programs are indispensable partners in efforts to educate and empower the legal profession to identify, treat, and prevent conditions at the root of the current well-being crisis, and to create lawyer-specific programs and access to treatment.24 Many lawyer assistance programs employ teams of experts that are well-qualified to help lawyers, judges, and law students who experience physical or mental health conditions. Lawyer assistance programs’ services are confidential, and many include prevention, intervention, evaluation, counseling, referral to professional help, and on-going monitoring. Many cover a range of well-being-related topics including substance use and mental health disorders, as well as cognitive impairment, process addictions, burnout, and chronic stress. A number also provide services to lawyer discipline and admissions processes (e.g., monitoring and drug and alcohol screening).25

Notably, the Study found that, of lawyers who had reported past treatment for alcohol use, those who had used a treatment program specifically tailored to legal professionals reported, on average, significantly lower scores on the current assessment of alcohol use.26 This at least suggests that lawyer assistance programs, which are specifically tailored to identify and refer lawyers to treatment providers and resources, are a better fit than general treatment programs.

Judges, regulators, legal employers, law schools, and bar associations should ally themselves with lawyer assistance programs to provide the above services. These stakeholders should also promote the services of state lawyer assistance programs. They also should emphasize the confidential nature of those services to reduce barriers to seeking help. Lawyers are reluctant to seek help for mental health and substance use disorders for fear that doing so might negatively affect their licenses and lead to stigma or judgment of peers.27 All stakeholders can help combat these fears by clearly communicating about the confidentiality of lawyer assistance programs.

We also recommend coordinating regular meetings with lawyer assistance program directors to create solutions to the problems facing the profession. Lawyer assistance programs can help organizations establish confidential support groups, wellness days, trainings, summits, and/ or fairs. Additionally, lawyer assistance programs can serve as a resource for speakers and trainers on lawyer well-being topics, contribute to publications, and provide guidance to those concerned about a lawyer’s well-being.

5.2. Consult Lawyer Well-Being Committees and Other Types of Well-Being Experts.

We also recommend partnerships with lawyer well-being committees and other types of organizations and consultants that specialize in relevant topics. For example, the American Bar Association’s Law Practice Division established an Attorney Well-Being Committee in 2015. A number of state bars also have well-being committees including Georgia, Indiana, Maryland, South Carolina, and Tennessee.28 The Florida Bar Association’s Young Lawyers Division has a Quality of Life Committee “for enhancing and promoting the quality of life for young lawyers.”29 Some city bar associations also have well-being initiatives, such as the Cincinnati Bar Association’s Health and Well-Being Committee.30 These committees can serve as a resource for education, identifying speakers and trainers, developing materials, and contributing to publications. Many high-quality consultants are also available on well-being subjects.

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24 The ABA Commission on Lawyer Assistance Programs’ (CoLAP) website provides numerous resources, including help lines and a directory of state-based law assistant programs. See http://www.americanbar.org/groups/lawyer_assistance.html.
26 Krill, Johnson, & Albert, supra note 1, at 50.
27 Id. at 51.
Care should be taken to ensure that they understand the particular types of stress that affect lawyers.

6. FOSTER COLLEGIALITY AND RESPECTFUL ENGAGEMENT THROUGHOUT THE PROFESSION.

We recommend that all stakeholders develop and enforce standards of collegiality and respectful engagement. Judges, regulators, practicing lawyers, law students, and professors continually interact with each other, clients, opposing parties, staff, and many others.

Those interactions can either foment a toxic culture that contributes to poor health or can foster a respectful culture that supports well-being. Chronic incivility is corrosive. It depletes energy and motivation, increases burnout, and inflicts emotional and physiological damage. It diminishes productivity, performance, creativity, and helping behaviors.

Incivility appears to be declining in the legal profession. For example, in a 1992 study, 42 percent of lawyers and 45 percent of judges believed that civility and professionalism among bar members were significant problems. In a 2007 survey of Illinois lawyers, 72 percent of respondents categorized incivility as a serious or moderately serious problem in the profession. A recent study of over 6,000 lawyers found that lawyers did not generally have a positive view of lawyer or judge professionalism.

There is evidence showing that women lawyers are more frequent targets of incivility and harassment. Legal-industry commentators offer a host of hypotheses to explain the decline in civility. Rather than continuing to puzzle over the causes, we acknowledge the complexity of the problem and invite further thinking on how to address it.

As a start, we recommend that bar associations and courts adopt rules of professionalism and civility, such as those that exist in many jurisdictions. Likewise, law firms should adopt their own professionalism standards. Since rules alone will not change culture, all stakeholders should devise strategies to promote wide-scale, voluntary observance of those standards. This should include an expectation that all leaders in the profession be a role model for these standards of professionalism.

Exemplary standards of professionalism are inclusive. Research reflects that organizational diversity and inclusion initiatives are associated with employee well-being, including, for example, general mental and physical health, perceived stress level, job satisfaction, organizational commitment, trust, work engagement,
perceptions of organizational fairness, and intentions to remain on the job.40 A significant contributor to well-being is a sense of organizational belongingness, which has been defined as feeling personally accepted, respected, included, and supported by others. A weak sense of belonging is strongly associated with depressive symptoms.31 Unfortunately, however, a lack of diversity and inclusion is an entrenched problem in the legal profession.42 The issue is pronounced for women and minorities in larger law firms.43

6.1. Promote Diversity and Inclusivity.

Given the above, we recommend that all stakeholders urgently prioritize diversity and inclusion. Regulators and bar associations can play an especially influential role in advocating for initiatives in the profession as a whole and educating on why those initiatives are important to individual and institutional well-being. Examples of relevant initiatives include: scholarships, bar exam grants for qualified applicants, law school orientation programs that highlight the importance of diversity and inclusion, CLE programs focused on diversity in the legal profession, business development symposia for women- and minority-owned law firms, pipeline programming for low-income high school and college students, diversity clerkship programs for law students, studies and reports on the state of diversity within the state's bench and bar, and diversity initiatives in law firms.44

6.2. Create Meaningful Mentoring and Sponsorship Programs.

Another relevant initiative that fosters inclusiveness and respectful engagement is mentoring. Research has shown that mentorship and sponsorship can aid well-being and career progression for women and diverse professionals. They also reduce lawyer isolation.46 Those who have participated in legal mentoring report a stronger sense of personal connection with others in the legal community, restored enthusiasm for the legal profession, and more resilience—all of which benefit both mentors and mentees.47 At least 35 states and the District of Columbia sponsor formal mentoring programs.48

7. ENHANCE LAWYERS’ SENSE OF CONTROL.

Practices that rob lawyers of a sense of autonomy and control over their schedules and lives are especially harmful to their well-being. Research studies show that high job demands paired with a lack of a sense of control breeds depression and other psychological disorders.49 Research suggests that men in jobs with such characteristics have an elevated risk of alcohol abuse.50 A recent review of strategies designed to prevent workplace depression found that those designed to improve the perception of control were among the

45Ferris, Daniels, & Sexton, supra note 40; A. Ramaswami, G. F. Dreher, R. Bretz, & C. Wiethoff, The Interactive Effects of Gender and Mentoring on Career Attainment: Making the Case for Female Lawyers, 37 J. CAREER DEV. 692 (2010).
48Of the 35 programs, seven are mandatory (GA, NV, NM, OR, SC, UT, and WY) and some are approved for CLE credits. See the American Bar Association for more information: http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/mentoring.html.
Research confirms that environments that facilitate control and autonomy contribute to optimal functioning and well-being.52

We recommend that all stakeholders consider how long-standing structures of the legal system, organizational norms, and embedded expectations might be modified to enhance lawyers’ sense of control and support a healthier lifestyle. Courts, clients, colleagues, and opposing lawyers all contribute to this problem. Examples of the types of practices that should be reviewed include the following:

- Practices concerning deadlines such as tight deadlines for completing a large volume of work, limited bases for seeking extensions of time, and ease and promptness of procedures for requesting extensions of time;
- Refusal to permit trial lawyers to extend trial dates to accommodate vacation plans or scheduling trials shortly after the end of a vacation so that lawyers must work during that time;
- Tight deadlines set by clients that are not based on business needs;
- Senior lawyer decision-making in matters about key milestones and deadlines without consulting other members of the litigation team, including junior lawyers;
- Senior lawyers’ poor time-management habits that result in repeated emergencies and weekend work for junior lawyers and staff;
- Expectations of 24/7 work schedules and of prompt response to electronic messages at all times; and
- Excessive law school workload, controlling teaching styles, and mandatory grading curves.

8. PROVIDE HIGH-QUALITY EDUCATIONAL PROGRAMS ABOUT LAWYER DISTRESS AND WELL-BEING.

All stakeholders should ensure that legal professionals receive training in identifying, addressing, and supporting fellow professionals with mental health and substance use disorders. At a minimum, training should cover the following:

- The warning signs of substance use or mental health disorders, including suicidal thinking;
- How, why, and where to seek help at the first signs of difficulty;
- The relationship between substance use, depression, anxiety, and suicide;
- Freedom from substance use and mental health disorders as an indispensable predicate to fitness to practice;
- How to approach a colleague who may be in trouble;
- How to thrive in practice and manage stress without reliance on alcohol and drugs; and
- A self-assessment or other check of participants’ mental health or substance use risk.

As noted above, to help reduce stigma, such programs should consider enlisting the help of recovering lawyers who are successful members of the legal community. Some evidence reflects that social norms predict problem drinking even more so than stress.53 Therefore, a team-based training program may be most effective because it focuses on the level at which the social norms are enforced.54

Given the influence of drinking norms throughout the profession, however, isolated training programs are not sufficient. A more comprehensive, systemic campaign is likely to be the most effective—though certainly the most challenging.55 All stakeholders will be critical players in such an aspirational goal. Long-term strategies should consider scholars’ recommendations to incorporate mental health and substance use disorder training into broader health-promotion programs to help skirt the stigma that may otherwise deter attendance.

53 D. C. Hodgins, R. Williams, & G. Munro, Workplace Responsibility, Stress, Alcohol Availability and Norms as Predictors of Alcohol Consumption-Related Problems Among Employed Workers, 44 SUBSTANCE USE & MISUSE 2062 (2009).
55 Kolar & von Treuer, supra note 54.
Research also suggests that, where social drinking has become a ritual for relieving stress and for social bonding, individuals may resist efforts to deprive them of a valued activity that they enjoy. To alleviate resistance based on such concerns, prevention programs should consider making “it clear that they are not a temperance movement, only a force for moderation,” and that they are not designed to eliminate bonding but to ensure that drinking does not reach damaging dimensions.56

Additionally, genuine efforts to enhance lawyer well-being must extend beyond disorder detection and treatment. Efforts aimed at remodeling institutional and organizational features that breed stress are crucial, as are those designed to cultivate lawyers’ personal resources to boost resilience. All stakeholders should participate in the development and delivery of educational materials and programming that go beyond detection to include causes and consequences of distress. These programs should be eligible for CLE credit, as discussed in Recommendation 20.3. Appendix B to this report offers examples of well-being-related educational content, along with empirical evidence to support each example.

Well-being efforts must extend beyond detection and treatment and address root causes of poor health.

9. GUIDE AND SUPPORT THE TRANSITION OF OLDER LAWYERS.

Like the general population, the lawyer community is aging and lawyers are practicing longer.57 In the Baby Boomer generation, the oldest turned 62 in 2008, and the youngest will turn 62 in 2026.58 In law firms, one estimate indicates that nearly 65 percent of equity partners will retire over the next decade.59 Senior lawyers can bring much to the table, including their wealth of experience, valuable public service, and mentoring of new lawyers. At the same time, however, aging lawyers have an increasing risk for declining physical and mental capacity. Yet few lawyers and legal organizations have sufficiently prepared to manage transitions away from the practice of law before a crisis occurs. The result is a rise in regulatory and other issues relating to the impairment of senior lawyers. We make the following recommendations to address these issues:

Appendix B to this report offers examples of well-being-related educational content, along with empirical evidence to support each example.

Planning Transition of Older Lawyers

1. Provide education to detect cognitive decline.

2. Develop succession plans.

3. Create transition programs to respectfully aid retiring professionals plan for their next chapter.


First, all stakeholders should create or support programming for detecting and addressing cognitive decline in oneself and colleagues.

Second, judges, legal employers, bar associations, and regulators should develop succession plans, or provide education on how to do so, to guide the transition of aging legal professionals. Programs should include help for aging members who show signs of diminished cognitive skills, to maintain their dignity while also assuring they are competent to practice. A model program in this regard is the North Carolina Bar Association’s Senior Lawyers Division.

Third, we recommend that legal employers, law firms, courts, and law schools develop programs to aid the transition of retiring legal professionals. Retirement can enhance or harm well-being depending on the individual’s adjustment process. Many lawyers who are approaching retirement age have devoted most of their adult lives to the legal profession, and their identities often are wrapped up in their work. Lawyers whose self-esteem is contingent on their workplace success are likely to delay transitioning and have a hard time adjusting to retirement. Forced retirement that deprives individuals of a sense of control over the exit timing or process is particularly harmful to well-being and long-term adjustment to retirement.

To assist stakeholders in creating the programming to guide and support transitioning lawyers, the Task Force sets out a number of suggestions in Appendix C.

10. DE-EMPHASIZE ALCOHOL AT SOCIAL EVENTS.

Workplace cultures or social climates that support alcohol consumption are among the most consistent predictors of employee drinking. When employees drink together to unwind from stress and for social bonding, social norms can reinforce tendencies toward problem drinking and stigmatize seeking help. On the other hand, social norms can also lead colleagues to encourage those who abuse alcohol to seek help.

In the legal profession, social events often center around alcohol consumption (e.g., “Happy Hours,” “Bar Reviews,” networking receptions, etc.). The expectation of drinking is embedded in the culture, which may contribute to over-consumption. Legal employers, law schools, bar associations, and other stakeholders that plan social events should provide a variety of alternative non-alcoholic beverages and consider other types of activities to promote socializing and networking. They should strive to develop social norms in which lawyers discourage heavy drinking and encourage others to seek help for problem use.

11. UTILIZE MONITORING TO SUPPORT RECOVERY FROM SUBSTANCE USE DISORDERS.

Extensive research has demonstrated that random drug and alcohol testing (or “monitoring”) is an effective way of supporting recovery from substance use disorders and increasing abstinence rates. The medical profession has long relied on monitoring as a key component of its treatment paradigm for physicians, resulting in long-term recovery rates for that population that are between 70-96 percent, which is the highest in all of the treatment outcome literature. One study found that 96 percent of medical professionals who were subject to random drug tests remained drug-free, compared to only 64 percent of those who were not subject to mandatory testing. Further, a national survey of physician health programs found that among medical professionals who completed their prescribed treatment requirements (including monitoring), 95 percent were licensed and actively

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63 Id.
working in the health care field at a five year follow-up after completing their primary treatment program. In addition, one study has found that physicians undergoing monitoring through physician health programs experienced lower rates of malpractice claims.

Such outcomes are not only exceptional and encouraging, they offer clear guidance for how the legal profession could better address its high rates of substance use disorders and increase the likelihood of positive outcomes. Although the benefits of monitoring have been recognized by various bar associations, lawyer assistance programs, and employers throughout the legal profession, a uniform or “best practices” approach to the treatment and recovery management of lawyers has been lacking. Through advances in monitoring technologies, random drug and alcohol testing can now be administered with greater accuracy and reliability—as well as less cost and inconvenience—than ever before. Law schools, legal employers, regulators, and lawyer assistance programs would all benefit from greater utilization of monitoring to support individuals recovering from substance use disorders.

12. BEGIN A DIALOGUE ABOUT SUICIDE PREVENTION.

It is well-documented that lawyers have high rates of suicide. The reasons for this are complicated and varied, but some include the reluctance of attorneys to ask for help when they need it, high levels of depression amongst legal professionals, and the stressful nature of the job. If we are to change these statistics, stakeholders need to provide education and take action. Suicide, like mental health or substance use disorders, is a highly stigmatized topic. While it is an issue that touches many of us, most people are uncomfortable discussing suicide. Therefore, stakeholders must make a concerted effort towards suicide prevention to demonstrate to the legal community that we are not afraid of addressing this issue. We need leaders to encourage dialogue about suicide prevention.

One model for this is through a “Call to Action,” where members of the legal community and stakeholders from lawyer assistance programs, the judiciary, law firms, law schools, and bar associations are invited to attend a presentation and community discussion about the issue.

Call to Action

- Organize “Call to Action” events to raise awareness.
- Share stories of those affected by suicide.
- Provide education about signs of depression and suicidal thinking.
- Learn non-verbal signs of distress.
- Collect and publicize available resources.

When people who have been affected by the suicide of a friend or colleague share their stories, other members of the legal community begin to better understand the impact and need for prevention. In addition, stakeholders can schedule educational presentations that incorporate information on the signs and symptoms of suicidal thinking along with other mental health/health/
substance use disorders. These can occur during CLE presentations, staff meetings, training seminars, at law school orientations, bar association functions, etc. Stakeholders can contact their state lawyer assistance programs, employee assistance program agencies, or health centers at law schools to find speakers, or referrals for counselors or therapists so that resources are available for family members of lawyers, judges, and law students who have taken their own life.

It’s important for all stakeholders to understand that, while lawyers might not tell us that they are suffering, they will show us through various changes in behavior and communication styles. This is so because the majority of what we express is non-verbal. Becoming better educated about signs of distress will enable us to take action by, for example, making health-related inquiries or directing them to potentially life-saving resources.

13. SUPPORT A LAWYER WELL-BEING INDEX TO MEASURE THE PROFESSION’S PROGRESS.

We recommend that the ABA coordinate with state bar associations to create a well-being index for the legal profession that will include metrics related to lawyers, staff, clients, the legal profession as a whole, and the broader community. The goal would be to optimize the well-being of all of the legal profession’s stakeholders. Creating such an index would correspond with a growing worldwide consensus that success should not be measured solely in economic terms. Measures of well-being also have an important role to play in defining success and informing policy. The index would help track progress on the transformational effort proposed in this report. For law firms, it also may help counter-balance the “profits per partner metric” that has been published by The American Lawyer since the late 1980s, and which some argue has driven the profession away from its core values. As a foundation for building the well-being index, stakeholders could look to, for example, criteria used in The American Lawyer’s Best Places to Work survey, or the Tristan Jepson Memorial Foundation’s best practice guidelines for promoting psychological well-being in the legal profession.

73 ALBERT MEHRABIAN, SILENT MESSAGES: IMPLICIT COMMUNICATION OF EMOTIONS AND ATTITUDES (1972).
Judges occupy an esteemed position in the legal profession and society at large. For most, serving on the bench is the capstone of their legal career. The position, however, can take a toll on judges’ health and well-being. Judges regularly confront contentious, personal, and vitriolic proceedings. Judges presiding over domestic relations dockets make life-changing decisions for children and families daily. Some report lying awake at night worrying about making the right decision or the consequences of that decision. Other judges face the stress of presiding over criminal cases with horrific underlying facts.

Also stressful is the increasing rate of violence against judges inside and outside the courthouse. Further, many judges contend with isolation in their professional lives and sometimes in their personal lives. When a judge is appointed to the bench, former colleagues who were once a source of professional and personal support can become more guarded and distant. Often, judges do not have feedback on their performance. A number take the bench with little preparation, compounding the sense of going it alone. Judges also cannot “take off the robe” in every day interactions outside the courthouse because of their elevated status in society, which can contribute to social isolation. Additional stressors include re-election in certain jurisdictions. Limited judicial resources coupled with time-intensive, congested dockets are a pronounced problem. More recently, judges have reported a sense of diminishment in their estimation among the public at large. Even the most astute, conscientious, and collected judicial officer can struggle to keep these issues in perspective.

We further recognize that many judges have the same reticence in seeking help out of the same fear of embarrassment and occupational repercussions that lawyers have. The public nature of the bench often heightens the sense of peril in coming forward. Many judges, like lawyers, have a strong sense of perfectionism and believe they must display this perfectionism at all times. Judges’ staff can act as protectors or enablers of problematic behavior. These are all impediments to seeking help. In addition, lawyers, and even a judge’s colleagues, can be hesitant to report or refer a judge whose behavior is problematic for fear of retribution.

In light of these barriers and the stressors inherent in the unique role judges occupy in the legal system, we make the following recommendations to enhance well-being among members of the judiciary.

14. COMMUNICATE THAT WELL-BEING IS A PRIORITY.

The highest court in each state should set the tone for the importance of the well-being of judges. Judges are not immune from suffering from the same stressors as lawyers, and additional stressors are unique to work as a jurist.
15. DEVELOP POLICIES FOR IMPAIRED JUDGES.

It is essential that the highest court and its commission on judicial conduct implement policies and procedures for intervening with impaired members of the judiciary. For example, the highest court should consider adoption of policies such as a Diversion Rule for Judges in appropriate cases. Administrative and chief judges also should implement policies and procedures for intervening with members of the judiciary who are impaired in compliance with Model Rule of Judicial Conduct 2.14. They should feel comfortable referring members to judicial or lawyer assistance programs. Educating judicial leaders about the confidential nature of these programs will go a long way in this regard. Judicial associations and educators also should promote CoLAP’s judicial peer support network, as well as the National Helpline for Judges Helping Judges.90

16. REDUCE THE STIGMA OF MENTAL HEALTH AND SUBSTANCE USE DISORDERS.

As reflected in Recommendation 4, the stigma surrounding mental health and substance use disorders poses an obstacle to treatment. Judges are undisputed leaders in the legal profession. We recommend they work to reduce this stigma by creating opportunities for open dialogue. Simply talking about these issues helps combat the unease and discomfort that causes the issues to remain unresolved. In a similar vein, we encourage judges to participate in the activities of lawyer assistance programs, such as volunteering as speakers and serving as board members. This is a powerful way to convey to lawyers, law students, and other judges the importance of lawyer assistance programs and to encourage them to access the programs’ resources.

17. CONDUCT JUDICIAL WELL-BEING SURVEYS.

This report was triggered in part by the Study and the Survey of Law Student Well-Being. No comparable research has been conducted of the judiciary. We recommend that CoLAP and other concerned entities conduct a broad-based survey of the judiciary to determine the state of well-being and the prevalence of issues directly related to judicial fitness such as burnout, compassion fatigue, mental health, substance use disorders and help-seeking behaviors.

18. PROVIDE WELL-BEING PROGRAMMING FOR JUDGES AND STAFF.

Judicial associations should invite lawyer assistance program directors and other well-being experts to judicial conferences who can provide programming on topics related to self-care as well as resources available to members of the judiciary experiencing mental health or substance use disorders. Topics could include burnout, secondary traumatic stress, compassion fatigue, strategies to maintain well-being, as well as identification of and intervention for mental health and substance use disorders.

Judicial educators also should make use of programming that allows judges to engage in mutual support and sharing of self-care strategies. One such example is roundtable discussions held as part of judicial conferences or establishing a facilitated mentoring

90The ABA-sponsored National Helpline for Judges Helping Judges is 1-800-219-6474.
program or mentoring circle for judicial members. We have identified isolation as a significant challenge for many members of the judiciary. Roundtable discussions and mentoring programs combat the detrimental effects of this isolation.81

Judicial associations and educators also should develop publications and resources related to well-being, such as guidebooks. For example, a judicial association could create wellness guides such as “A Wellness Guide for Judges of the California State Courts.” This sends the signal that thought leaders in the judiciary value well-being.

19. MONITOR FOR IMPAIRED LAWYERS AND PARTNER WITH LAWYER ASSISTANCE PROGRAMS

Judges often are among the first to detect lawyers suffering from an impairment. Judges know when a lawyer is late to court regularly, fails to appear, or appears in court under the influence of alcohol or drugs. They witness incomprehensible pleadings or cascading requests for extensions of time. We believe judges have a keen pulse on when a lawyer needs help. With the appropriate training, judges’ actions can reduce client harm and save a law practice or a life. We make the following recommendations tailored to helping judges help the lawyers appearing before them.

Consistent with Recommendation 5.1, judges should become familiar with lawyer assistance programs in their state. They should learn how best to make referrals to the program. They should understand the confidentiality protections surrounding these referrals. Judges also should invite lawyer assistance programs to conduct educational programming for lawyers in their jurisdiction using their courtroom or other courthouse space.

Judges, for example, can devote a bench-bar luncheon at the courthouse to well-being and invite representatives of the lawyers assistance program to the luncheon.

Judicial educators should include a section in bench book-style publications dedicated to lawyer assistance programs and their resources, as well as discussing how to identify and handle lawyers who appear to have mental health or substance use disorders. Further, judges and their staff should learn the signs of mental health and substance use disorders, as well as strategies for intervention, to assist lawyers in their courtrooms who may be struggling with these issues. Judges can also advance the well-being of lawyers who appear before them by maintaining courtroom decorum and de-escalating the hostilities that litigation often breeds.

81The ABA-sponsored National Helpline for Judges Helping Judges is 1-800-219-6474.

82For more information on judicial roundtables, see AM. BAR ASS’N COMM’N ON LAW. ASSISTANCE PROGRAMS, JUDICIAL ROUNDTABLES, available at https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/fs_colap_Judicial_Roundtable_Protocols.authcheckdam.pdf.
Regulators play a vital role in fostering individual lawyer well-being and a professional culture that makes it possible. We broadly define “regulators” to encompass all stakeholders who assist the highest court in each state in regulating the practice of law. This definition includes lawyers and staff in regulatory offices; volunteer lawyer and non-lawyer committee, board, and commission members; and professional liability lawyers who advise law firms and represent lawyers in the regulatory process.

Courts and their regulators frequently witness the conditions that generate toxic professional environments, the impairments that may result, and the negative professional consequences for those who do not seek help. Regulators are well-positioned to improve and adjust the regulatory process to address the conditions that produce these effects. As a result, we propose that the highest court in each state set an agenda for action and send a clear message to all participants in the legal system that lawyer well-being is a high priority.

To carry out the agenda, regulators should develop their reputation as partners with practitioners. The legal profession often has a negative perception of regulators, who typically appear only when something has gone awry. Regulators can transform this perception by building their identity as partners with the rest of the legal community rather than being viewed only as its “police.”

Most regulators are already familiar with the 1992 Report of the Commission on Evaluation of Disciplinary Enforcement—better known as the “McKay Commission Report.” It recognized and encouraged precisely what we seek to do through this report: to make continual improvements to the lawyer regulation process to protect the public and assist lawyers in their professional roles. Accordingly, we offer the following recommendations to ensure that the regulatory process proactively fosters a healthy legal community and provides resources to rehabilitate impaired lawyers.

20. TAKE ACTIONS TO MEANINGFULLY COMMUNICATE THAT LAWYER WELL-BEING IS A PRIORITY.


In 2016, the Conference of Chief Justices adopted a resolution recommending that each state’s highest court consider the ABA’s proposed Model Regulatory Objectives. Among other things, those objectives sought to encourage “appropriate preventive or wellness programs.” By including a wellness provision, the ABA recognized the importance of the human element in the practice of law: To accomplish all other listed objectives, the profession must have healthy, competent lawyers. The Supreme Court of Colorado already has adopted

See AM. BAR ASS’N RESOL. 105 (February 2016).
RESOL. 105, supra note 92.
a version of the ABA's Regulatory Objectives. In doing so, it recommended proactive programs offered by the Colorado Lawyer Assistance Program and other organizations to assist lawyers throughout all stages of their careers to practice successfully and serve their clients. The Supreme Court of Washington also recently enacted regulatory objectives.

We recommend that the highest court in each U.S. jurisdiction follow this lead. Each should review the ABA and Colorado regulatory objectives and create its own objectives that specifically promote effective lawyer assistance and other proactive programs relating to well-being. Such objectives will send a clear message that the court prioritizes lawyer well-being, which influences competent legal services. This, in turn, can boost public confidence in the administration of justice.

**20.2. Modify the Rules of Professional Conduct to Endorse Well-Being As Part of a Lawyer's Duty of Competence.**

ABA Model Rule of Professional Conduct 1.1 (Competence) states that lawyers owe a duty of competence to their clients. “Competent” representation is defined to require “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” We recommend revising this Rule and/or its Comments to more clearly include lawyers’ well-being in the definition of “competence.”

One alternative is to include language similar to California’s Rule of Professional Conduct 3-110, which defines “competence” to include the “mental, emotional, and physical ability reasonably necessary” for the representation. A second option is to amend the Comments to Rule 1.1 to clarify that professional competence requires an ability to comply with all of the Court’s essential eligibility requirements (see Recommendation 21.2 below).

Notably, we do not recommend discipline solely for a lawyer’s failure to satisfy the well-being requirement or the essential eligibility requirements. Enforcement should proceed only in the case of actionable misconduct in the client representation or in connection with disability proceedings under Rule 23 of the ABA Model Rules for Disciplinary Enforcement. The goal of the proposed amendment is not to threaten lawyers with discipline for poor health but to underscore the importance of well-being in client representations. It is intended to remind lawyers that their mental and physical health impacts clients and the administration of justice, to reduce stigma associated with mental health disorders, and to encourage preventive strategies and self-care.

**20.3. Expand Continuing Education Requirements to Include Well-Being Topics.**

We recommend expanding continuing education requirements for lawyers and judges to mandate credit for mental health and substance use disorder programming and allow credit for other well-being-related topics that affect lawyers’ professional capabilities.

In 2017, the ABA proposed a new Model Continuing Legal Education (MCLE) Rule that recommends mandatory mental health programming. The Model Rule requires lawyers to earn at least one credit hour every three years of CLE programming that addresses the prevention, detection, and/or treatment of “mental health and substance use disorders.” We recommend that all states adopt this provision of the Model Rule. Alternatively, states could consider authorizing ethics credit (or other specialized credits) for CLE programs that address these topics. California and Illinois are examples of state bars that already have such requirements.

The ABA’s new Model Rule also provisionally recommends that states grant CLE credit for “Lawyer Well-Being Programming.” The provision encompasses a broader scope of topics than might fall under a narrow definition of mental health and substance use

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disorders. Tennessee is one example of a pioneering state that authorizes credit for a broad set of well-being topics. Its CLE Regulation 5H authorizes ethics and professionalism credit for programs that are designed, for example, to: enhance optimism, resilience, relationship skills, and energy and engagement in their practices; connect lawyers with their strengths and values; address stress; and to foster cultures that support outstanding professionalism.\textsuperscript{100} We recommend that regulators follow Tennessee’s lead by revising CLE rules to grant credit for similar topics.

20.4. Require Law Schools to Create Well-Being Education for Students as An Accreditation Requirement.

In this recommendation, the Task Force recognizes the ABA’s unique role as accreditor for law schools through the Council of the Section of Legal Education and Admissions to the Bar of the ABA.\textsuperscript{101} The Task Force recommends that the Council revise the Standards and Rules of Procedure for Approval of Law Schools to require law schools to create well-being education as a criterion for ABA accreditation. The ABA should require law schools to publish their well-being-related resources on their websites. These disclosures can serve as resources for other law schools as they develop and improve their own programs. Examples of well-being education include a mandatory one credit-hour course on well-being topics or incorporating well-being topics into the professional responsibility curriculum.

A requirement similar to this already has been implemented in the medical profession for hospitals that operate residency programs. Hospitals that operate Graduate Medical Education programs to train residents must comply with the Accreditation Council for Graduate Medical Education (ACGME) Program Requirements. The ACGME requires hospitals to “be committed to and responsible for . . . resident well-being in a supportive educational environment.”\textsuperscript{102} This provision requires that teaching hospitals have a documented strategy for promoting resident well-being and, typically, hospitals develop a wellness curriculum for residents.

21. ADJUST THE ADMISSIONS PROCESS TO SUPPORT LAW STUDENT WELL-BEING.

To promote law student well-being, regulations governing the admission to the practice of law should facilitate the treatment and rehabilitation of law students with impairments.

21.1. Re-Evaluate Bar Application Inquiries About Mental Health History.

Most bar admission agencies include inquiries about applicants’ mental health as part of fitness evaluations for licensure. Some critics have contended that the deterrent effect of those inquiries discourages persons in need of help from seeking it. Not everyone agrees with that premise, and some argue that licensing of professionals necessarily requires evaluation of all risks that an applicant may pose to the public. Over the past several decades, questions have evolved to be more tightly focused and to elicit only information that is current and germane. There is continuing controversy over the appropriateness of asking questions about mental health at all. The U.S. Department of Justice has actively encouraged states to eliminate questions relating to mental health, and some states have modified or eliminated such questions.\textsuperscript{103} In 2015, the ABA adopted a resolution that the focus should be directed “on conduct or behavior that impairs an applicant’s ability to practice law in a competent, ethical, and professional manner.”\textsuperscript{104} We recommend that each state follow the ABA and more closely focus on such conduct or behavior rather than any diagnosis or treatment history.

\textsuperscript{102} ACCREDITATION COUNSEL FOR GRADUATE MEDICAL EDUCATION, CGME COMMON PROGRAM REQUIREMENTS, § VI.A.2, available at https://www.acgme.org/Portals/0/PPAssets/ProgramRequirements/CPRs_07012016.pdf.
\textsuperscript{104} AM. BAR ASS’N RESOL. 102 (August 2015).

Promoting lawyer well-being includes providing clear eligibility guidelines for lawyers with mental or physical impairments. Regulators in each state should adopt essential eligibility requirements that affirmatively state the abilities needed to become a licensed lawyer. Their purpose is to provide the framework for determining whether or not an individual has the required abilities, with or without reasonable accommodations.

At least fourteen states have essential eligibility requirements for admission to practice law.105 These requirements help the applicant, the admissions authority, and the medical expert understand what is needed to demonstrate fitness to practice law. Essential eligibility requirements also aid participants in lawyer disability and reinstatement proceedings, when determinations must be made of lawyers’ capacity to practice law.

21.3. Adopt a Rule for Conditional Admission to Practice Law With Specific Requirements and Conditions.

Overly-rigid admission requirements can deter lawyers and law students from seeking help for substance use and mental health disorders. To alleviate this problem, states should adopt conditional admission requirements, which govern applicants for admission to the practice of law who have successfully undergone rehabilitation for substance use or another mental disorder, but whose period of treatment and recovery may not yet be sufficient to ensure continuing success.106 Conditional admission programs help dismantle the stigma of mental health and substance use disorders as “scarlet letters.” Especially for law students, they send a meaningful message that even in the worst circumstances, there is hope: seeking help will not block entry into their chosen profession.

21.4. Publish Data Reflecting Low Rate of Denied Admissions Due to Mental Health Disorders and Substance Use.

At present, no state publishes data showing the number of applications for admission to practice law that are actually denied or delayed due to conduct related to substance use and other mental health disorders. From informal discussions with regulators, we know that a low percentage of applications are denied. Publication of this data might help alleviate law students’ and other applicants’ fears that seeking help for such disorders will inevitably block them from practicing law. Accordingly, we recommend that boards of bar examiners collect and publish such data as another means of encouraging potential applicants to seek help immediately and not delay until after their admission.

22. ADJUST LAWYER REGULATIONS TO SUPPORT WELL-BEING.

22.1. Implement Proactive Management-Based Programs (PMBP) That Include Lawyer Well-Being Components.

PMBP programs encourage best business practices and provide a resource-based framework to improve lawyers’ ability to manage their practice. Such programs

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106 About a quarter of all jurisdictions already have conditional admission rules for conduct resulting from substance use or other mental disorders. See 2016 NAT’L CONF. OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS, Chart 2: Character and Fitness Determinations (2016). Those states include Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Puerto Rico, Rhode Island, South Dakota, Tennessee, Texas, West Virginia, Wisconsin and Wyoming. Additionally, Guam allows conditional admission for conduct related to substance abuse.
are designed to alleviate practice stress, improve lawyer-client relationships, and enhance career satisfaction.\(^\text{107}\) Further, PMBP programs allow regulators to engage with the profession in a service-oriented, positive manner, reducing the anxiety, fear, and distrust that often accompanies lawyers’ interactions with regulators.\(^\text{108}\) Transforming the perception of regulators so that they are viewed as partners and not only as police will help combat the culture of stress and fear that has allowed mental health and substance use disorders to proliferate.

22.2. Adopt A Centralized Grievance Intake System to Promptly Identify Well-Being Concerns.

We recommend that regulators adopt centralized intake systems. These allow expedited methods for receipt and resolution of grievances and help reduce the stress associated with pending disciplinary matters. With specialized training for intake personnel, such systems also can result in faster identification of and possible intervention for lawyers struggling with substance use or mental health disorders.\(^\text{109}\)

22.3. Modify Confidentiality Rules to Allow One-Way Sharing of Lawyer Well-Being Related Information From Regulators to Lawyer Assistance Programs.

Regulators’ information-sharing practices can contribute to the speed of help to lawyers in need. For example, admissions offices sometimes learn that applicants are suffering from a substance use or other mental health disorder. Other regulators may receive similar information during investigations or prosecutions of lawyer regulation matters that they consider to be confidential information. To facilitate help for lawyers suffering from such disorders, each state should simplify its confidentiality rules to allow admissions offices and other regulators to share such information immediately with local lawyer assistance programs.

Allowing this one-way flow of information can accelerate help to lawyers who need it. To be clear, the recommended information sharing would be one-way. As always, the lawyer assistance programs would be precluded from sharing any information with any regulators or others.

22.4. Adopt Diversion Programs and Other Alternatives to Discipline That Are Proven Successful in Promoting Well-Being.

Discipline does not make an ill lawyer well. We recommend that regulators adopt alternatives to formal disciplinary proceedings that rehabilitate lawyers with impairments. Diversion programs are one such alternative, and they have a direct and positive impact on lawyer well-being. Diversion programs address minor lawyer misconduct that often features an underlying mental health or substance use disorder.\(^\text{110}\) When lawyers enter a diversion program, they agree to follow


\[^{109}\text{The American Bar Association’s Model Rules for Lawyer Disciplinary Enforcement, Rule 1, defines a Central Intake Office as the office that “receive[s] information and complaints regarding the conduct of lawyers over whom the court has jurisdiction” and determines whether to dismiss the complaint or forward it to the appropriate disciplinary agency. The Model Rules for Lawyer Disciplinary Enforcement are available at http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html.}\]

\[^{110}\text{Title 6 of Washington’s Rules for Enforcement of Lawyer Conduct provides an excellent overview of when diversion is appropriate and procedures for diversion. It is available through the Washington State Courts website at http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=ELC. Some of the many jurisdictions to adopt such programs are Arizona, Colorado, the District of Columbia, Florida, Illinois, Iowa, Kansas, Louisiana, New Hampshire, New Jersey, Oklahoma, Oregon, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.}\]
certain conditions to continue practicing law. Those conditions can include training, drug or alcohol testing, peer assistance, and treatment. Monitoring plays a central role in ensuring compliance with the diversion agreement and helps lawyers successfully transition back to an unconditional practice of law and do so healthy and sober. By conditioning continued practice on treatment for an underlying mental health disorder or substance use disorder, diversion agreements can change a lawyer's life.

In addition, probation programs also promote wellness. Lawyer misconduct that warrants a suspension of a lawyer's license may, under certain circumstances, qualify for probation. In most jurisdictions, the probation period stays the license suspension and lawyers may continue practicing under supervision and specified conditions that include training, testing, monitoring, and treatment. Once again, this places a lawyer facing a mental health or substance use crisis on the path to better client service and a lifetime of greater well-being and sobriety.

23. ADD WELL-BEING-RELATED QUESTIONS TO THE MULTISTATE PROFESSIONAL RESPONSIBILITY EXAM (MPRE).

A 2009 survey reflected that 22.9 percent of professional responsibility/legal ethics professors did not cover substance use and addiction at all in their course, and 69.8 percent addressed the topic in fewer than two hours. Notwithstanding the pressure to address myriad topics in this course, increased attention must be given to reduce these issues among our law students. The National Conference of Bar Examiners should consider adding several relevant questions to the MPRE, such as on the confidentiality of using lawyer assistance programs, the frequency of mental health and substance use disorders, and the tie-in to competence and other professional responsibility issues. Taking this step underscores both the importance of the topic and the likelihood of students paying closer attention to that subject matter in their course. In addition, professional responsibility casebook authors are encouraged to include a section devoted to the topic, which will in turn compel instructors to teach in this area.

112 See Krill, Johnson, & Albert, supra note 1, for the ABA Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation Study; Organ, Jaffe, Bender, supra note 3, for Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns.
Legal employers, meaning all entities that employ multiple practicing lawyers, can play a large role in contributing to lawyer well-being. While this is a broad and sizable group with considerable diversity, our recommendations apply fairly universally. A specific recommendation may need to be tailored to address the realities particular to each context, but the crux of each recommendation applies to all.

24. ESTABLISH ORGANIZATIONAL INFRASTRUCTURE TO PROMOTE WELL-BEING.

24.1. Form A Lawyer Well-Being Committee.

Without dedicated personnel, real progress on well-being strategies will be difficult to implement and sustain. Accordingly, legal employers should launch a well-being initiative by forming a Lawyer Well-Being Committee or appointing a Well-Being Advocate. The advocate or committee should be responsible for evaluating the work environment, identifying and addressing policies and procedures that create the greatest mental distress among employees, identifying how best to promote a positive state of well-being, and tracking progress of well-being strategies. They should prepare key milestones, communicate them, and create accountability strategies. They also should develop strategic partnerships with lawyer assistance programs and other well-being experts and stay abreast of developments in the profession and relevant literature.


Legal employers should consider continually assessing the state of well-being among lawyers and staff and whether workplace cultures support well-being. An assessment strategy might include an anonymous survey conducted to measure lawyer and staff attitudes and beliefs about well-being, stressors in the firm that significantly affect well-being, and organizational support for improving well-being in the workplace. Attitudes are formed not only by an organization’s explicit messages but also implicitly by how leaders and lawyers actually behave. Specifically related to the organizational climate for support for mental health or substance use disorders, legal employers should collect information to ascertain, for example, whether lawyers:

- Perceive that you, their employer, values and supports well-being.
- Perceive leaders as role modeling healthy behaviors and empathetic to lawyers who may be struggling.
- Can suggest improvements to better support well-being.
- Would feel comfortable seeking needed help, taking time off, or otherwise taking steps to improve their situation.
- Are aware of resources available to assist their well-being.
- Feel expected to drink alcohol at organizational events.
- Feel that substance use and mental health problems are stigmatized.
- Understand that the organization will reasonably accommodate health conditions, including recovery from mental health disorders and addiction.


114 For guidance on developing their own strategic plan, Well-Being Committees could look to the Tristan Jepson Memorial Foundation’s best practice guidelines for promoting psychological well-being in the legal profession, see supra note 76. They might also consider creating an information hub to post all well-being related resources. Resources could include information about the growing number of mental health apps. See, e.g., R. E. Silverman, Tackling Workers’ Mental Health, One Text at a Time, WALL ST. J., July 19, 2016, available at https://www.wsj.com/articles/tackling-workers-mental-health-one-text-at-a-time-1468953055; B. A. Clough & L. M. Casey, The Smart Therapist: A Look to the Future of Smartphones and eHealth Technologies in Psychotherapy, 46 PROF. PSYCHOL. RES. & PRAC. 147 (2015).
As part of the same survey or conducted separately, legal employers should consider assessing the overall state of lawyers’ well-being. Surveys are available to measure concepts like depression, substance use, burnout, work engagement, and psychological well-being. The Maslach Burnout Inventory (MBI) is the most widely used burnout assessment. It has been used to measure burnout among lawyers and law students. Programs in the medical profession have recommended a bi-annual distribution of the MBI.

Legal employers should carefully consider whether internal staff will be able to accurately conduct this type of assessment or whether hiring an outside consultant would be advisable. Internal staff may be more vulnerable to influence by bias, denial, and misinterpretation.

25. ESTABLISH POLICIES AND PRACTICES TO SUPPORT LAWYER WELL-BEING.

Legal employers should conduct an in-depth and honest evaluation of their current policies and practices that relate to well-being and make necessary adjustments. This evaluation should seek input from all lawyers and staff in a safe and confidential manner, which creates transparency that builds trust. Appendix D sets out example topics for an assessment.

Legal employers also should establish a confidential reporting procedure for lawyers and staff to convey concerns about their colleagues’ mental health or substance use internally, and communicate how lawyers and staff can report concerns to the appropriate disciplinary authority and/or to the local lawyer assistance program. Legal employers additionally should establish a procedure for lawyers to seek confidential help for themselves without being penalized or stigmatized. CoLAP and state lawyer assistance programs can refer legal employers to existing help lines and offer guidance for establishing an effective procedure that is staffed by properly-trained people. We note that the ABA and New York State Bar Association have proposed model law firm policies for handling lawyer impairment that can be used for guidance. The ABA has provided formal guidance on managing lawyer impairment.


Research reflects that about a quarter of lawyers are workaholics, which is more than double that of the 10 percent rate estimated for U.S. adults generally. Numerous health and relationship problems, including depression, anger, anxiety, sleep problems, weight gain, high blood pressure, low self-esteem, low life satisfaction, work burnout, and family conflict can develop from work addiction. Therefore, we recommend that legal employers monitor for work addiction and avoid rewarding extreme behaviors that can ultimately harm their health. Legal employers should expressly encourage lawyers to make time to care for themselves and attend to other personal obligations. They may also want to consider promoting physical activity to aid health and cognitive functioning.

25.2. Actively Combat Social Isolation and Encourage Interconnectivity.

As job demands have increased and budgets have tightened, many legal employers have cut back on social activities. This could be a mistake. Social support from colleagues is an important factor for coping with stress and preventing negative consequences like burnout. Socializing helps individuals recover from work demands...
and can help stave off emotional exhaustion.\textsuperscript{122} It inhibits lawyers feeling isolated and disconnected, which helps with firm branding, messaging, and may help reduce turnover. We recommend deemphasizing alcohol at such events.

26. PROVIDE TRAINING AND EDUCATION ON WELL-BEING, INCLUDING DURING NEW LAWYER ORIENTATION.

We recommend that legal employers provide education and training on well-being-related topics and recruit experts to help them do so. A number of law firms already offer well-being related programs, like meditation, yoga sessions, and resilience workshops.\textsuperscript{123} We also recommend orientation programs for new lawyers that incorporate lawyer well-being education and training.\textsuperscript{124} Introducing this topic during orientation will signal its importance to the organization and will start the process of developing skills that may help prevent well-being problems. Such programs could:

• Introduce new lawyers to the psychological challenges of the job.\textsuperscript{125}
• Reduce stigma surrounding mental health problems.
• Take a baseline measure of well-being to track changes over time.
• Provide resilience-related training.
• Incorporate activities focused on individual lawyers’ interests and strengths, and not only on organizational expectations.\textsuperscript{126}

Further, law firms should ensure that all members and staff know about resources, including lawyer assistance programs, that can assist lawyers who may experience mental health and substance use disorders. This includes making sure that members and staff understand confidentiality issues pertaining to those resources.


At its core, law is a helping profession. This can get lost in the rush of practice and in the business aspects of law. Much research reflects that organizational cultures that focus chiefly on materialistic, external rewards can damage well-being and promote a self-only focus. In fact, research shows that intrinsic values like relationship-

Work cultures that constantly emphasize competitive, self-serving goals can harm lawyer well-being.

development and kindness are stifled in organizations that emphasize extrinsic values like competition, power, and monetary rewards.\textsuperscript{127} Work cultures that constantly emphasize competitive, self-serving goals will continually trigger competitive, selfish behaviors from lawyers that harm organizations and individual well-being. This can be psychologically draining. Research of Australian lawyers found that 70 percent reported that the practice of law is bottom-line driven.\textsuperscript{128} Lawyers who reported that the practice of law was primarily about generating profits were more likely to be depressed.\textsuperscript{129} This affects the
bottom line since poor mental health can cause disability and lost productivity.

Consequently, we recommend that legal employers evaluate what they prioritize and value, and how those values are communicated. When organizational values evoke a sense of belonging and pride, work is experienced as more meaningful. Experiencing work as meaningful is the biggest contributor to work engagement—a form of work-related well-being.


Contextual factors (i.e., the structure, habits, and dynamics of the work environment) play an enormous role in influencing behavior change. Training alone is almost never enough. To achieve change, legal employers will need to set standards, align incentives, and give feedback about progress on lawyer well-being topics.

Currently, few legal employers have such structural supports for lawyer well-being. For example, many legal employers have limited or no formal leader development programs, no standards set for leadership skills and competencies, and no standards for evaluating leaders’ overall performance or commitment to lawyer well-being. Additionally, incentive systems rarely encourage leaders to develop their own leadership skills or try to enhance the well-being of lawyers with whom they work. In law firms especially, most incentives are aligned almost entirely toward revenue growth, and any feedback is similarly narrow. To genuinely adopt lawyer well-being as a priority, these structural and cultural issues will need to be addressed.

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The Path To Lawyer Well-Being

“Well-being is a combination of feeling good as well as actually having meaning, good relationships, and accomplishment.” — Martin Seligman

Law students start law school with high life satisfaction and strong mental health measures. But within the first year of law school, they experience a significant increase in anxiety and depression. Research suggests that law students are among the most dissatisfied, demoralized, and depressed of any graduate student population.

The 2016 Survey of Law Student Well-Being found troublesome rates of alcohol use, anxiety, depression, and illegal drug use at law schools across the country.

42% of students needed help for poor mental health but only about half sought it out.

Equally worrisome is students’ level of reluctance to seek help for those issues. A large majority of students (about 80 percent) said that they were somewhat or very likely to seek help from a health professional for alcohol, drug, or mental health issues, but few actually did. For example, while 42 percent thought that they had needed help for mental health problems in the prior year, only about half of that group actually received counseling from a health professional. Only four percent said they had ever received counseling for alcohol or drug issues—even though a quarter were at risk for problem drinking.

The top factors that students reported as discouraging them from seeking help were concerns that it would threaten their bar admission, job, or academic status; social stigma; privacy concerns; financial reasons; belief that they could handle problems on their own; and not having enough time. Students’ general reluctance to seek help may be one factor explaining why law student wellness has not changed significantly since the last student survey in the 1990s. It appears that recommendations stemming from the 1993 survey either were not implemented or were not successful.

The Survey of Law Student Well-Being did not seek to identify the individual or contextual factors that might be contributing to students’ health problems. It is important to root out such causes to enable real change. For example, law school graduates cite heavy workload, competition, and grades as major law school stressors. Others in the legal community have offered additional insights about common law school practices, which are discussed below. Law school well-being initiatives should not be limited to detecting disorders and enhancing student resilience. They also should include identifying organizational practices that may be contributing to the problems and assessing what changes can be made to support student well-being. If legal educators ignore the impact of law school stressors, learning is likely to be suppressed and illness may be intensified.

The above reflects a need for both prevention strategies to address dysfunctional drinking and misuse of substances as well as promotion strategies that identify aspects of legal education that can be revised to support

135Organ, Jaffe, & Bender, supra note 3, at 143.
136Id. at 140.
137Id.
139Id. at vi-vii.
141Patthoff, supra note 134, at 424.
well-being. The recommendations below offer some ideas for both.

27. CREATE BEST PRACTICES FOR DETECTING AND ASSISTING STUDENTS EXPERIENCING PSYCHOLOGICAL DISTRESS.

Ignoring law school stressors can suppress learning and intensify illness.

Law schools should develop best practices for creating a culture in which all associated with the school take responsibility for student well-being. Faculty and administrators play an important role in forming a school's culture and should be encouraged to share responsibility for student well-being.

27.1. Provide Training to Faculty Members Relating to Student Mental Health and Substance Use Disorders.

Faculty have significant sway over students but generally students are reluctant to approach them with personal problems, especially relating to their mental health. Students' aversion to doing so may be exacerbated by a perception that faculty members must disclose information relating to students' competence to practice to the state bar. To help remove uncertainty and encourage students to ask for help, law schools should consider working with lawyer assistance programs on training faculty on how to detect students in trouble, how to have productive conversations with such students, what and when faculty need to report information relating to such students, as well as confidentiality surrounding these services. Students should be educated about faculty's reporting requirements to add clarity and reduce student anxiety when interacting with faculty.

Additionally, faculty members should be encouraged to occasionally step out of their formal teaching role to convey their respect and concern for students, to acknowledge the stressors of law school, and to decrease stigma about seeking help for any health issues that arise. Faculty should consider sharing experiences in which students confronted similar issues and went on to become healthy and productive lawyers.

To support this recommendation, deans of law schools must be engaged. The well-being of future lawyers is too important to relegate to student affairs departments. For faculty to take these issues seriously, it must be clear to them that deans value the time that faculty spend learning about and addressing the needs of students outside the classroom. With the full backing of their deans, deans of students should provide training and/or information to all faculty that includes talking points that correspond to students' likely needs—e.g., exam scores, obtaining jobs, passing the bar, accumulating financial debt, etc. Talking points should be offered only as a guideline. Faculty should be encouraged to tailor conversations to their own style, voice, and relationship with the student.

Law schools should consider inviting law student and lawyer well-being experts to speak at faculty lunches, colloquia, and workshops to enhance their knowledge of this scholarship. Such programming should include not just faculty but teaching assistants, legal writers, peer mentors, and others with leadership roles in whom law students may seek to confide. Many of these experts are members of the Association of American Law Schools section on Balance in Legal Education. Their scholarship is organized in an online bibliography divided into two topics: Humanizing the Law School Experience and Humanizing the Practice of Law.

142 See Organ, Jaffe, & Bender, supra note 3, at 153. At American University Washington College of Law, as but one example likely among many, the dean of students invites faculty no less than every other year to meet with the University Counseling director and D.C. Bar Lawyer Assistance Program manager to discuss trends, highlight notable behaviors, discuss how to respond to or refer a student, and the importance of tracking attendance.


145 Id. at Bibliography.
27.2. Adopt a Uniform Attendance Policy to Detect Early Warning Signs of Students in Crisis.

While law students may occasionally miss class due to personal conflicts, their repeated absence often results from deteriorating mental health. Creating a system to monitor for chronic absences can help identify students for proactive outreach. Consequently, law schools should adhere to a consistent attendance policy that includes a timely reporting requirement to the relevant law school official. Absent such a requirement, deans of students may be left with only a delayed, reactive approach.

If faculty members are reluctant to report student absences, a system can be created to ensure that a report cannot be traced to the faculty member. Several law schools have adopted “care” networks or random check-ins whereby someone can report a student as potentially needing assistance. In these programs, the identity of the person who provided the report is kept confidential.

Certain models on this issue include the American University Washington College of Law, which implements random “check-in” outreach, emailing students to visit the Student Affairs office for brief conversations. This method allows for a student about whom a concern has been raised to be folded quietly into the outreach. Georgetown Law School allows anyone concerned about a student to send an email containing only the student’s name, prompting relevant law school officials to check first with one another and then investigate to determine if a student meeting is warranted. The University of Miami School of Law uses an online protocol for a student to self-report absences in advance, thus enabling the dean of students to follow up as appropriate if personal problems are indicated.

27.3. Provide Mental Health and Substance Use Disorder Resources.

Law schools should identify and publicize resources so that students understand that there are resources available to help them confront stress and well-being crises. They should highlight the benefits of these resources and that students should not feel stigmatized for seeking help. One way to go about this is to have

Develop Student Resources

✔ Create and publicize well-being resources designed for students.
✔ Counter issues of stigma.
✔ Include mental health resources in every course syllabus.
✔ Organize wellness events.
✔ Develop a well-being curriculum.
✔ Establish peer mentoring.

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4 Counter issues of stigma.
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4 Organize wellness events.
4 Develop a well-being curriculum.
4 Establish peer mentoring.

Every course syllabus identify the law school’s mental health resources. The syllabus language should reflect an understanding that stressors exist. Law schools also can hold special events, forums, and conversations that coincide with national awareness days, such as mental health day and suicide prevention day.

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146 See Organ, Jaffe, & Bender, supra note 3, at 152.
147 Id.
148 Id.
149 Id.
150 Id.
151 One example of such a provision is: “Mental Health Resources: Law school is a context where mental health struggles can be exacerbated. If you ever find yourself struggling, please do not hesitate to ask for help. If you wish to seek out campus resources, here is some basic information: [Website]. [Law School Name] is committed to promoting psychological wellness for all students. Our mental health resources offer support for a range of psychological issues in a confidential and safe environment. [Phone; email; address; hotline number].”
Developing a well-being curriculum is an additional way to convey that resources are available and that the law school considers well-being a top priority. Northwestern University’s Pritzker School of Law has accomplished the latter with well-being workshops, mindfulness and resilience courses, and meditation sessions as part of a larger well-being curriculum.152

Another noteworthy way to provide resources is to establish a program where law students can reach out to other law students who have been trained to intervene and help refer students in crisis. Touro Law School established a “Students Helping Students” program in 2010 where students volunteer to undergo training to recognize mental health problems and refer students confronting a mental health crisis.153

28. ASSESS LAW SCHOOL PRACTICES AND OFFER FACULTY EDUCATION ON PROMOTING WELL-BEING IN THE CLASSROOM.

Law school faculty are essential partners in student well-being efforts. They often exercise powerful personal influence over students, and their classroom practices contribute enormously to the overall law school experience. Whether faculty members exercise their influence to promote student well-being depends, in part, on support of the law school culture and priorities. To support their involvement, faculty members should be invited into strategic planning to develop workable ideas. Framing strategies as helping students develop into healthy lawyers who possess grit and resilience may help foster faculty buy-in. Students’ mental resilience can be viewed as a competitive advantage during their job searches and as support along their journeys as practicing lawyers toward sustainable professional and personal identities.

Evaluating law school faculty on how classroom practices can affect student well-being is one place to start the process of gaining faculty buy-in. For example, law professor Larry Krieger and social scientist Kennon Sheldon identified potential culprits that undercut student well-being, including hierarchical markers of worth such as comparative grading, mandatory curves, status-seeking placement practices, lack of clear and timely feedback, and teaching practices that are isolating and intimidating.154

Evaluate classroom practices for their impact on student well-being.

Because organizational practices so significantly influence student well-being, we recommend against focusing well-being efforts solely on detecting dysfunction and strengthening students’ mental toughness. We recommend that law schools assess their classroom and organizational practices, make modifications where possible, and offer faculty programming on supporting student well-being while continuing to uphold high standards of excellence. Harmful practices should not be defended solely on the ground that law school has always been this way. Teaching practices should be evaluated to assess whether they are necessary to the educational experience and whether evidence supports their effectiveness.

29. EMPOWER STUDENTS TO HELP FELLOW STUDENTS IN NEED.

As noted above, students often are reluctant to seek mental health assistance from faculty members. Empowering students to assist each other can be a helpful alternative. One suggestion is to create a peer mentoring program that trains student mentors to provide support to fellow students in need. The ideal mentors would be students who are themselves in

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152 Northwestern Law’s well-being curriculum can be found at http://www.law.northwestern.edu/law-school-life/student-services/wellness/curriculum/.
recovery. They should be certified by the local lawyer assistance program or another relevant organization and should be covered by the lawyer assistance program’s confidentiality provisions. Peer mentors should not have a direct reporting obligation to their law school dean of students. This would help ensure confidentiality in the peer mentoring relationship and would foster trust in the law school community.155

30. INCLUDE WELL-BEING TOPICS IN COURSES ON PROFESSIONAL RESPONSIBILITY.

Mental health and substance use should play a more prominent role in courses on professional responsibility, legal ethics, or professionalism. A minimum of one class session should be dedicated to the topic of substance use and mental health issues, during which bar examiners and professional responsibility professors or their designee (such as a lawyer assistance program representative) appear side-by-side to address the issues. Until students learn from those assessing them that seeking assistance will not hurt their bar admission prospects, they will not get the help they need.

31. COMMIT RESOURCES FOR ONSITE PROFESSIONAL COUNSELORS.

Law schools should have, at a minimum, a part-time, onsite professional counselor. An onsite counselor provides easier access to students in need and sends a symbolic message to the law school community that seeking help is supported and should not be stigmatized. Although the value of such a resource to students should justify the necessary budget, law schools also could explore inexpensive or no-cost assistance from lawyer assistance programs. Other possible resources may be available from the university or private sector.

32. FACILITATE A CONFIDENTIAL RECOVERY NETWORK.

Law schools should consider facilitating a confidential network of practicing lawyers in recovery from substance use to connect with law students in recovery. Law students are entering a new community and may assume that there are few practicing lawyers in recovery. Facilitating a confidential network will provide an additional support network to help students manage the challenges of law school and maintain health. Lawyers Concerned for Lawyers is an example of a legal peer assistance group that exists in many regions that may be a confidential network source.

33. PROVIDE EDUCATION OPPORTUNITIES ON WELL-BEING-RELATED TOPICS.

33.1. Provide Well-Being Programming During the 1L Year.

We agree with the Survey of Law Student Well-Being report’s recommendation that law schools should incorporate well-being topics into student orientation.156 We recommend that during 1L orientation, law schools should include information about student well-being and options for dealing with stress. Communications should convey that seeking help is the best way to optimize their studies and to ensure they graduate and move successfully into law practice. Other vulnerable times during which well-being-related programming would be particularly appropriate include the period before fall final exams, the period when students receive their first set of law school grades (usually at the start of spring semester), and the period before spring final exams. The Task Force commends Southwestern Law School’s IL “Peak Performance Program” and its goal of helping new law students de-stress, focus, and perform well in law school.157 This voluntary program is the type of programming that can have a transformative effect on law student well-being.

33.2. Create A Well-Being Course and Lecture Series for Students.

To promote a culture of well-being, law schools should create a lecture series open to all students and a course designed to cover well-being topics in depth. Well-being

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155The University of Washington School of Law offers a “Peer Support Program” that includes peer counseling, that offers stress management resources, and support for multicultural engagement. More information on the program can be found at https://www.law.uw.edu/wellness/resources/.

156Organ, Jaffe, & Bender, supra note 3, at 148.

has been linked to improved academic performance, and, conversely, research reflects that well-being deficits connect to impaired cognitive performance. Recent research also has found that teaching well-being skills enhances student performance on standardized tests, and improves study habits, homework submission, and long-term academic success—all of which are required by the ABA’s Model Rules of Professional Conduct. The content of a well-being course could be guided by education reform recommendations. Appendix E provides content suggestions for such a course.

34. DISCOURAGE ALCOHOL-CENTERED SOCIAL EVENTS.

Although the overwhelming majority of law students are of legal drinking age, a law school sends a strong message when alcohol-related events are held or publicized with regularity. Students in recovery and those thinking about it may feel that the law school does not take the matter seriously and may be less likely to seek assistance or resources. A law school can minimize the alcohol provided; it can establish a policy whereby student organizations cannot use student funds for the purchase of alcohol. Events at which alcohol is not the primary focus should be encouraged and supported. Further, law school faculty should refrain from drinking alcohol at law school social events.

35. CONDUCT ANONYMOUS SURVEYS RELATING TO STUDENT WELL-BEING.

Recommendation 24 for legal employers suggests regular assessment of lawyer well-being. That same recommendation applies in the law school context.

Effects of Student Well-Being

- Better academic performance and cognitive functioning
- Enhanced test performance
- Improved study habits and homework quality
- Long-term academic success

grades, and long-term academic success, as well as adult education attainment, health, and wealth. A well-being course can, for example, leverage research findings from positive psychology and neuroscience to explore the intersection of improved well-being, enhanced performance, and enriched professional identity development for law students and lawyers. Further knowledge of how to maintain well-being can enhance competence, diligence, and work relationships.

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159 At a minimum, permission should be sought from the dean of students to serve alcohol at school-sponsored, school-located events, so administration is aware. Off-campus events should be only on a cash basis by the establishment. Professional networking events, and on campus events should be focused on the program or speaker, and not on drink specials or offers of free alcohol. Publicity of these events should avoid mention of discounted drink specials that could detract from the professional networking environment. In all instances, providing alcohol should be limited to beer and wine. Open bars not regulated by drink tickets or some other manner of controlling consumption should not be permitted.
Bar associations are organized in a variety of ways, but all share common goals of promoting members’ professional growth, quality of life, and quality of the profession by encouraging continuing education, professionalism (which encompasses lawyer competence, ethical conduct, eliminating bias, and enhancing diversity), pro bono and public service. Bar members who are exhausted, impaired, disengaged, or overly self-interested will not live up to their full potential as lawyers or positive contributors to society. Below are recommendations for bar associations to foster positive change in the well-being of the legal community which, in turn, should benefit lawyers, bar associations, and the general public.

36. ENCOURAGE EDUCATION ON WELL-BEING TOPICS IN COORDINATION AND IN ASSOCIATION WITH LAWYER ASSISTANCE PROGRAMS.


In line with Recommendation 8, bar associations should develop and regularly offer educational programming on well-being-related topics. Bar leadership should recommend that all sections adopt a goal of providing at least one well-being related educational opportunity at all bar-sponsored events, including conferences, section retreats, and day-long continuing legal education events.

36.2. Create Educational Materials to Support Individual Well-Being and “Best Practices” for Legal Organizations.

We recommend that bar associations develop “best practice” model policies on well-being-related topics, for example practices for responding to lawyers in distress, succession planning, diversity and inclusion, mentoring practices, work-life balance policies, etc.

36.3 Train Staff to Be Aware of Lawyer Assistance Program Resources and Refer Members.

Educating bar association staff regarding lawyer assistance programs’ services, resources, and the confidentiality of referrals is another way to foster change in the legal community. Bar association staff can further promote these resources to their membership. A bar association staff member may be the person who coordinates a needed intervention for a lawyer facing a mental health or substance use crisis.

37. SPONSOR EMPIRICAL RESEARCH ON LAWYER WELL-BEING AS PART OF ANNUAL MEMBER SURVEYS.

Many bar associations conduct annual member surveys. These surveys offer an opportunity for additional research on lawyer well-being and awareness of resources. For example, questions in these surveys can gauge awareness of support networks either in law firms or through lawyer assistance programs. They can survey lawyers on well-being topics they would like to see addressed in bar journal articles, at bar association events, or potentially through continuing legal education courses. The data gathered can inform bar associations’ outreach and educational efforts.

“When we look at what has the strongest statistical relationship to overall [life satisfaction], the first one is your career well-being, or the mission, purpose and meaning of what you’re doing when you wake up each day.” — Tom Rath
38. LAUNCH A LAWYER WELL-BEING COMMITTEE.

We recommend that bar associations consider forming Lawyer Well-Being Committees. As noted in Recommendation 5.2, the ABA and a number of state bar associations already have done so. Their work supplements lawyer assistance programs with a more expansive approach to well-being. These committees typically focus not only on addressing disorders and ensuring competence to practice law but also on optimal functioning and full engagement in the profession. Such committees can provide a valuable service to members by, for example, dedicating attention to compiling resources, high-quality speakers, developing and compiling educational materials and programs, serving as a clearinghouse for lawyer well-being information, and partnering with the lawyer assistance program, and other state and national organizations to advocate for lawyer well-being initiatives.

The South Carolina Bar’s Lawyer Wellness Committee, launched in 2014 and featuring a “Living Above the Bar” website, is a good model for well-being committees. In 2016, the ABA awarded this Committee the E. Smythe Gambrell Professionalism Award, which honors excellence and innovation in professionalism programs. 160

39. SERVE AS AN EXAMPLE OF BEST PRACTICES RELATING TO LAWYER WELL-BEING AT BAR ASSOCIATION EVENTS.

Bar associations should support members’ well-being and role model best practices in connection with their own activities and meetings. This might include, for example, organizing functions to be family-friendly, scheduling programming during times that do not interfere with personal and family time, offering well-being-related activities at events (e.g., yoga, fun runs, meditation, providing coffee or juice bars, organizing Friends of Bill/support group meetings), providing well-being-related education and training to bar association leaders, and including related programming at conferences and other events. For instance, several bar associations around the country sponsor family-friendly fun runs, such as the Maricopa County Bar Association annual 5k Race Judicata.

160The South Carolina Bar’s lawyer well-being website is available at http://discussions.scbar.org/public/wellness/index.html.
lawyers’ professional liability (LPL) carriers have a vested interest from a loss prevention perspective to encourage lawyer well-being. Happier, healthier lawyers generally equate to better risks. Better risks create stronger risk pools. Stronger risk pools enjoy lower frequency and often less severe claims. Fewer claims increases profitability. For lawyers, the stronger the performance of the risk pool, the greater the likelihood of premium reduction. Stakeholders interested in lawyer well-being would be well-served to explore partnerships with lawyers’ professional liability carriers, many of whom enjoy bar-related origins with their respective state bar and as members of the National Association of Bar-Related Insurance Carriers (or NABRICOs). Even commercial carriers active in the lawyers’ malpractice market enjoy important economic incentives to support wellness initiatives, and actively assess risks which reflect on the likelihood of future claims. In certain jurisdictions, lawyers’ professional liability carriers are amongst the most important funders of lawyer assistance programs, appreciating that an ounce of prevention is worth a pound of cure. An impaired or troubled attorney who is aided before further downward spiral harms the lawyer’s ability to engage in high-quality professional services can directly prevent claims. Thus, LPL carriers are well-served to understand lawyer assistance program needs, their impact, and how financial and marketing support of such programs can be a worthy investment. At the same time, where appropriate, lawyer assistance programs could prepare a case for support to LPL carriers on how their activities affect attorneys, much like a private foundation examines the impact effectiveness of grantees. If the case for support is effectively made, support may follow.

**40. ACTIVELY SUPPORT LAWYER ASSISTANCE PROGRAMS.**

In certain jurisdictions, lawyers’ professional liability carriers are amongst the most important funders of lawyer assistance programs, appreciating that an ounce of prevention is worth a pound of cure. An impaired or troubled attorney who is aided before further downward spiral harms the lawyer’s ability to engage in high-quality professional services can directly prevent claims. Thus, LPL carriers are well-served to understand lawyer assistance program needs, their impact, and how financial and marketing support of such programs can be a worthy investment. At the same time, where appropriate, lawyer assistance programs could prepare a case for support to LPL carriers on how their activities affect attorneys, much like a private foundation examines the impact effectiveness of grantees. If the case for support is effectively made, support may follow.

**Happier, healthier lawyers equate to better risk, fewer claims, and greater profitability.**

In certain jurisdictions, lawyers’ professional liability carriers are amongst the most important funders of lawyer assistance programs, appreciating that an ounce of prevention is worth a pound of cure. An impaired or troubled attorney who is aided before further downward spiral harms the lawyer’s ability to engage in high-quality professional services can directly prevent claims. Thus, LPL carriers are well-served to understand lawyer assistance program needs, their impact, and how financial and marketing support of such programs can be a worthy investment. At the same time, where appropriate, lawyer assistance programs could prepare a case for support to LPL carriers on how their activities affect attorneys, much like a private foundation examines the impact effectiveness of grantees. If the case for support is effectively made, support may follow.

**41. EMPHASIZE WELL-BEING IN LOSS PREVENTION PROGRAMS.**

Most LPL carriers, as a means of delivering value beyond just the promise of attorney protection in the event of an error or omission, are active in developing risk management programs via CLE, law practice resources, checklists, and sample forms designed to reduce the susceptibility of an attorney to a claim. These resources often center on topics arising from recent claims trends, be it law practice management tips, technology traps, professionalism changes, or ethical infrastructure challenges. LPL carriers should consider paying additional attention to higher level attorney wellness issues, focusing on how such programs promote the emotional and physical foundations from which lawyers can thrive in legal service delivery. Bar associations are increasingly exploring well-being programs as a member benefit, and LPL carriers could be helpful in providing financial support or thought leadership in the development of such programs.

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Examples of LPL carriers serving the market from the commercial side include CNA, AON, Liberty Mutual, Hartford, among others.
42. INCENTIVIZE DESIRED BEHAVIOR IN UNDERWRITING LAW FIRM RISK.

The process of selecting, structuring, and pricing LPL risk is part art, part science. Underwriters, in addition to seeking core LPL information such as area of practice, claim frequency, claim severity, firm size, firm longevity and firm location, are also working to appreciate and understand the firm’s complete risk profile. The more effectively a firm can illustrate its profile in a positive manner, the more desirable a firm will be to a carrier’s risk pool. Most states permit carriers flexibility in applying schedule rating credits or debits to reflect the individual risk characteristics of the law firm. LPL carriers should more actively explore the application of lawyer well-being premium credits, much like they currently do for internal risk management systems, documented attorney back-up systems, and firm continuity.

43. COLLECT DATA WHEN LAWYER IMPAIRMENT IS A CONTRIBUTING FACTOR TO CLAIMS ACTIVITY.

LPL carriers traditionally track claims based on area of practice or the nature of the error. LPL carriers do not ordinarily track when substance abuse, stress, depression, or mental health are suspected to be contributing factors to the underlying claim. This is primarily due to the fact that most LPL claims adjusters, usually attorneys by trade, lack sufficient (or usually any) clinical training to make such a determination. That being said, anecdotal evidence suggests the impact is substantial. Thus, LPL carriers should consider whether a “common sense” assessment of instances where attorney impairment is suspected to be a contributing factor to the underlying claim. Such information would be helpful to lawyer assistance programs and as an important data point for what bar counsel or disciplinary units similarly see when investigating bar grievances. LPL carriers are in a prime position to collect data, share such data when appropriate, and assess the manner in which lawyer impairment has a direct correlation to claims activity.
“It is under the greatest adversity that there exists the greatest potential for doing good, both for oneself and others.” — Dalai Lama

Because lawyer assistance programs are so well-positioned to play a pivotal role in lawyer well-being, they should be adequately funded and organized to ensure that they can fulfill their potential.

**Lawyer assistance programs should be supported to fulfill their full potential.**

This is not consistently the case. While a lawyer assistance program exists in every state, according to the 2014 Comprehensive Survey of Lawyer Assistance Programs their structures, services, and funding vary widely. Lawyer assistance programs are organized either as agencies within bar associations, as independent agencies, or as programs within the state’s court system. Many operate with annual budgets of less than $500,000. About one quarter operate without any funding and depend solely on volunteers. The recommendations below are designed to equip lawyer assistance programs to best serve their important role in lawyer well-being.

### 44. LAWYERS ASSISTANCE PROGRAMS SHOULD BE APPROPRIATELY ORGANIZED AND FUNDED.

#### 44.1 Pursue Stable, Adequate Funding.

Lawyer assistance programs should advocate for stable, adequate funding to provide outreach, screening, counseling, peer assistance, monitoring, and preventative education. Other stakeholders should ally themselves with lawyer assistance programs in pursuit of this funding.

#### 44.2 Emphasize Confidentiality.

Lawyer assistance programs should highlight the confidentiality of the assistance they provide. The greatest concern voiced by lawyer assistance programs in the most recent CoLAP survey was under-utilization of their services stemming from the shame and fear of disclosure that are bound up with mental health and substance use disorders. Additionally, lawyer assistance programs should advocate for a supreme court rule protecting the confidentiality of participants in the program, as well as immunity for those making good faith reports, volunteers, and staff.

#### 44.3 Develop High-Quality Well-Being Programming.

Lawyer assistance programs should collaborate with other organizations to develop and deliver programs on the topics of lawyer well-being, identifying and treating substance use and mental health disorders, suicide prevention, cognitive impairment, and the like. They should ensure that all training and other education efforts emphasize the availability of resources and the
confidentiality of the process. Lawyer assistance programs should evaluate whether they have an interest in and funding to expand their programming beyond the traditional focus on treatment of alcohol use and mental health disorders. Some lawyer assistance programs already have done so. The 2014 Comprehensive Survey of Lawyer Assistance Programs reflects that some well-resourced lawyer assistance programs include services that, for example, address transition and succession planning, career counseling, anger management, grief, and family counseling.\(^{167}\) Increasingly, lawyer assistance programs are expanding their services to affirmatively promote well-being (rather than seeking only to address dysfunction) as a means of preventing prevalent impairments.

This expansion is consistent with some scholars' recommendations for Employee Assistance Programs that encourage engagement in a broader set of prevention and health-promotion strategies. Doing so could expand the lawyer assistance programs' net to people who are in need but have not progressed to the level of a disorder. It also could reach people who may participate in a health-promotion program but would avoid a prevention program due to social stigma.\(^{168}\) Health-promotion approaches could be incorporated into traditional treatment protocols. For example, “Positive Recovery” strategies strive not only for sobriety but also for human flourishing.\(^{169}\) Resilience-boosting strategies have also been proposed for addiction treatment.\(^{170}\)

### 44.4 Lawyer Assistance Programs’ Foundational Elements.

All lawyer assistance programs should include the following foundational elements to provide effective leadership and services to lawyers, judges, and law students:

- A program director with an understanding of the legal profession and experience addressing mental health conditions, substance use disorders, and wellness issues for professionals;
- A well-defined program mission and operating policies and procedures;
- Regular educational activities to increase awareness and understanding of mental health and substance use disorders;
- Volunteers trained in crisis intervention and assistance;
- Services to assist impaired members of the legal profession to begin and continue recovery;
- Participation in the creation and delivery of interventions;
- Consultation, aftercare services, voluntary and diversion monitoring services, referrals to other professionals, and treatment facilities; and
- A helpline for individuals with concern about themselves or others.\(^{171}\)

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CONCLUSION

“"It always seems impossible until it’s done.” — Nelson Mandela

This Report makes a compelling case that the legal profession is at a crossroads. Our current course, one involving widespread disregard for lawyer well-being and its effects, is not sustainable. Studies cited above show that our members suffer at alarming rates from conditions that impair our ability to function at levels compatible with high ethical standards and public expectations. Depression, anxiety, chronic stress, burnout, and substance use disorders exceed those of many other professions. We have ignored this state of affairs long enough. To preserve the public’s trust and maintain our status as a self-regulating profession, we must truly become “our brothers’ and sisters’ keepers,” through a strong commitment to caring for the well-being of one another, as well as ourselves.

The members of the National Task Force for Lawyer Well-Being urge all stakeholders identified in this report to take action. To start, please review the State Action Plan and Checklist that follows in Appendix A. If you are a leader in one of these sectors, please use your authority to call upon your cohorts to come together and develop a plan of action. Regardless of your position in the legal profession, please consider ways in which you can make a difference in the essential task of bringing about a culture change in how we, as lawyers, regard our own well-being and that of one another.

As a profession, we have the capacity to face these challenges and create a better future for our lawyers that is sustainable. We can do so—not in spite of—but in pursuit of the highest professional standards, business practices, and ethical ideals.

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National Task Force on Lawyer Well-Being
State Action Plan & Checklist

*Chief Justice (or Designee) “To Do List”*

___ **Gather all stakeholders**

(Identify leaders in the jurisdiction with an interest in and commitment to well-being issues. Bring these leaders together in a Commission on Lawyer Well-Being. The attached list of potential stakeholder representatives offers guidance.)

___ **Review the Task Force Report**

Have Commission members familiarize themselves with the Task Force Report. It provides concrete recommendations for how to address lawyer well-being issues.

___ **Do an inventory of recommendations**

(Next, assess which recommendations can be implemented in the jurisdiction. This includes an assessment of the leadership and resources required to implement these recommendations.)

___ **Create priorities**

(Each jurisdiction will have its own priorities based on the inventory of recommendations. Which ones are the most urgent? Which ones will create the most change? Which ones are feasible?)

___ **Develop an action plan**

(Having inventoried the recommendations and prioritized them, now is the time to act. What does that path forward look like? Who needs to be involved? How will progress be measured?)
National Task Force on Lawyer Well-Being
State Action Plan & Checklist

Checklist for Gathering the Stakeholders

Item 1 of the Plan above recommends the gathering of stakeholders as a first step. The National Task Force suggests the Chief Justice of each state create a Commission on Lawyer Well-Being in that state and appoint representatives from each stakeholder group to the Commission. Below is a checklist of potential stakeholder representatives the Chief Justice may consider in making appointments.

**JUDICIAL**
- Supreme Court Chief Justice or designated representative
- Other judge representatives

**LAWYER ASSISTANCE PROGRAM (LAP)**
- LAP Director
- Clinical director
- Lawyer representative to the LAP

**LAW SCHOOLS**
- Dean representative
- Faculty representative
- Law student representative

**REGULATORS**
- Admissions (or Board of Law Examiners) representative
- Mandatory CLE program representative
- CLE provider representative
- Regulation/Bar/Disciplinary Counsel representative

**BAR ASSOCIATIONS**
- Bar president
- Bar president-elect
- Executive director
- Young lawyer division representative
- Specialty bar representative

**LAW FIRMS**
- Sole practitioner
- Small firm representative (2-5 lawyers)
- Medium firm representative (6-15 lawyers)
- Large firm representative (16+ lawyers)
- In-house counsel representative
- Non-traditional lawyer representative

**ALLIES**
- ASAM representative (addiction psychiatrist)
- Organizational/behavioral psychologist
- Members of the public
Recommendation 8 advises stakeholders to provide high-quality education programs and materials on causes and consequences of lawyer distress and well-being. Below is a list of example educational topics for such programming with empirical support.

8.1 Work Engagement vs. Burnout

The work engagement-burnout model can serve as a general organizing framework for stakeholders’ efforts to boost lawyer well-being and curb dysfunction. Work engagement is a kind of work-related well-being. It includes high levels of energy and mental resilience, dedication (which includes a sense of meaningfulness, significance, and challenge), and frequently feeling positively absorbed in work. Work engagement contributes to, for example, mental health, less stress and burnout, job satisfaction, helping behaviors, reduced turnover, performance, and profitability.

Burnout is essentially the opposite of engagement. It is a stress response syndrome that is highly correlated with depression and can have serious psychological and physiological effects. Workers experiencing burnout feel emotionally and physically exhausted, cynical about the value of their activities, and uncertain about their capacity to perform well.

The work engagement-burnout model proposes the idea of a balance between resources and demands: Engagement arises when a person’s resources (i.e., positive individual, job, and organizational factors, like autonomy, good leadership, supportive colleagues, feedback, interesting work, optimism, resilience) outweigh demands (i.e., draining aspects of the job, like work overload and conflicting demands). But when excessive demands or a lack of recovery from demands tip the scale, workers are in danger of burnout. Disengagement, alienation, and turnover become likely. Resources contribute to engagement; demands feed burnout. Using this framework as a guide, stakeholders should develop lawyer well-being strategies that focus on increasing individual and organizational resources and decreasing demands when possible.

The incidence of burnout vs. work engagement in the legal profession is unknown but has been well-studied in the medical profession. Research has found that 30-40 percent of licensed physicians, 49 percent of medical students, and 60 percent of new residents meet the definition of burnout, which is associated with an increased risk of depression, substance use, and suicidal thinking. Burnout also undermines professionalism and quality of patient care by eroding honesty, integrity, altruism, and self-regulation.

The medical profession’s work on these issues can serve as a guide for the legal profession. It has conducted

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174 Maslach, Schaufeli, & Leiter, supra note 121.
hundreds of studies, has identified many individual and organizational contributors to burnout, and has proposed well-being strategies and resilience programs. Bi-annually, the American Medical Association (AMA) co-sponsors an International Conference on Physician Health. The September 2016 conference was held in Boston with the theme, “Increasing Joy in Medicine.” The conference included 70 presentations, workshops, and plenary speaker sessions on a wide variety of well-being topics over a three-day period (See AMA website).

### 8.2 Stress

Stress is inevitable in lawyers’ lives and is not necessarily unhealthy. Mild to moderate levels of stress that are within our capability can present positive challenges that result in a sense of mastery and accomplishment. Much of our daily stress is governed by our beliefs about our coping abilities. When stress is perceived as a positive, manageable challenge, the stress response actually can enable peak performance. For example, in a study of a New Zealand law firm, researchers found that lawyers who frequently experience positive challenge reported the highest levels of work engagement. The researchers also found that, where lawyers felt overburdened by work, they were more likely to experience burnout.

This finding highlights the importance of positive challenge but also its paradoxical effect: Challenge contributes to work-related well-being, but it also can lead to negative consequences like burnout when it becomes overwhelming. Stressors that pose the greatest risk of harm are those that are uncontrollable, ambiguous, unpredictable, and chronic that we perceive as exceeding our ability to cope. Such stressors increase the rise of (or exacerbate) depression, anxiety, burnout, alcohol abuse, and physical conditions such as cardiovascular, inflammatory, and other illnesses that can affect lawyers’ health and capacity to practice. For example, in a 2004 study of North Carolina lawyers, more than half had elevated levels of perceived stress, and this was the highest predictor of depression of all factors in the study.

Stress also is associated with cognitive decline, including impaired attention, concentration, memory, and problem-solving. Stress also can harm one’s ability to establish strong relationships with clients and is associated with relational conflict, which can further undermine lawyers’ ability to competently represent and interact with clients. Both personal and environmental factors in the workplace contribute to stress and whether it positively fuels performance or impairs mental health and functioning.

Research reflects that organizational factors more significantly contribute to dysfunctional stress responses than individual ones, and that the most effective prevention strategies target both.

### 8.3 Resilience & Optimism

The American Psychological Association defines resilience as: “An individual’s capacity to adapt, grow, and thrive in response to challenges.” Resilience is an individual’s ability to adapt, grow, and thrive in response to challenges. Resilience is the ability to bounce back from setbacks and recover from adverse experiences. It is the ability to cope with stress and adversity, to maintain or regain a sense of control, and to recover from setbacks and to achieve one’s goals despite obstacles.

The Path to Lawyer Well-Being
as a process that enables us to bounce back from adversity in a healthy way. It also has been defined as a “process to harness resources to sustain well-being”—a definition that connects resilience to the resource-balancing framework of the work engagement–burnout model discussed above. Our capacity for resilience derives from a host of factors, including genetics and childhood experiences that influence the neurobiology of our stress response—specifically, whether the stress response is both activated and terminated efficiently.191

But resilience also derives from a collection of psychological, social, and contextual factors—many of which we can change and develop. These include, for example, optimism, confidence in our abilities and strengths (self-efficacy), effective problem-solving, a sense of meaning and purpose, flexible thinking, impulse control, empathy, close relationships and social support, and faith/spirituality.192 A model for developing many of these psychological and social competencies is provided by the U.S. Army’s Master Resilience Training program.193 As noted above, the medical profession also has designed resilience programs for physicians and residents that can serve as guides, and researchers have offered additional strategies.184

Among the most important of the personal competencies is optimistic explanatory style, which is a habit of thought that allows people to put adverse events in a rational context and not be overwhelmed by catastrophic thinking. The principal strategy for building optimistic explanatory style is by teaching cognitive reframing based on cognitive–behavioral therapy research.196 The core of the technique is to teach people to monitor and dispute their automatic negative self-talk. Neurobiology scholars recently have argued that this capacity is so important to our regulation of stress that it constitutes the cornerstone of resilience.196

This skill can benefit not only practicing lawyers but also law students.197 Stanford Law, for example, has offered a 3-hour course teaching cognitive framing that has been popular and successful.198 Lawyer assistance programs also could benefit from learning this and other resilience strategies, which have been used in addiction treatment.199

Aside from individual-level skills and strengths, developing “structural resilience” also is important, if not more important. This requires leaders to develop organizations and institutions that are resource-enhancing to help give people the wherewithal to realize their full potential.200 Individual resilience is highly dependent on the context in which people are embedded. This means that initiatives to foster lawyer well-being should take a systemic perspective.

8.4 Mindfulness Meditation

Mindfulness meditation is a practice that can enhance cognitive reframing (and thus resilience) by aiding our ability to monitor our thoughts and avoid becoming emotionally overwhelmed. A rapidly growing body of research on meditation has shown its potential for help in addressing a variety of psychological and psychosomatic disorders, especially those in which stress plays a causal role.201 One type of meditative practice is mindfulness—a technique that cultivates the skill of being present by focusing attention on your breath and detaching from your thoughts or feelings. Research has found that mindfulness can reduce rumination, stress, depression, and anxiety.202 It

192 Southwick, Bonanno, Masten, Panter-Brick, & Yehuda, supra note 185.
197Id.
200Id.
202Alim, Lawson, & Neumeister, supra note 170.
203GRAFFORD, supra note 131; Southwick, Bonanno, Masten, Panter-Brick, & Yehuda, supra note 185.
also can enhance a host of competencies related to lawyer effectiveness, including increased focus and concentration, working memory, critical cognitive skills, reduced burnout, and ethical and rational decision-making. Multiple articles have advocated for mindfulness as an important practice for lawyers and law students. Evidence also suggests that mindfulness can enhance the sense of work-life balance by reducing workers’ preoccupation with work.

8.5 Rejuvenation Periods to Recover From Stress

Lawyers must have downtime to recover from work-related stress. People who do not fully recover are at an increased risk over time for depressive symptoms, exhaustion, and burnout. By contrast, people who feel recovered report greater work engagement, job performance, willingness to help others at work, and ability to handle job demands. Recovery can occur during breaks during the workday, evenings, weekends, vacations, and even microbreaks when transitioning between projects. And the quality of employees’ recovery influences their mood, motivation, and job performance.

Researchers have identified four strategies that are most effective for recovering from work demands: (1) psychological detachment (mentally switching off from work), (2) mastery experiences (challenges and learning experiences), (3) control (spending time off as we choose), and (4) relaxation. Falling into the second category is physical activity (exercise and sports), which may be an especially effective form of recovery for people performing mentally demanding work—like lawyers. This is so because low-effort activities (e.g., watching TV) may actually increase subjective feelings of fatigue.

Quality sleep is critically important in the recovery process. Sleep deprivation has been linked to a multitude of health problems that decay the mind and body, including depression, cognitive impairment, decreased concentration, and burnout. Cognitive impairment associated with sleep-deprivation can be profound. For example, a study of over 5,000 people showed that too little sleep was associated with a decline over a five-year-period in cognitive functioning, including reasoning, vocabulary, and global cognitive status. Research on short-term effects of sleep deprivation shows that people who average four hours of sleep per night for four or five days develop the same cognitive impairment as if they had been awake for 24 hours—which is the equivalent of being legally drunk.

Given lawyers’ high risk for depression, it is worth noting evidence that sleep problems have the highest predictive value for who will develop clinical depression.
as antidepressant medication and psychotherapy. In a review of strategies for preventing workplace depression, researchers found that interventions to increase physical activity were among the most effective.

Research also shows that physical exercise improves brain functioning and cognition. Physical activity, which stimulates new cell growth in the brain, can offset the negative effects of stress, which causes brain atrophy. Greater amounts of physical activity (particularly aerobic) have been associated with improvements in memory, attention, verbal learning, and speed of cognitive processing. A growing body of evidence reflects that regular aerobic activity in middle age significantly reduces the risk of developing dementia and, in older age, can slow the progression of cognitive decline of those who already are diagnosed with Alzheimer’s disease.

8.8 Control and Autonomy

As noted in Recommendation 7, feeling a lack of control over work is a well-established contributor to poor mental health, including depression and burnout. A sense of autonomy is considered to be a basic psychological need that is foundational to well-being and optimal functioning. Other organizational practices that can enhance a sense of autonomy include, for example, structuring work to allow for more discretion and autonomy and encouraging lawyers to craft aspects of their jobs to the extent possible to best suit their strengths and interests.

The benefits of autonomy-support are not limited to manager-subordinate relationships for legal employers. Research reflects that law students with autonomy-supportive professors and school cultures have higher well-being and performance. Lawyer-client relationships also
can be enhanced by autonomy-supportive behaviors by both parties. Lawyers respect client autonomy by, for example, taking full account of their perspectives, not interrupting, affording choice, offering information respectfully, providing a rationale for recommendations, sharing power in decision-making (when appropriate), and accepting clients’ decisions.\textsuperscript{226} In the medical profession, this model of client-centered care has been found to result in better outcomes, patient satisfaction, and diminished risk of malpractice lawsuits.\textsuperscript{227}

8.9 Conflict Management

Our legal system is adversarial—it’s rooted in conflict. Even so, lawyers generally are not trained on how to constructively handle conflict and to adapt tactics based on context—from necessary work-related conflicts to inter-personal conflicts with clients, opposing counsel, colleagues, or loved ones.\textsuperscript{228} Conflict is inevitable and can be both positive and negative.\textsuperscript{229} But chronic, unmanaged conflict creates physical, psychological, and behavioral stress. Research suggests that conflict management training can reduce the negative stressful effects of conflict and possibly produce better, more productive lawyers.\textsuperscript{230}

8.10 Work-Life Conflict

The stress of chronic work-life conflict can damage well-being and performance.\textsuperscript{231} A study of a New Zealand law firm found that work-life conflict was the strongest predictor of lawyer burnout.\textsuperscript{232} Similarly, a study of Australian lawyers found that preoccupation with work was the strongest predictor of depression.\textsuperscript{233} Research in the medical profession repeatedly has found that work-life conflict contributes to burnout.\textsuperscript{234} A large scale study across a variety of occupations found that reports of work-life conflict increased the odds of poor physical health by 90 percent.\textsuperscript{235} On the other hand, work-life balance (WLB) benefits workers and organizations.\textsuperscript{236}

WLB is a complex topic, but research provides guidance on how to develop a WLB-supportive climate. Adopting a formal policy that endorses flexibility is a threshold requirement. Such policies foster the perception of organizational support for flexibility, which is even more important to workers’ experience of WLB than actual benefit use. Policies should not be restricted to work-family concerns and any training should emphasize support for the full range of work-life juggling issues. Narrow family-focused policies can create feelings of resentment by workers who have valued non-family commitment.

WLB initiatives cannot end with formal policies or people will doubt their authenticity and fear using them. For example, nearly all large firms report having a flexible schedule policy.\textsuperscript{237} But a recent survey of law firm lawyers found that use of flexibility benefits was highly stigmatizing.\textsuperscript{238} To benefit from WLB initiatives, organizations must develop a WLB-supportive climate. Research has identified multiple factors for doing so: (1) job autonomy, (2) lack of negative consequences for using WLB benefits, (3) level of perceived expectation that work should be prioritized over family, and (5) supervisor support for WLB. By far, the most important factor is the last. Supervisors communicate their support for WLB by, for example, creatively accommodating non-work-related needs, being empathetic with juggling efforts, and role modeling WLB behaviors.\textsuperscript{239}

\textsuperscript{227}Id.; see also C. White, The Impact of Motivation on Customer Satisfaction Formation: A Self-Determination Perspective, 49 EUROPEAN J. MARKETING 1923 (2015).
\textsuperscript{228} M. T. Colatrotela, A Lawyer for All Seasons: The Lawyer as Conflict Manager, 49 SAN DIEGO L. REV. 93 (2012).
\textsuperscript{230} D. L. Haraway & W. M. Haraway, Analysis of the Effect of Conflict-Management and Resolution Training on Employee Stress at a Healthcare Organization, 83 HOSPITAL TOPICS 11 (2005); see also Colatrotela, supra note 228.
\textsuperscript{231} BRAFFORD, supra note 131; D. A. MAJOR & R. BURKE, HANDBOOK OF WORK-LIFE INTEGRATION AMONG PROFESSIONALS: CHALLENGES AND OPPORTUNITIES (2013).
\textsuperscript{232} Hopkins & Gardner, supra note 183.
\textsuperscript{234} E.g., E. Amoafó, N. Hanabali, A. Patel, & P. Singh, What Are the Significant Factors Associated with Burnout in Doctors?, 65 OCCUPATIONAL MED. 117 (2015).
\textsuperscript{236} M. T. Colatrotela, A Lawyer for All Seasons: The Lawyer as Conflict Manager, 49 SAN DIEGO L. REV. 93 (2012).
\textsuperscript{237} D. L. Haraway & W. M. Haraway, Analysis of the Effect of Conflict-Management and Resolution Training on Employee Stress at a Healthcare Organization, 83 HOSPITAL TOPICS 11 (2005); see also Colatrotela, supra note 228.
\textsuperscript{238} BRAFFORD, supra note 131; D. A. MAJOR & R. BURKE, HANDBOOK OF WORK-LIFE INTEGRATION AMONG PROFESSIONALS: CHALLENGES AND OPPORTUNITIES (2013).
\textsuperscript{239} Hopkins & Gardner, supra note 183.
To support WLB, bar associations and regulators should work with legal employers to develop best practices and relevant training. Regulators and judges should consider whether any of their practices and policies can be modified to better support lawyer WLB.

8.11 Meaning and Purpose

Research has found that feeling that our lives are meaningful is important for physical and psychological wellness. It provides a buffer against stress. For example, meaning in life is associated with a reduced risk of anxiety, depression, substance use, suicidal ideation, heart attack, and stroke; slower cognitive decline in Alzheimer’s patients; and lower overall mortality for older adults.

For many lawyers, an important part of building a meaningful life is through meaningful work. Experiencing meaning in our work matters and is valuable. A large body of research shows that meaningfulness plays an important role in workplace well-being and performance. Evidence suggests that the perception of meaningfulness is the strongest predictor of work engagement.

Meaningfulness develops when people feel that their work corresponds to their values. Organizations can enhance the experience of fit and meaningfulness by, for example, fostering a sense of belonging; designing and framing work to highlight its meaningful aspects; and articulating compelling goals, values, and beliefs.

These same principles apply in law school. Studies in the college context have found that the majority of students want their educational experiences to be meaningful and to contribute to a life purpose. One study measured “psychological sense of community,” which was proposed as a foundation for students to find greater meaning in their educational experience. It was the strongest predictor of academic thriving in the study. Deterioration of law students’ sense of meaning may contribute to their elevated rate of psychological distress. Research reflects that, over the course of law school, many students disconnect from their values and become emotionally numb.

8.12. Substance Use and Mental Health Disorders

Recommended content for training on substance use and mental disorders is outlined above in Recommendation 8 in the body of this report.

8.13. Additional Topics

Many topics are possible for programming aimed at boosting work engagement and overall well-being (through resource-development) and curbing stress and burnout (by limiting demands) or otherwise promoting lawyer well-being. Additional topics to consider include: psychological...
capital (composed of optimism, self-efficacy, hope, and resilience),\textsuperscript{248} psychological hardiness (composed of commitment, control, and challenge),\textsuperscript{249} stress mindset,\textsuperscript{250} growth mindset,\textsuperscript{251} grit,\textsuperscript{252} effort-reward balance,\textsuperscript{253} transformational leadership,\textsuperscript{254} self-determination theory,\textsuperscript{255} strengths-based management,\textsuperscript{256} emotional intelligence and regulation,\textsuperscript{257} organizational fairness,\textsuperscript{258} nutrition,\textsuperscript{259} interpersonal skills,\textsuperscript{260} and political skills.\textsuperscript{261}

\textsuperscript{248}E.g., Avey, Luthans, & Jensen, supra note 181.
\textsuperscript{250}Crum, Salovey, Achor, supra note 50; McGonigal, supra note 182.
\textsuperscript{251}C. S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS (2008).
\textsuperscript{252}A. DUCKWORTH, GRIT: THE POWER OF PASSION AND Perseverance (2016).
\textsuperscript{253}Krieger & Sheldon, supra note 5.
\textsuperscript{254}D. O. Clifton & J. K. Harter, Investing in Strengths, in Cameron, Dutton, & Quinn, supra note 32.
\textsuperscript{256}Greenberg, Positive Organizational Justice: From Fair to Fairer—and Beyond, in EXPLORING POSITIVE RELATIONSHIPS AT WORK: BUILDING A THEORETICAL AND RESEARCH FOUNDATION 159-78 (J. E. Dutton & B. R. Ragins eds., 2007).
\textsuperscript{257}J. Mencl, A. J. Wefald, & K. W. van Ittersum, Transformational Leader Attributes: Interpersonal Skills, Engagement, and Well-Being, 37 LEADERSHIP & ORG. DEV. J. 635 (2016).
\textsuperscript{258}Id.; C. C. Rosen & D. C. Ganster, Workplace Politics and Well-Being: An Allometric Load Perspective, in IMPROVING EMPLOYEE HEALTH AND WELL-BEING 3-23 (A. M. Rossi, J. A. Meurs, P. L. Perrewa eds., 2014); Ferris, Daniels, & Sexton, supra note 40.
Appendix to Recommendation 9:  
Guide and Support The Transition of Older Lawyers.

Recommendation 9 advised stakeholders to create programs for detecting and addressing cognitive decline in lawyers, develop succession plans for aging lawyers, and develop reorientation programs to support lawyers facing retirement. Such initiatives and programs may include the following:

• Gathering demographic information about the lawyer population, including years in practice, the nature of the practice, the size of the firm in which the lawyer’s practice is conducted, and whether the lawyer has engaged in any formal transition or succession planning for the lawyer’s practice;

• Working with medical professionals to develop educational programs, checklists, and other tools to identify lawyers who may be experiencing incapacity issues;

• Developing and implementing educational programs to inform lawyers and their staff members about incapacity issues, steps to take when concerns about a lawyer’s incapacity are evident, and the importance of planning for unexpected practice interruptions or the cessation of practice;

• Developing succession or transition planning manuals and checklists, or planning ahead guidelines for lawyers to use to prepare for an unexpected interruption or cessation of practice;262

• Enacting rules requiring lawyers to engage in succession planning;

• Providing a place on each lawyer’s annual license renewal statement for the lawyer to identify whether the lawyer has engaged in succession and transition planning and, if so, identifying the person, persons or firm designated to serve as a successor;

• Enacting rules that allow senior lawyers to continue to practice in a reduced or limited license or emeritus capacity, including in pro bono and other public service representation;

• Enacting disability inactive status and permanent retirement rules for lawyers whose incapacity does not warrant discipline, but who, nevertheless, should not be allow to practice law;

• Developing a formal, working plan to partner with Judges and Lawyer Assistance Programs to identify, intervene, and assist lawyers demonstrating age-related or other incapacity or impairment.263

• Developing “re-orientation” programs to proactively engage lawyers in transition planning with topics to include:
  • financial planning;
  • pursuing “bridge” or second careers;
  • identity transformation;
  • developing purpose in life;
  • cognitive flexibility;
  • goal-setting;
  • interpersonal connection;
  • physical health;
  • self-efficacy;
  • perceived control, mastery, and optimism.264


263See generally W. Slease, et al., supra note 60.

264See, e.g., S. D. Asebedo & M. C. Seay, Positive Psychological Attributes and Retirement Satisfaction, 25 J. FIN. COUNSELING & PLANNING 161 (2014); Dingemans & Henkens, supra note 64; Houfort, Fernet, Vallerand, Laframboise, Guay, & Koestner, supra note 62; Muratore & Earl, supra note 64.
APPENDIX D

Appendix to Recommendation 25:
Topics for Legal Employers’ Audit of Well-Being Related Policies and Practices

Legal employers should consider topics like the following as part of their audits of current policies and practices to evaluate whether the organization adequately supports lawyer well-being.

MENTAL HEALTH & SUBSTANCE USE DISORDERS

• Is there a policy regarding substance use, mental health, and impairment? If so, does it need updating?
• Does the policy explain lawyers’ ethical obligations relating to their own or colleagues’ impairment?
• Is there a leave policy that would realistically support time off for treatment?
• Are there meaningful communications about the importance of well-being?
• Do health plans offered to employees include coverage for mental health and substance use disorder treatment?

LAW PRACTICE MANAGEMENT PRACTICES AFFECTING LAWYER WELL-BEING

• Assessment of Well-Being: Is there a regular practice established to assess work engagement, burnout, job satisfaction, turnover intentions, psychological well-being, or other indicators of well-being and to take action on the results?

• Orientation Practices: Are orientation practices established to set new lawyers up for success, engagement, and well-being?

• Work-Life Balance-Related Policies & Practices: Is there a policy that allows flexibility and an organizational climate that supports it? Is it a practice to recognize lawyers and staff who demonstrate a high standard of well-being?

• Diversity/Inclusion-Related Policies & Practices: Diversity and inclusion practices impact lawyer well-being. Are policies and practices in place with a specific mission that is adequately funded?265

• 24/7 Availability Expectations: Do practices allow lawyers time for sufficient rejuvenation? Are response-time expectations clearly articulated and reasonable? Is there an effort to protect time for lawyers to recover from work demands by regulating work-related calls and emails during evenings, weekends, and vacations?266

365For example, a 2015 report found that most larger firms have some type of diversity training (80 percent) and all participating firms reported having a women’s affinity group. But the report also found that affinity groups were “woefully underfunded” and lacking clear goals and missions. See L. S. RIKLEEN, REPORT OF THE NINTH ANNUAL NAWL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS, NAT’L ASSOC. OF WOMEN LAWYERS FOUND. (2015), available at http://www.nawl.org/2015nawlsurvey.

366For example, McDonald’s and Volkswagen—along with one in four U.S. companies—have agreed to stop sending emails to employees after hours. See Fritz, Ellis, Demsky, Lin, & Guros, supra note 265. In the highly-demanding world of law, firms should consider the possibility of establishing new norms for lawyers that limit after-hours emails and calls to actual emergencies—especially to associates who have less work-related autonomy and, thus, are at a higher risk for fatigue and burnout.
• **Billing Policies & Practices:** Do billing practices encourage excessive work and unethical behavior?267

• **Compensation Practices:** Are compensation practices fair? And are they perceived as fair? Do they follow standards of distributive (fair outcome), procedural (fair process), interpersonal (treating people with dignity and respect), and informational (transparency) fairness? Perceived unfairness in important practices can devastate well-being and motivation. For example, a large-scale study found that people were 50 percent more likely to have a diagnosed health condition if they perceived unfairness at work.268 Further, high levels of interpersonal and informational fairness should not be ignored—they can reduce the negative effect of less fair procedures and outcomes.269

• **Performance Appraisal Practices:** Are performance appraisal practices fair and perceived as fair? Are observations about performance regularly noted to use in the review? Do multiple raters contribute? Are they trained on the process and to reduce common biases?270 Is feedback given in a two-way communication? Is specific, timely feedback given regularly, not just annually? Is feedback empathetic and focused on behavior not the person’s worth? Is good performance and progress toward goals regularly recognized? Is goal-setting incorporated?271 Is performance feedback balanced and injected with positive regard and respect to improve likelihood of acceptance?272 Are lawyers asked to describe when they feel at their best and the circumstances that contribute to that experience?273 Carefully managing this process is essential given evidence that bungled performance feedback harms well-being and performance.

• **Vacation Policies & Practices:** Is there a clear vacation policy? Does the organizational culture encourage usage and support detachment from work? In their study of 6,000 practicing lawyers, law professor Larry Krieger and psychology professor Kennon Sheldon found that the number of vacation days taken was the strongest predictor of well-being among all activities measured in the study. It was a stronger predictor of well-being even than income level.274 This suggests that legal employers should encourage taking of vacation—or at least not discourage or unreasonably interfere with it.

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270F. Luthans & A. Stajkovic, Provide Recognition for Performance Improvement, in Locke, supra note 7, 239-53.
274Krieger & Sheldon, supra note 5.
Appendix E

Appendix to Recommendation 33.2: Creating a Well-Being Course and Lecture Series for Law Students

Recommendation 33.2 suggests that law schools design a lecture series dedicated to well-being topics. In 2007, the Carnegie Foundation for the Advancement of Teaching issued a report titled *Educating Lawyers: Preparation for the Profession of Law* (referred to as the “Carnegie Report”). The Carnegie Report describes three “apprenticeships” in legal education: (1) the intellectual apprenticeship, where students acquire a knowledge base; (2) the practice apprenticeship, where students learn practical legal skills; and (3) the professional identity apprenticeship, where students cultivate the attitudes and values of the legal profession. The 2016 *Foundations for Practice Report* by the Institute for the Advancement of the American Legal System recommends that law schools teach character attributes including courtesy, humility, respect, tact, diplomacy, sensitivity, tolerance, and compassion; and self-care and self-regulation skills such as positivity and managing stress; exhibiting flexibility, adaptability, and resilience during challenging circumstances; and decision-making under pressure. A well-being course can address the *Foundations for Practice Report* recommendations while helping law students develop a professional identity that encompasses a commitment to physical and mental well-being.

Appendix B includes topics that could be incorporated into a well-being course for law students. The list below includes additional topics and provides suggested student readings in the footnotes:

- Basic Wellbeing and Stress Reduction;\(^{277}\)
- Cognitive Well-being and Good Nutrition;\(^{278}\)
- Restorative Practices, such as Mindfulness, Meditation, Yoga, and Gratitude;\(^{279}\)
- The Impact of Substances such as Caffeine, Alcohol, Nicotine, Marijuana, Adderall, Ritalin, Cocaine, and Opiates on Cognitive Function;\(^{280}\)
- “Active bystander” training that educates students about how to detect when their fellow students may be in trouble with respect to mental health disorders, suicidal thinking, or substance use and what action to take;
- Cultivating a Growth Mindset;\(^{281}\)
- Improving Pathway (strategies for identifying goals and plans for reaching them) and Agency (sustaining motivation to achieve objectives) Thinking;\(^{282}\)

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\(^{280}\) Austin, supra note 277, 827.


• Enhancing Emotion Regulation;

• Fostering Optimism and Resilience;

• Preparing for a Satisfying Legal Career;

• Developing Strong Lawyering Values, such as Courage, Willpower, and Integrity;

• Work Life Balance in the Law; and

• Lawyers as Leaders.

Many resources for teaching well-being skills are available to legal educators in the online AALS Balance in Legal Education Bibliography. Expert guest speakers can be found in the AALS Balance in Legal Education section, and at local lawyer assistance programs and lawyer well-being committees.


289See AALS, supra note 145.

290See AALS, supra note 144.
The Report of the National Task Force on Lawyer Well-Being was primarily authored and edited by the Task Force members, whose biographies are below. The Task Force members were assisted in the creation of the Report by a team that included liaisons, contributing authors, peer reviewers, and individuals who contributed in a variety of other important capacities. Their biographies also are provided below.

**BREE BUCHANAN (CO-CHAIR, EDITOR, AUTHOR)**

Bree Buchanan, J.D., is Director of the Texas Lawyers Assistance Program of the State Bar of Texas. She serves as co-chair of the National Task Force on Lawyer Wellbeing and is an advisory member of the ABA Commission on Lawyers Assistance Programs (CoLAP). Ms. Buchanan is also the appointed chair of CoLAP for 2017-2018.

Ms. Buchanan, upon graduation from the University of Texas School of Law, practiced in the public and private sector with a focus on representing both adult and child victims of family violence. She worked on public policy initiatives and systems change at both the state and federal level as the Public Policy Director for the Texas Council on Family Violence and the National Domestic Violence Hotline. After this position, Ms. Buchanan was appointed Clinical Professor and Co-Director of the Children’s Rights Clinic at the University of Texas School of Law.

Ms. Buchanan is a frequent speaker at CLE programs for national organizations, as well as for state and local bar entities. She is a graduate student at the Seminary of the Southwest where she is pursuing a Masters in Spiritual Direction, and is the proud parent of a senior at New York University. Ms. Buchanan tends to her own well-being by engaging in a regular meditation practice, rowing, staying connected to 12-Step recovery, and being willing to ask for help when she needs it.

**JAMES C. COYLE (CO-CHAIR, EDITOR, AUTHOR)**

Jim Coyle is Attorney Regulation Counsel for the Colorado Supreme Court. Mr. Coyle oversees attorney admissions, attorney registration, mandatory continuing legal and judicial education, attorney discipline and diversion, regulation of the unauthorized practice of law, and inventory counsel matters. Mr. Coyle has been a trial attorney with the Office of Disciplinary Counsel or successor Office of Attorney Regulation Counsel since 1990. Prior to that, he was in private practice. He served on the National Organization of Bar Counsel (NOBC) board of directors from 2014 – 2016. Mr. Coyle was on the Advisory Committee to the ABA Commission on Lawyer Assistance Programs and is now a member of the Commission for the 2017 – 2018 term.

Mr. Coyle is active in promoting proactive regulatory programs that focus on helping lawyers throughout the stages of their careers successfully navigate the practice of law and thus better serve their clients. This includes working on and co-hosting the first ABA Center for Professional Responsibility (CPR)/NOBC/Canadian Regulators Workshops on proactive, risk-based regulatory programs, in Denver in May 2015, in Philadelphia in June 2016, and St. Louis in June 2017; participating in the NOBC Program Committee and International Committee, including as Chair of the Entity Regulation Subcommittee, now known as the Proactive Management-Based Programs Committee; and prior service on the NOBC Aging Lawyers and Permanent Retirement subcommittees. Mr. Coyle tends to his own well-being through gardening, exercise, and dreaming about retirement.
ANNE BRAFFORD (EDITOR-IN-CHIEF, AUTHOR)
Anne Brafford served as the Editor-in-Chief for the Task Force Report on Lawyer Well-Being. Anne is the Chairperson of the American Bar Association Law Practice Division’s Attorney Well-Being Committee. She is a founding member of Aspire, an educational and consulting firm for the legal profession (www.aspire.legal). In 2014, Anne left her job as an equity partner at Morgan, Lewis & Bockius LLP after 18 years of practice to focus on thriving in the legal profession. Anne has earned a Master’s degree in Applied Positive Psychology (MAPP) from the University of Pennsylvania and now is a PhD student in positive organizational psychology at Claremont Graduate University (CGU). Anne’s research focuses on lawyer thriving and includes topics like positive leadership, resilience, work engagement, meaningful work, motivation, and retention of women lawyers. She also is an Assistant Instructor in the MAPP program for Dr. Martin Seligman and, for two years, was a Teaching Assistant at CGU for Dr. Mihaly Csikszentmihalyi, the co-founders of positive psychology. Look for her upcoming book to be published this fall by the American Bar Association’s Law Practice Division called Positive Professionals: Creating High-Performing, Profitable Firms Through The Science of Engagement. It provides practical, science-backed advice on boosting work engagement for lawyers. Anne can be reached at abrafford@aspire.legal, www.aspire.legal.

JOSH CAMSON (EDITOR, AUTHOR)
Josh Camson is a criminal defense attorney with Camson Law, LLC in Collegeville, Pennsylvania. He is a member of the Pennsylvania Bar Association Ethics Committee and the ABA Standing Committee on Professionalism. He is a former long-time staff writer for Lawyerist.com, a law practice management blog and the former editor of BitterLawyer.com, a comedy site for lawyers and law students.

CHARLES GRUBER (AUTHOR)
Charles A. Gruber is a solo practitioner in Sandy, Utah. He is a graduate of the University of Texas Law School. He is licensed to practice law in Utah and California. His areas of practice are personal injury, medical malpractice, and legal malpractice.

A former attorney with the Utah State Bar Office of Professional Conduct, Mr. Gruber represents and advises attorneys on ethics issues. A former member of the NOBC, he currently is a member of APRL. He serves on the Board of Utah Lawyers Helping Lawyers. Utah Lawyers Helping Lawyers is committed to rendering confidential assistance to any member of the Utah State Bar whose professional performance is or may be impaired because of mental illness, emotional distress, substance abuse or any other disabling condition or circumstance.

Mr. Gruber tends to his own well being by trying to remember and follow the suggestions of the 11th step of the 12 Steps.

As we go through the day we pause, when agitated or doubtful, and ask for the right thought or action. We constantly remind ourselves we are no longer running the show, humbly saying to ourselves many times each day “They will be done”. We are then in much less danger of excitement, fear, anger, worry, self-pity, or foolish decisions. We become much more efficient. We do not tire so easily, for we are not burning up energy foolishly as we did when we were trying to arrange life to suit ourselves. Big Book pg. 87-88.

TERRY HARRELL (AUTHOR)
Terry Harrell completed her undergraduate degree in psychology at DePauw University in 1986 and completed her law degree at Maurer School of Law in 1989. Following law school she practiced law with Ice Miller and then clerked for Judge William I. Garrard on the Indiana Court of Appeals.

In 1993 she completed her Master of Social Work Degree (MSW) at Indiana University. Terry is a Licensed Clinical Social Worker (LCSW), a Licensed Clinical Addictions Counselor (LCAC) in Indiana, and has a Master Addictions Counselor certification from NAADAC. In 1992 Terry began working for Midtown Community Mental Health Center. While there she worked in a variety of areas including inpatient treatment, crisis services, adult outpatient treatment, wrap around services for severely emotionally disturbed adolescents, and management. In 2000 Terry began working as the Clinical Director for JLAP and in 2002 became the Executive Director.

From 2007 through 2010 Terry served on the Advisory Committee to the American Bar Association’s Commission on Lawyer Assistance Programs (CoLAP).
She served from 2010 through 2013 as a commissioner on CoLAP. She is past Chair of the Senior Lawyer Assistance Subcommittee for CoLAP and an active member of the CoLAP National Conference Planning Committee. In August 2014 Terry became the first ever LAP Director to be appointed Chair of the ABA Commission on Lawyer Assistance Programs. Locally, Terry is a member of the Indiana State Bar Association and is active with the Professional Legal Education Admission and Development Section, the Planning Committee for the Solo Small Firm Conference, and the Wellness Committee.

DAVID B. JAFFE (AUTHOR)
David Jaffe is Associate Dean for Student Affairs at American University Washington College of Law. In his work on wellness issues among law students over the last decade, he has served on the D.C. Bar Lawyer Assistance Program including as its chair, and continues to serve on the ABA Commission on Lawyer Assistance Programs (CoLAP) as co-chair of the Law School Assistance Committee. Jaffe co-authored “Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns”, reporting the results of a survey he co-piloted in 2014. He also produced the “Getting Health, Staying Healthy” video that is used as a resource in many Professional Responsibility classes around the country, and is responsible for modernizing the “Substance Abuse & Mental Health Toolkit for Law Students and Those Who Care About Them”.

Jaffe has presented frequently on law student wellness, including to the National Conference of Bar Examiners, the ABA Academic Deans, the ABA Young Lawyers Division, CoLAP, AALS, the D.C. Bar, and NALSAP. He received the 2015 CoLAP Meritorious Service Award in recognition of his commitment to improving the lives of law students, and the 2009 Peter N. Kutulakis Award from the AALS Student Services Section for outstanding contributions to the professional development of law students. Jaffe states that he seeks self-care each day by being in the moment with each of his two daughters.

TRACY L. KEPLER (AUTHOR)
Tracy L. Kepler is the Director of the American Bar Association’s Center for Professional Responsibility (CPR), providing national leadership in developing and interpreting standards and scholarly resources in legal and judicial ethics, professional regulation, professionalism and client protection. In that role, she manages and coordinates the efforts of 18 staff members and 13 entities including five ABA Standing Committees (Ethics, Professionalism, Professional Regulation, Client Protection, and Specialization), the ABA/BNA Lawyers’ Manual on Professional Conduct, the Center’s Coordinating Council and other Center working committees.

From 2014-2016, Ms. Kepler served as an Associate Solicitor in the Office of General Counsel for the U.S. Patent & Trademark Office (USPTO), where she concentrated her practice in the investigation, prosecution and appeal of patent/trademark practitioner disciplinary matters before the Agency, U.S. District Courts and Federal Circuit, provided policy advice on ethics and discipline related matters to senior management, and drafted and revised Agency regulations. From 2000-2014, she served as Senior Litigation Counsel for the Illinois Attorney Registration and Disciplinary Commission (ARDC), where she investigated and prosecuted cases of attorney misconduct.

From 2009-2016, Ms. Kepler served in various capacities, including as President, on the Board of the National Organization of Bar Counsel (NOBC), a non-profit organization of legal professionals whose members enforce ethics rules that regulate the professional conduct of lawyers who practice law in the United States and abroad. Ms. Kepler also taught legal ethics as an Adjunct Professor at American University’s Washington College of Law. Committed to the promotion and encouragement of professional responsibility throughout her career, Ms. Kepler has served as the Chair of the CPR’s CLE Committee and its National Conference Planning Committee, and is a frequent presenter of ethics related topics to various national, state and local organizations. She has also served as the NOBC Liaison to the ABA CPR Standing Committees, and to the ABA Commission on Lawyer Assistance Programs (CoLAP), where she was a Commission member, a member of its Advisory Committee, the Chair of its Education and Senior Lawyer Committees, and also a member of its National Conference Planning Committee. Ms. Kepler also participates as a
faculty member for the National Institute of Trial Advocacy (NITA) trial and deposition skills programs, and served as the Administrator of the NOBC-NITA Advanced Advocates Training Program from 2011-2015. She is a graduate of Northwestern University in Evanston, Illinois, and received her law degree from New England School of Law in Boston, Massachusetts.

**PATRICK KRILL (AUTHOR)**
A leading authority on the addiction and mental health problems of lawyers, Patrick is the founder of Krill Strategies, a behavioral health consulting firm exclusively for the legal profession. Patrick is an attorney, licensed and board certified alcohol and drug counselor, author, and advocate. His groundbreaking work in the field of attorney behavioral health includes initiating and serving as lead author of the first and only national study on the prevalence of attorney substance use and mental health problems, a joint undertaking of the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation that was published in The Journal of Addiction Medicine.

Patrick is the former director of the Hazelden Betty Ford Foundation’s Legal Professionals Program, where he counseled many hundreds of legal professionals from around the country who sought to better understand and overcome the unique challenges faced on a lawyer’s road to recovery. He has authored more than fifty articles related to addiction and mental health, and has been quoted in dozens of national and regional news outlets, including the New York Times, Wall Street Journal, Washington Post, Chicago Tribune, and countless legal industry trade publications and blogs. As a frequent speaker about addiction and its intersection with the law, Patrick has taught multiple graduate-level courses in addiction counseling, and has spoken, lectured, or conducted seminars for over one hundred organizations throughout the United States, including professional and bar associations, law firms, law schools, and corporations.

Patrick maintains his own wellbeing by prioritizing his personal relationships and exercising daily. Whether it be hiking, yoga, or weight lifting, his secret to managing stress is a dedication to physical activity. Patrick can be reached at patrick@prkrill.com, www.prkrill.com.

**CHIEF JUSTICE DONALD W. LEMONS, SUPREME COURT OF VIRGINIA (AUTHOR)**
Chief Justice Donald W. Lemons received his B.A. from the University of Virginia in 1970. Before entering law school, he served as a Probation Officer in Juvenile and Domestic Relations Court. In 1976, he earned his J.D. from the University of Virginia School of Law. From 1976 until 1978, he served as Assistant Dean and Assistant Professor of Law at the University of Virginia School of Law. Thereafter, he entered the private practice of the law in Richmond, Virginia. Chief Justice Lemons has served at every level of the court system in Virginia. He served as a substitute judge in General District Court and in Juvenile and Domestic Relations Court. In 1995, he was elected by the General Assembly to be a Judge in the Circuit Court of the City of Richmond. While serving in that capacity, Chief Justice Lemons started one of the first Drug Court dockets in Virginia. He was then elected by the General Assembly to serve as a Judge on the Court of Appeals of Virginia. In 2000, he was elected by the General Assembly as a Justice of the Supreme Court of Virginia. In 2014, the Justices of the Supreme Court of Virginia elected Justice Lemons to serve as the next Chief Justice, following the retirement of Chief Justice Cynthia D. Kinser on December 31, 2014. Chief Justice Lemons is also the Distinguished Professor of Judicial Studies at the Washington and Lee University School of Law, serves on the Board of Directors for the Conference of Chief Justices, is the former President of the American Inns of Court (2010 – 2014), and an Honorary Bencher of Middle Temple in London. He is married to Carol Lemons, and they have three children and six grandchildren. He and Carol reside in beautiful Nelson County, Virginia, in the foothills of the Blue Ridge Mountains.

**SARAH MYERS (AUTHOR)**
Sarah Myers is the Clinical Director of the Colorado Lawyer Assistance Program. She received her B.A. from the University of Richmond in Virginia, her M.A. from Naropa University in Boulder, Colorado, and her J.D. at the University of Denver in Colorado. She is a Colorado licensed attorney, licensed marriage and family therapist, and licensed addiction counselor. Ms. Myers is also a licensed post-graduate level secondary teacher, certified trauma and abuse psychotherapist, and certified LGTBQ
therapist. She has over 18 years of experience as a professor and teacher, psychotherapist, clinical supervisor, and program director.

Ms. Myers specializes in stress management, psychoneuroimmunology, and psychoeducation, topics that she presents to thousands of judges, lawyers, and law students each year. In addition, she has authored hundreds of articles on wellness concepts such as compassion fatigue, professional burnout, mental health support, and life-enhancing techniques for the legal community. Ms. Myers strives to “practice what she preaches” for self-care, which includes: simple meditation throughout the day to relax her nervous system, using humor and laughter to cope with difficult situations or personalities, cultivating positive relationships with friends and family, and engaging in hobbies such as gardening, caring for numerous pets (including a koi pond), yoga, learning new things, and reading science fiction and fantasy novels.

CHRIS L. NEWBOLD (AUTHOR)
Chris Newbold is Executive Vice President of ALPS Corporation and ALPS Property & Casualty Company. In his role as Executive Vice President, Mr. Newbold oversees bar association relations, strategic and operational planning, risk management activities amongst policyholders, human resources, and non-risk related subsidiary units. Internally at ALPS, Mr. Newbold has developed leading conceptual models for strategic planning which have driven proven results, ensured board and staff accountability, focused organizational energies, embraced change, integrated budgeting and human resource functions into the process and enabled a common vision for principal stakeholders. Externally, Mr. Newbold is a nationally-recognized strategic planning facilitator in the bar association and bar foundations worlds, conducts risk management seminars on best practices in law practice management and is well-versed in captive insurance associations and other insurance-related operations.

Mr. Newbold received his law degree from the University of Montana School of Law in 2001, and holds a bachelor’s degree from the University of Wisconsin-Madison. Following his graduation from law school, he served one year as a law clerk for the Honorable Terry N. Trieweiler of the Montana Supreme Court. He began his career at ALPS as President and Principal Consultant of ALPS Foundation Services, a non-profit fundraising and philanthropic management consulting firm. Mr. Newbold is currently a member of the State Bar of Montana, the American Bar Association, and is involved in a variety of charitable activities. Mr. Newbold resides in Missoula, Montana, with his wife, Jennifer, and their three children, Cameron (11), Mallory (9) and Lauren (5).

JAYNE REARDON (EDITOR, AUTHOR)
Jayne Reardon is the Executive Director of the Illinois Supreme Court Commission on Professionalism. A tireless advocate for professionalism, Jayne oversees programs and initiatives to increase the civility and professionalism of attorneys and judges, create inclusiveness in the profession, and promote increased service to the public. Jayne developed the Commission’s successful statewide Lawyer-to-Lawyer Mentoring Program which focuses on activities designed to explore ethics, professionalism, civility, diversity, and wellness in practice settings. She spearheaded development of an interactive digital and social media platform that connects constituencies through blogs, social networking sites and discussion groups. A frequent writer and speaker on topics involving the changing practice of law, Jayne asserts that embracing inclusiveness and innovation will ensure that the profession remains relevant and impactful in the future. Jayne’s prior experience includes many successful years of practice as a trial lawyer, committee work on diversity and recruiting issues, and handling attorney discipline cases as counsel to the Illinois Attorney Registration and Disciplinary Commission Review Board.

Jayne graduated from the University of Notre Dame and the University of Michigan Law School. She is active in numerous bar and civic organizations. She serves as Chair of the American Bar Association’s Standing Committee on Professionalism and is a Steering Committee member of the National Lawyer Mentoring Consortium. Jayne also is active in the ABA Consortium of Professionalism Initiatives, Phi Alpha Delta Legal Fraternity, Illinois State Bar Association, Women’s Bar Association of Illinois, and the Chicago Bar Association. Jayne lives in Park Ridge, Illinois, with her husband and those of her four children who are not otherwise living in college towns and beyond.
HON. DAVID SHAHEED (AUTHOR)

David Shaheed became the judge in Civil Court 1, Marion County, Indiana, in August, 2007. Prior to this assignment, Judge Shaheed presided over Criminal Court 14, the Drug Treatment Diversion Court and Reentry Court. The Indiana Correctional Association chose Shaheed as 2007 Judge of the Year for his work with ex-offenders and defendants trying to recover from substance abuse.

Judge Shaheed has worked as a judicial officer in the Marion County Superior Court since 1994 starting as a master commissioner and being appointed judge by Governor Frank O’Bannon in September 1999. As a lawyer, Judge Shaheed was Chief Administrative Law Judge for the Indiana Unemployment Appeals Division; Legal Counsel to the Indiana Department of Workforce Development and served as Counsel to the Democratic Caucus of the Indiana House of Representatives in 1995. He was also co-counsel for the Estate of Michael Taylor, and won a 3.5 million dollar verdict for the mother of a sixteen year-old youth who was found shot in the head in the back seat of a police car.

Judge Shaheed is an associate professor for the School of Public and Environmental Affairs (SPEA) at Indiana University in Indianapolis. He is also a member of the ABA Commission on Lawyers Assistance Programs (CoLAP).

Lynda received her BA from Franklin & Marshall College in Lancaster, PA and her JD from Catholic University in Washington, DC. Lynda was the 2015-2016 President of the Association of Professional Responsibility Lawyers. She serves on several State Bar of Arizona Committees, and as a liaison to the ABA Standing Committee on Ethics and Professional Responsibility. She is an Arizona Delegate in the ABA House of Delegates. Lynda has received several awards for her contributions to the legal profession, including the 2007 State Bar of Arizona Member of the Year award, the Scottsdale Bar Association’s 2010 Award of Excellence, and the 2015 AWLA, Maricopa Chapter, Ruth V. McGregor award. She is a prior chair of the ABA Standing Committee on Client Protection and a past member of the ABA's Professionalism Committee and Center for Professional Responsibility Conference Planning Committee. Lynda was the 2008-2009 President of the Scottsdale Bar Association. She has been an adjunct professor at all three Arizona law schools, teaching professional responsibility.

WILLIAM D. SLEASE (AUTHOR)

William D. Slease is Chief Disciplinary Counsel for the New Mexico Supreme Court Disciplinary Board. In addition to his duties as Chief Disciplinary Counsel, he serves as an adjunct professor at the University of New Mexico School of Law where he has taught employment law, ethics and trial practice skills. He currently chairs the Supreme Court of the State of New Mexico’s Lawyer’s Succession and Transition Committee which has developed a comprehensive set of materials for lawyers to use in identifying and responding to incapacities that affect lawyers’ abilities to practice law. He is a member and the 2016-17 President of the National Organization of Bar Counsel and previously served as the Chair of the NOBC-APRL-CoLAP Second Joint Committee on Aging Lawyers charged with studying and making recommendations for addressing the so-called “senior tsunami” of age-impaired lawyers. Bill takes care of his own wellness by spending time with his family, and by fishing for trout in the beautiful lakes and streams of New Mexico.
LINDA ALBERT

Linda Albert is a Licensed Clinical Social Worker and a Certified Alcohol and Drug Counselor. She received her Master's Degree from UW-Madison in Science and Social Work. Linda has worked over the past 34 years as an administrator, consultant, trainer, program developer and psychotherapist in a variety of settings including providing services to impaired professionals.

Linda served on the ABA Commission on Lawyer Assistance Programs heading up the Research section. She co-facilitated a research project on compassion fatigue and legal professionals resulting in two peer reviewed publications and multiple articles. She is co-author of the ABA, Hazelden Betty Ford collaborative national research study on the current rates of substance use, depression and anxiety within the legal community. Linda has done multiple presentations for conferences at the local, state and national level. She loves her work and is driven by the opportunity to make a positive contribution to the lives of the individuals and the fields of practice she serves.

Currently Linda is employed by The Psychology Center in Madison, Wisconsin, where she works as a professional trainer, consultant, and psychotherapist.

DONALD CAMPBELL

Donald D. Campbell is a shareholder at Collins Einhorn Farrell in suburban Detroit, Michigan. Don’s practice focuses on attorney grievance defense, judicial grievance matters, and legal malpractice defense. He has extensive experience in counseling and advising lawyers and judges regarding professional ethics. He is an adjunct professor of law at the University of Detroit School of Law, where he has taught professional responsibility and a seminar in business law and ethics. Prior to joining the Collins Einhorn firm, Don served as associate counsel with the Michigan Attorney Grievance Commission, the Michigan Supreme Court’s arm for the investigation and prosecution of lawyer misconduct. He also previously served as an assistant prosecuting attorney in Oakland County, Michigan. He currently serves as the President of the Association of Professional Responsibility Lawyers (see APRL.net). Don tends to his well-being by cheering for the Detroit Lions (and he has been about as successful).

ERICA MOESER

Erica Moeser has been the president of the National Conference of Bar Examiners since 1994. She is a former chairperson of the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association, and has served as a law school site evaluator, as a member of the Section’s Accreditation and Standards Review Committees, and as the co-chairperson of the Section’s Bar Admissions Committee. She served as the director of the Board of Bar Examiners of the Supreme Court of Wisconsin from 1978 until joining the Conference.

Ms. Moeser holds the following degrees: B.A., Tulane University, 1967; M.S., the University of Wisconsin, 1970; and J.D., the University of Wisconsin, 1974. She was admitted to practice law in Wisconsin in January 1975. Ms. Moeser holds honorary degrees from three law schools. Ms. Moeser has taught Professional Responsibility as an adjunct at the University of Wisconsin Law School. She was elected to membership in the American Law Institute in 1992.

In 2013 Ms. Moeser received the Kutak Award, honoring “an individual who has made significant contributions to the collaboration of the academy, the bench, and the bar,” from the ABA Section of Legal Education and Admissions to the Bar.

ACKNOWLEDGEMENTS

PAUL BURGOYNE, TERRY HARRELL, AND LYNDA SHELY

The Task Force gratefully acknowledges the contributions of Paul Burgoyne, immediate past president of the National Organization of Bar Counsel and Deputy Chief Disciplinary Counsel, The Disciplinary Board of the Supreme Court of Pennsylvania, as well as Terry Harrell, President of the ABA Commission on Lawyer Assistance Programs (ABA CoLAP), and Lynda Shely, past president of the Association of Professional Responsibility Lawyers (APRL), for their formal endorsement of the Task Force’s formation in the spring of 2016 on behalf of their respective organizations.

JONATHAN WHITE (AUTHOR, EDITOR)

Jonathan White is the Task Force Staff Attorney and also served as a contributing author and editor to the Report. Mr. White is a staff attorney at the Colorado Supreme Court
Office of Attorney Regulation Counsel. He is the day-to-day project manager for the Colorado Supreme Court Advisory Committee’s Proactive Management-Based Program (PMBP) Subcommittee. The subcommittee is developing a program to help Colorado lawyers better serve their clients through proactive practice self-assessments. The self-assessments also promote compliance with the Colorado Rules of Professional Conduct. Mr. White rejoined the Office of Attorney Regulation Counsel in November 2016 after previously working for the office as a law clerk in 2009 and 2010.

Mr. White practiced civil defense litigation for several years before rejoining the Office of Attorney Regulation Counsel. Mr. White also served as a judicial law clerk to the Honorable Christopher Cross and the Honorable Vincent White of the Douglas County District Court in Castle Rock, Colorado. He is a 2010 graduate of the University of Colorado Law School. While in law school, he was an articles editor for the Colorado Journal of International Environmental Law & Policy. The Journal published his note, “Drilling in Ecologically and Environmentally Troubled Waters: Law and Policy Concerns Surrounding Development of Oil Resources in the Florida Straits,” in 2010. In 2009, fellow law students selected him to receive the annual Family Law Clinic Award in recognition of his work in the law school’s clinical program.

Mr. White received his B.A. from Middlebury College in 2003. He recently volunteered as a reading tutor to elementary school students in the Denver Public Schools during the 2015-2016 academic year.

ED BRAFFORD, GRAPHIC DESIGNER

Edward Brafford donated his skills and talents to design the layout for the Task Force Report. Mr. Brafford designs for The Firefly Creative LLC (www.thefireflycreative.com) and can be reached at Ed@tfcreative.com.

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DEBRA AUSTIN, PH.D.
Dr. Austin is a law professor and lawyer wellbeing advocate. She writes and speaks about how neuroscience and positive psychology research can help law students, lawyers, and judges improve their wellbeing and performance. Her seminal work, Killing Them Softly, shines a bright light on lawyer depression, substance abuse, and suicide, and its application of neuroscience to the chronic stresses of law school and law practice depicts how law students and lawyers suffer cognitive damage that impairs them from doing precisely what their studies and practices require. Drink Like a Lawyer uses neuroscience research to demonstrate how self-medication with substances like alcohol, marijuana, and study drugs impairs law student and lawyer thinking. Food for Thought examines neuroscience research that explores the relationship between diet and increased risk of cognitive damage, such as dementia and Alzheimer’s disease, and describes optimal nutrition habits that build and maintain a healthy lawyer brain. Positive Legal Education proposes a new field of inquiry and a new method of training lawyer leaders that will enhance lawyer effectiveness and wellbeing. Dr. Austin’s presentations connect lawyer wellbeing to performance and ethical obligations, and they are accredited for general and ethics CLE in multiple states.

Dr. Austin teaches at the University of Denver Sturm College of Law. She received her Bachelor of Music Education from University of Colorado; her J.D. from University of San Francisco; and her Ph.D. in Education from University of Denver. She received the William T. Driscoll Master Educator Award in 2001. To maintain her wellbeing, Dr. Austin meditates, practices yoga, and cycles on the beautiful trails around Colorado.

HON. ROBERT L. CHILDERS
Judge Childers was the presiding judge of Division 9 of the Circuit Court of Tennessee for the 30th Judicial District from 1984 to 2017. He is a past president of the Tennessee Judicial Conference and the Tennessee Trial Judges Association. He has also served as a Special Judge of the Tennessee Supreme Court Workers’ Compensation Panel and the Tennessee Court of Appeals. He served on the ABA Commission on Lawyer Assistance Programs (CoLAP) from 1999 to 2011, including serving as Chair of the Commission from 2007-2011. He is a founding member, past president and Master of the Bench of the Leo Bearman Sr. Inn of Court. The Memphis Bar Association recognized Judge Childers in 1986, 1999, and 2006 as Outstanding Judge of the Year, and he was recognized by the MBA Family Law Section in 2006. He was recognized as Outstanding...
Judge of the Year by the Shelby County (TN) Deputy Sheriffs Association in 1990. He received the Judge Wheatcraft Award from the Tennessee Coalition Against Domestic and Sexual Violence for outstanding service in combating domestic violence in 2001. He has received the Distinguished Alumnus Award from the University of Memphis (2002), the Justice Frank F. Drowota III Outstanding Judicial Service Award from the Tennessee Bar Association (2012), and the Excellence in Legal Community Leadership Award from the Hazelden Foundation (2012). In 2017 he received the William M. Leech Jr. Public Service Award from the Fellows of the Tennessee Bar Association Young Lawyers Division.

Judge Childers is currently serving as president of the University of Memphis Alumni Association. He has been a faculty member at the National Judicial College at the University of Nevada-Reno, the Tennessee Judicial Conference Judicial Academy, and a lecturer at the Cecil C. Humphreys School of Law at the University of Memphis. He has also been a frequent lecturer and speaker at CLE seminars and before numerous schools, civic, church and business groups in Tennessee and throughout the nation.

COURTNEY WYLIE

Courtney recently joined the professional development team at Drinker Biddle & Reath LLP. In this position, she designs and implements programs for the firm’s attorneys on leadership, professionalism, and lawyer well-being topics. Prior to joining DBR, Courtney Wylie worked at the University of Chicago Law School as the Associate Director of Student Affairs & Programs. In this position, she was primarily responsible for the Keystone Leadership and Professional Program and the Kapnick Leadership Development Initiative. Before that Courtney worked in both the private and public sector as an attorney.

Courtney is the current appointed ABA Young Lawyer’s Division Liaison to the Commission on Lawyer Assistance Programs (COLAP) and an appointed Advisory Committee Member of (COLAP). Though an initial skeptic regarding meditation and exercise, she now makes an effort to make it part of her daily practice to remain healthy, positive, focused, and centered. She similarly regularly lectures on the importance of self-care for attorneys and law students.

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THE PATH TO LAWYER WELL-BEING:
Practical Recommendations For Positive Change
ADOPTED

AMERICAN BAR ASSOCIATION

ABA WORKING GROUP TO ADVANCE WELL-BEING IN THE LEGAL PROFESSION
COMMISSION ON LAWYER ASSISTANCE PROGRAMS
STANDING COMMITTEE ON PROFESSIONALISM
NATIONAL ORGANIZATION OF BAR COUNSEL

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association supports the goal of reducing mental
2 health and substance use disorders and improving the well-being of lawyers, judges
3 and law students; and
4
5 FURTHER RESOLVED, That the American Bar Association urges all federal, state,
6 local, territorial, and tribal courts, bar associations, lawyer regulatory entities, institutions
7 of legal education, lawyer assistance programs, professional liability carriers, law firms,
8 and other entities employing lawyers to consider the recommendations set out in the
9 report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive*
10 Change, by the National Task Force on Lawyer Well-Being.
REPORT

The American Bar Association has been instrumental in developing recent research examining aspects of well-being among law students and lawyers. This research has quantified an alarming rate of alcohol and other substance use and mental health concerns, coupled with deficient help-seeking behaviors. These studies have been a catalyst for a coalition of entities within and outside of the ABA to form the National Task Force on Lawyer Well-Being. After analyzing the data and seeking input from numerous sources, the Task Force issued a report in August 2017, which presents a series of recommendations directed at a variety of stakeholders within the justice system. The recommendations are designed to be transformative when implemented. They are designed to shift the culture of the legal profession to one that is focused on well-being. They are designed to strengthen the legal profession in a way that assures the public has a justice system that is competent, fair and just. This resolution calls upon those stakeholders to consider the Task Force recommendations.

The Research

In 2014, the ABA Board of Governors selected a coalition of ABA entities to receive an award from its Enterprise Fund to research law student well-being. The coalition included the Commission on Lawyer Assistance Programs, the Solo, Small Firm and General Practice Division, the Young Lawyers Division, the Law Students Division and the Commission on Disability Rights. The Dave Nee Foundation also joined the project and provided research and additional financial support. Associate Dean David B. Jaffe, American University Washington College of Law, Professor Jerry M. Organ, University of St. Thomas Law School, and Dr. Katherine M. Bender, Dave Nee Foundation, led the research design, implementation and analysis, with input from representatives of the Enterprise Fund coalition.

The Survey of Law Student Well-Being was designed to measure alcohol use, drug use, and mental health issues among law students. Fifteen law schools were selected to participate, representing a diverse range of settings and structures, e.g. urban/rural, small/large, geographic dispersion. Over 3,300 law students took part in the survey, which examined alcohol use, substance use, mental health issues and help-seeking behaviors.

The results showed that more than one out of four law students reported binge drinking within the prior two weeks of the survey. One out of seven students reported they had used prescription drugs without a prescription in the prior year. The incidence of marijuana and cocaine use had increased substantially since similar research was done in 1991, with the use of cocaine doubling.

When examining mental health issues, the survey showed that more than one out of six students screened for depression and nearly one out of four screened for anxiety.
Perhaps the most concerning aspects of this research involves the limitations reported for help-seeking behaviors. Of the 42 percent of respondents who indicated they needed help for mental health issues, only about half of them actually received counseling. Students showed a reluctance to turn to a dean of students or a state lawyer assistance program and indicated they were concerned about threats to bar admissions, academic standing and job prospects.

In 2015, the ABA Commission on Lawyer Assistance Programs joined with the Hazelden Betty Ford Center to survey lawyers for alcohol use, substance use, and mental health issues, as well as help-seeking behaviors. Bar associations from 16 states assisted with the research, resulting in survey responses from 12,825 licensed and employed lawyers.

The findings indicated that more than one-fifth of the respondents scored at a level consistent with problematic drinking. This was nearly twice that of a similar study of a highly-educated workforce. Over a fourth of the respondents reported some level of depression, with nearly half indicating that they had experience depression at some point in their careers. Similarly, about a fifth of respondents reported suffering from anxiety, with more than six out of ten having done so at some period of their careers. More than one out of ten respondents reported suicidal thoughts at some point while practicing law. Even more significant, 0.7 percent of respondents indicated at least one prior suicide attempt. While this is a very small percentage, if it were extrapolated over the 1.3 million lawyers in the U.S., that would lead us to conclude that 9,100 lawyers have attempted suicide.

Similar to the results found for law students, lawyers are reluctant to seek help. They are concerned that available measures are not sufficiently private and confidential and worried that others will learn of their circumstances.

*The National Task Force on Lawyer Well-Being*

Prior to the undertaking of the research, the Commission on Lawyer Assistance Programs, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers had collaborated on projects involving conditional admission of new lawyers in recovery and age-related cognitive impairment, among other issues. Upon the release of the survey results, these entities recognized the need to collaborate on the development of programs and policies that would reverse the course of lawyer impairment.

In the summer of 2016, representatives from these groups were joined by those from six other entities both within and outside of the ABA to create the National Task Force on Lawyer Well-Being. The ABA Standing Committee on Professionalism, the ABA Center for Professional Responsibility, the ABA Young Lawyers Division, the ABA Law Practice Division Attorney Wellbeing Committee, the National Conference of Chief Justices, and the National Conference of Bar Examiners joined the three founding entities to form the Task Force.
Between August 2016 and August 2017, the Task Force analyzed aspects of the research, explored additional resources and conducted widespread outreach in its effort to promulgate its report and recommendations for changes designed to create a sound and sustainable profession.

In its analysis of the research, the Task Force stated:

The two studies... reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers' basic competence. This research suggests that the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust.

Preliminary to and in support of its recommendations, the Task Force stated:

The legal profession is already struggling. Our profession confronts a dwindling market share as the public turns to more accessible, affordable alternative legal service providers. We are at a crossroads. To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.

The Task Force Recommendations

In its report entitled The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, published in August 2017, the Task Force opens by offering three primary reasons to take action: organizational effectiveness, ethical integrity, and humanitarian concerns; and defines lawyer well-being as a "continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections."

The Task Force indicates the report's recommendations focus on five central themes:

(1) identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession,
(2) eliminating the stigma associated with help-seeking behaviors,
(3) emphasizing that well-being is an indispensable part of a lawyer's duty of competence,
(4) educating lawyers, judges, and law students on lawyer well-being issues, and
(5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

The Report is divided into two sections. The first section sets out a series of recommendations suitable for input and implementation by all stakeholders. The recommendations are fully set out with analysis and commentary in the report at https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWell BeingReportRevFINAL.pdf.

In brief, these recommendations are as follows:

- Acknowledge the Problems and Take Responsibility.
- Use This Report as a Launch Pad for a Profession-Wide Action Plan.
- Leaders Should Demonstrate a Personal Commitment to Well-Being.
- Facilitate, Destigmatize, and Encourage Help-Seeking Behaviors.
- Build Relationships with Lawyer Well-Being Experts.
  - Partner with Lawyer Assistance Programs.
  - Consult Lawyer Well-Being Committees and Other Types of Well-Being Experts.
- Foster Collegiality and Respectful Engagement Throughout the Profession.
  - Promote Diversity & Inclusivity.
  - Create Meaningful Mentoring and Sponsorship Programs.
- Enhance Lawyers' Sense of Control.
- Provide High-Quality Educational Programs and Materials About Lawyer Well-Being.
- Guide and Support the Transition of Older Lawyers.
- De-emphasize Alcohol at Social Events.
- Use Monitoring to Support Recovery from Substance Use Disorders.
- Begin a Dialogue About Suicide Prevention.
- Support A Lawyer Well-Being Index to Measure the Profession’s Progress.

The second section identifies specific stakeholders and sets out specific recommendations for their implementation. Recommendations are set out for:

- The Judiciary;
- Regulators;
- Legal employers, including law firms;
- Law schools;
- Bar associations;
- Professional liability carriers; and
- Lawyer assistance programs.

Those recommendations addressing the judiciary include:

- Communicate that Well-Being Is a Priority.
• Develop Policies for Impaired Judges.
• Reduce Stigma of Mental Health and Substance Use Disorders.
• Conduct Judicial Well-Being Surveys.
• Provide Well-Being Programming for Judges and Staff.
• Monitor for Impaired Lawyers and Partner with Lawyer Assistance Programs.

Those recommendations addressing lawyer regulators include:

• Take Actions to Meaningfully Communicate That Lawyer Well-Being is a Priority.
• Adopt Regulatory Objectives That Prioritize Lawyer Well-Being.
• Modify the Rules of Professional Responsibility to Endorse Well-Being as Part of a Lawyer’s Duty of Competence.
• Expand Continuing Education Requirements to Include Well-Being Topics.
• Require Law Schools to Create Well-Being Education for Students as an Accreditation Requirement.
• Adjust the Admissions Process to Support Law Student Well-Being.
• Re-Evaluate Bar Application Inquiries About Mental Health History.
• Adopt Essential Eligibility Admission Requirements.
• Adopt a Rule for Conditional Admission to Practice Law with Specific Requirements and Conditions.
• Publish Data Reflecting Low Rate of Denied Admissions Due to Mental Health Disorders and Substance Use.
• Adjust Lawyer Regulations to Support Well-Being.
• Implement Proactive Management-Based Programs (PMBP) That Include Lawyer Well-Being Components.
• Adopt a Centralized Grievance Intake System to Promptly Identify Well-Being Concerns.
• Modify Confidentiality Rules to Allow One-Way Sharing of Lawyer Well-Being Related Information from Regulators to Lawyer Assistance Programs.
• Adopt Diversion Programs and Other Alternatives to Discipline That Are Proven.
• Add Well-Being Programs and Other Alternatives to Discipline That Are Proven.

Those recommendations to be implemented by law firms and other legal employers include:

• Establish Organizational Infrastructure to Promote Well-Being.
• Form a Lawyer Well-Being Committee.
• Assess Lawyers’ Well-Being.
• Establish Policies and Practices to Support Lawyer Well-Being.
• Monitor for Signs of Work Addiction and Poor Self-Care.
• Actively Combat Social Isolation and Encourage Interconnectivity.
• Provide Training and Education on Well-Being, Including During New Lawyer Orientation.
• Emphasize a Service-Centered Mission.
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- Create Standards, Align Incentives, and Give Feedback.

Recommendations directed toward law schools include:

- Create Best Practices for Detecting and Assisting Students Experiencing Psychological Distress.
- Provide Training to Faculty Members Relating to Student Mental Health and Substance Use Disorders.
- Adopt a Uniform Attendance Policy to Detect Early Warning Signs of Students in Crisis.
- Provide Mental Health and Substance Use Disorder Resources.
- Assess Law School Practices and Offer Faculty Education on Promoting Well-Being in the Classroom.
- Empower Students to Help Fellow Students in Need.
- Include Well-Being Topics in Courses on Professional Responsibility.
- Commit Resources for Onsite Professional Counselors.
- Facilitate a Confidential Recovery Network.
- Provide Education Opportunities on Well-Being Related Topics.
- Provide Well-Being Programming During the 1L Year.
- Create a Well-Being Course and Lecture Series for Students.
- Discourage Alcohol-Centered Social Events.
- Conduct Anonymous Surveys Relating to Student Well-Being.

Those recommendations directed toward bar associations include the following:

- Encourage Education on Well-Being Topics in Association with Lawyer Assistance Programs.
- Sponsor High-Quality CLE Programming on Well-Being-Related Topics.
- Create Educational Materials to Support Individual Well-Being and “Best Practices” for Legal Organizations.
- Train Staff to Be Aware of Lawyer Assistance Program Resources and Refer Members.
- Sponsor Empirical Research on Lawyer Well-Being as Part of Annual Member Surveys.
- Launch a Lawyer Well-Being Committee.
- Serve as an Example of Best Practices Relating to Lawyer Well-Being at Bar Association Events.

The Task Force recommends that lawyer professional liability carriers undertake the following:

- Actively Support Lawyer Assistance Programs.
- Emphasize Well-Being in Loss Prevention Programs.
- Incentivize Desired Behavior in Underwriting Law Firm Risk.
- Collect Data When Lawyer Impairment is a Contributing Factor to Claims Activity.
Finally, the Task Force makes the following recommendations for lawyer assistance programs:

- Lawyers Assistance Programs Should Be Appropriately Organized and Funded.
- Pursue Stable, Adequate Funding.
- Emphasize Confidentiality.
- Develop High-Quality Well-Being Programming.
- Lawyer Assistance Programs’ Foundational Elements.

Implementation

Within a week of the release of the Task Force report in 2017, the Conference of Chief Justices passed Resolution 6 at its Annual Meeting, providing its support for the goals of reducing impairments and addictive behavior and improving lawyer well-being. The resolution further recommended that each jurisdiction consider the recommendations set out by the Task Force. See https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_conference_of_chief_justices_resolution_6.authcheckdam.pdf.

Over the course of the past several months, lawyer assistance programs and regulators have advanced the report and its recommendations in several states, circulating the report to bar leaders, justices of their highest courts and others who are positioned to implement and advance the recommendations. This resolution calls on stakeholders to consider the recommendations more comprehensively.

Conclusion

As the conclusion of the Task Force report states:

This Report makes a compelling case that the legal profession is at a crossroads. Our current course, one involving widespread disregard for lawyer well-being and its effects, is not sustainable. Studies cited above show that our members suffer at alarming rates from conditions that impair our ability to function at levels compatible with high ethical standards and public expectations. Depression, anxiety, chronic stress, burnout, and substance use disorders exceed those of many other professions. We have ignored this state of affairs long enough. To preserve the public’s trust and maintain our status as a self-regulating profession, we must truly become "our brothers’ and sisters’ keepers,” through a strong commitment to caring for the well-being of one another, as well as ourselves.

The CoLAP research demonstrates the need. The National Task Force on Lawyer Well-Being has identified the solutions. It is time for the full range of stakeholders to step up and to consider the recommendations. We respectfully ask that the American Bar Association provide its leadership to further advance the path to well-being and assure a system that deserves full and complete public confidence.
Respectfully submitted,

Terry Harrell

Chair, The ABA Working Group to Advance Well-Being in the Legal Profession

February 2018
GENERAL INFORMATION FORM

Submitting Entity: ABA Working Group to Advance the Well-Being of the Legal Profession

Submitted By: Terry Harrell

1. Summary of Resolution(s). The Resolution urges stakeholders to consider the recommendations set out in the report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, by the National Task Force on Lawyer Well-Being.


3. Has this or a similar resolution been submitted to the House or Board previously? No

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   At the 2017 Midyear Meeting, the ABA passed Resolution 106, amending the Model Rule on Minimum Continuing Education. A provision of this model calls on states to require lawyers to take one hour of CLE programming every three years on substance use disorders or mental health matters. This is consistent with one of the recommendations in the report addressed in this Resolution.

   At the 1990 Annual Meeting, the House of Delegates passed the Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines.

   At the 1991 Midyear Meeting, the House of Delegates passed Guiding Principles for a Lawyer Assistance Program.

   At the 2004 Annual Meeting, the House of Delegates passed the Model Lawyer Assistance Program.

   The current resolution reinforces, but does not duplicate, the current policies.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. (If applicable)

   N/A.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The Working Group to Advance Well-Being in the Legal Profession was established by President Bass to, in part, advance the recommendations of the National Task Force on Lawyer Well-Being. Therefore, efforts to implement this policy will come from ABA leadership and be advanced in collaboration with the participating entities that comprise the Task Force. A symposium is being planned for the spring of 2018 and advancement of this policy and the Task Force recommendations will be featured at that time.

8. **Cost to the Association.** (Both direct and indirect costs)

   None.

9. **Disclosure of Interest.** (If applicable)

   N/A.

10. **Referrals.** Prior to filing, the proposed resolution has been circulated to the Commission on Lawyer Assistance Programs, the Standing Committee on Professionalism, and the National Organization of Bar Counsel.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The Resolution urges stakeholders to consider the recommendations set out in the report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, by the National Task Force on Lawyer Well-Being.

2. **Summary of the Issue that the Resolution Addresses**

   The resolution addresses the crisis of lawyer well-being that has been documented by research conducted by the ABA Commission on Lawyer Assistance Programs. The research demonstrates that alcohol use, substance use and mental health disorders among law students and lawyers far exceed other professions and populations. These circumstances undermine the ability of the legal profession to assure the public that the system of American justice is competent, fair and just.

3. **Please Explain How the Proposed Policy Position Will Address the Issue**

   The National Task Force on Lawyer Well-Being has spent a year analyzing research and conducting outreach to craft a series of recommendations directed toward a full range of stakeholders, which, if implemented, will advance a cultural shift toward a legal profession that is better able to meet the needs of society without the burdens of alcohol and other substance use disorders or unmanaged mental health concerns.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

   None.
Law School Professionalism Initiative
Report

Drafted by:
National Organization of Bar Counsel

December 2009
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Initiative Committee
2009

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III. STUDENT ACCOUNTABILITY AND LAW SCHOOL ENVIRONMENT

PERSONAL WELL-BEING AND MORALITY

Law schools should provide mechanisms for students to become aware of the pressures of law school and the adjustments that are necessary to cope successfully with the practice of law. Knowing the realities of practice and having opportunities to experience them will greatly assist students in deciding what type of practice is best for each.

The incidence of depression, other mental health problems, substance abuse and chemical dependency is significantly higher in the bar than in the general population. The legal education experience and the subsequent challenges of practicing law do not ameliorate these problems and often exacerbate them. Beyond formally diagnosable conditions, the law school environment often presents other challenges to personal well-being, including stress, social isolation and loss of commitment to personal values. Law schools should be aware of the potentially debilitating effects of legal education on mental health, well-being and commitment to personal values; and they should create programs that address and counteract those effects. Law schools should allocate resources to detect students who manifest problems with personal well-being and to intervene, ideally before those problems become debilitating or otherwise counter-productive to the law school learning environment. Law schools should strive to foster a culture that empowers students to be guided by their own moral compasses in addressing the professionalism and ethical challenges they face in law school and will face in the practice of law. Emphasis on engagement, teamwork and collaboration is necessary to fight the tendency of law students to be self-protective or self-interested to the point of unhealthy isolation or anti-social conduct directed toward other students. Law schools should teach resiliency and coping skills that will assist students to develop personal resources to deal in healthy ways with the challenges that
accompany the practice of law. It is of particular importance that law schools respect the moral values that students bring with them and aid them in the healthy integration of their moral selves with their future roles as agents for clients who may have radically different values.

**SUGGESTED MEASUREMENTS:**

- Does the school require that course syllabi demonstrate use of collaborative assignments and shared responsibility and accountability?
- Does the school provide resources devoted to counseling and interpersonal interaction outside the classroom?
- Does the school provide orientation training using self-assessment tools such as the Myers-Briggs, Birkman and other tools to help students understand their personal strengths and weaknesses in navigating the stressful world of legal education?
- Does the school have in place programs to familiarize students with the pressure inherent in the law school experience?
- Does the school have in place programs to familiarize students with the stresses inherent in the practice of law?
- Does the school have in place programs to assist students in making curriculum decisions consistent with the students’ anticipated practice setting?
- Does the school have in place programs to permit students to experience different practice settings to assist students in determining the practice settings which best suit them?
- Does the school’s curriculum accommodate and encourage self-reflection and experiences designed to assist students in determining the practice settings which will be most rewarding and satisfying to them?
What feedback mechanisms are provided for meaningful learning exercises in self-assessment?
National Workshop on Attorney Well-Being
Draft Table Topics

(1) What constitutes a law firm culture of well-being/your definition of well-being
   • Culture of Well-Being (two tables with same topic)

(2) How does a law firm support/incentivize a culture of well-being
   • Support/incentivize culture of well-being

(3) Challenges/barriers to creating a culture of well-being and implementing well-being policies/practices in the law firm setting (what structural changes need to occur, flexibility in provisions for practice setting, etc.)
   • Challenges/barriers

(4) What tools/existing policy provisions are you currently using that have improved well-being in your firm
   • Current effective tools

(5) What provisions would be useful to include in a well-being policy that are not already part of an existing impairment policy
   • Useful provisions to include

(6) How should firms manage well-being protocols – through HR, risk management partners in each office, a Well-Being Director for the firm
   • How to best manage well-being protocols

(7) How can your firm’s carrier and other entities assist with making well-being a valued component of the firm’s risk management programs
   • Collaboration with firm’s carrier & other entities

(8) What sort of unhealthy behaviors have you seem most commonly among lawyers, and are these problems getting worse, better, or staying the same
   • Unhealthy behaviors in the firm setting

(9) How will we measure success - impact on staff, the firm, the clients, etc.
   • Measure Success
The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys

Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW

Objectives: Rates of substance use and other mental health concerns among attorneys are relatively unknown, despite the potential for harm that attorney impairment poses to the struggling individuals themselves, and to our communities, government, economy, and society. This study measured the prevalence of these concerns among licensed attorneys, their utilization of treatment services, and what barriers existed between them and the services they may need.

Methods: A sample of 12,825 licensed, employed attorneys completed surveys, assessing alcohol use, drug use, and symptoms of depression, anxiety, and stress.

Results: Substantial rates of behavioral health problems were found, with 20.6% screening positive for hazardous, harmful, and potentially alcohol-dependent drinking. Men had a higher proportion of positive screens, and also younger participants and those working in the field for a shorter duration \( (P < 0.001) \). Age group predicted Alcohol Use Disorders Identification Test scores; respondents 30 years of age or younger were more likely to have a higher score than their older peers \( (P < 0.001) \). Levels of depression, anxiety, and stress among attorneys were significant, with 28%, 19%, and 23% experiencing symptoms of depression, anxiety, and stress, respectively.

Conclusions: Attorneys experience problematic drinking that is hazardous, harmful, or otherwise consistent with alcohol use disorders at a higher rate than other professional populations. Mental health distress is also significant. These data underscore the need for greater resources for lawyer assistance programs, and also the expansion of available attorney-specific prevention and treatment interventions.

Key Words: attorneys, mental health, prevalence, substance use

(J Addict Med 2016;10: 46–52)
outdated and poorly defined scope of the problem (Association of American Law Schools, 1994).

Recognizing this need, we set out to measure the prevalence of substance use and mental health concerns among licensed attorneys, their awareness and utilization of treatment services, and what, if any, barriers exist between them and the services they may need. We report those findings here.

METHODS

Procedures

Before recruiting participants to the study, approval was granted by an institutional review board. To obtain a representative sample of attorneys within the United States, recruitment was coordinated through 19 states. Among them, 15 state bar associations and the 2 largest counties of 1 additional state e-mailed the survey to their members. Those bar associations were instructed to send 3 recruitment e-mails over a 1-month period to all members who were currently licensed attorneys. Three additional states posted the recruitment announcement to their bar association web sites. The recruitment announcements provided a brief synopsis of the study and past research in this area, described the goals of the study, and provided a URL directing people to the consent form and electronic survey. Participants completed measures assessing alcohol use, drug use, and mental health symptoms. Participants were not asked for identifying information, thus allowing them to complete the survey anonymously. Because of concerns regarding potential identification of individual bar members, IP addresses and geo-location data were not tracked.

Participants

A total of 14,895 individuals completed the survey. Participants were included in the analyses if they were currently employed, and employed in the legal profession, resulting in a final sample of 12,825. Due to the nature of recruitment (eg, e-mail blasts, web postings), and that recruitment mailing lists were controlled by the participating bar associations, it is not possible to calculate a participation rate resulting in a final sample of 12,825. Due to the nature of recruitment (eg, e-mail blasts, web postings), and that recruitment mailing lists were controlled by the participating bar associations, it is not possible to calculate a participation rate. Demographic characteristics are presented in Table 1. Fairly equal numbers of men (53.4%) and women (46.5%) participated in the study. Age was measured in 6 categories from 30 years or younger, and increasing in 10-year increments to 71 years or older; the most commonly reported age group was 31 to 40 years old. The majority of the participants were identified as Caucasian/White (91.3%).

As shown in Table 2, the most commonly reported legal professional career length was 10 years or less (34.8%), followed by 11 to 20 years (22.7%) and 21 to 30 years (20.5%). The most common work environment reported was in private firms (40.9%), among whom the most common positions were Senior Partner (25.0%), Junior Associate (20.5%), and Senior Associate (20.3%). Over two-thirds (67.2%) of the sample reported working 41 hours or more per week.

Materials

Alcohol Use Disorders Identification Test

The Alcohol Use Disorders Identification Test (AUDIT) (Babor et al., 2001) is a 10-item self-report instrument developed by the World Health Organization (WHO) to screen for hazardous use, harmful use, and the potential for alcohol dependence. The AUDIT generates scores ranging from 0 to 40. Scores of 8 or higher indicate hazardous or harmful alcohol intake, and also possible dependence (Babor et al., 2001). Scores are categorized into zones to reflect increasing severity with zone II reflective of hazardous use, zone III indicative of harmful use, and zone IV warranting full diagnostic evaluation for alcohol use disorder. For the purposes of this study, we use the phrase “problematic use” to capture all 3 of the zones related to a positive AUDIT screen.

The AUDIT is a widely used instrument, with well established validity and reliability across a multitude of populations (Meneses-Gaya et al., 2009). To compare current rates of problem drinking with those found in other populations, AUDIT-C scores were also calculated. The AUDIT-C is a subscale comprised of the first 3 questions of the AUDIT.
focused on the quantity and frequency of use, yielding a range of scores from 0 to 12. The results were analyzed using a cut-off score of 5 for men and 4 for women, which have been interpreted as a positive screen for alcohol abuse or possible alcohol dependence (Bradley et al., 1998; Bush et al., 1998). Two other subscales focus on dependence symptoms (eg, impaired control, morning drinking) and harmful use (eg, blackouts, alcohol-related injuries).

**Depression Anxiety Stress Scales-21 item version**

The Depression Anxiety Stress Scales-21 (DASS-21) is a self-report instrument consisting of three 7-item subscales assessing symptoms of depression, anxiety, and stress. Individual items are scored on a 4-point scale (0–3), allowing for subscale scores ranging from 0 to 21 (Lovibond and Lovibond, 1995). Past studies have shown adequate construct validity and high internal consistency reliability (Antony et al., 1998; Clara et al., 2001; Crawford and Henry, 2003; Henry and Crawford, 2005).

**Drug Abuse Screening Test-10 item version**

The short-form Drug Abuse Screening Test-10 (DAST) is a 10-item, self-report instrument designed to screen and quantify consequences of drug use in both a clinical and research setting. The DAST scores range from 0 to 10 and are categorized into low, intermediate, substantial, and severe-concern categories. The DAST-10 correlates highly with both 20-item and full 28-item versions, and has demonstrated reliability and validity (Yudko et al., 2007).

**RESULTS**

Descriptive statistics were used to outline personal and professional characteristics of the sample. Relationships between variables were measured through $\chi^2$ tests for independence, and comparisons between groups were tested using Mann-Whitney $U$ tests and Kruskal-Wallis tests.

**Alcohol Use**

Of the 12,825 participants included in the analysis, 11,278 completed all 10 questions on the AUDIT, with 20.6% of those participants scoring at a level consistent with problematic drinking. The relationships between demographic and professional characteristics and problematic drinking are summarized in Table 3. Men had a significantly higher proportion of positive screens for problematic use compared with women ($\chi^2 [1, N = 11,229] = 154.57, P < 0.001$); younger participants had a significantly higher proportion compared with the older age groups ($\chi^2 [6, N = 11,213] = 232.15, P < 0.001$); and those working in the field for a shorter duration had a significantly higher proportion compared with those who had worked in the field for longer ($\chi^2 [4, N = 11,252] = 230.01, P < 0.001$). Relative to work environment and position, attorneys working in private firms or for the bar association had higher proportions than those in other environments ($\chi^2 [8, N = 11,244] = 43.75, P < 0.001$), and higher proportions were also found for those at the junior or senior associate level compared with other positions ($\chi^2 [6, N = 4671] = 61.70, P < 0.001$).

Of the 12,825 participants, 11,489 completed the first 3 AUDIT questions, allowing an AUDIT-C score to be calculated. Among these participants, 36.4% had an AUDIT-C score consistent with hazardous drinking or possible alcohol abuse or dependence. A significantly higher proportion of women (39.5%) had AUDIT-C scores consistent with problematic use compared with men (33.7%) ($\chi^2 [1, N = 11,440] = 41.93, P < 0.001$).

A total of 2901 participants (22.6%) reported that they have felt their use of alcohol or other substances was problematic at some point in their lives; of those that felt their use has been a problem, 27.6% reported problematic use manifested before law school, 14.2% during law school, 43.7% within 15 years of completing law school, and 14.6% more than 15 years after completing law school.

An ordinal regression was used to determine the predictive validity of age, position, and number of years in the legal field on problematic drinking behaviors, as measured by the AUDIT. Initial analyses included all 3 factors in a model to predict whether or not respondents would have a clinically significant total AUDIT score of 8 or higher. Age group predicted clinically significant AUDIT scores; respondents 30 years of age or younger were significantly more likely to have a higher score than their older peers ($P = 0.52$, Wald $df = 1 = 4.12$, $P < 0.001$). Number of years in the field
approached significance, with higher AUDIT scores predicted for those just starting out in the legal profession (0–10 yrs of experience) ($\beta = 0.46$, Wald $[df = 1] = 3.808$, $P = 0.051$). Model-based calculated probabilities for respondents aged 30 or younger indicated that they had a mean probability of 0.35 (standard deviation [SD] = 0.01), or a 35% chance for scoring an 8 or higher on the AUDIT; in comparison, those respondents who were 61 or older had a mean probability of 0.17 (SD = 0.01), or a 17% chance of scoring an 8 or higher.

Each of the 3 subscales of the AUDIT was also investigated. For the AUDIT-C, which measures frequency and quantity of alcohol consumed, age was a strong predictor of subscore, with younger respondents demonstrating significantly higher AUDIT-C scores. Respondents who were 30 years old or younger, 31 to 40 years old, and 41 to 50 years old all had significantly higher AUDIT-C scores than their older peers, respectively ($\beta = 1.16$, Wald $[df = 1] = 24.56$, $P < 0.001$; $\beta = 0.86$, Wald $[df = 1] = 16.08$, $P < 0.001$; and $\beta = 0.48$, Wald $[df = 1] = 6.237$, $P = 0.013$), indicating that younger age predicted higher frequencies of drinking and quantity of alcohol consumed. No other factors were significant predictors of AUDIT-C scores. Neither the predictive model for the dependence subscale nor the harmful use subscale indicated significant predictive ability for the 3 included factors.

### Drug Use
Participants were questioned regarding their use of various classes of both licit and illicit substances to provide a basis for further study. Participant use of substances is displayed in Table 1. Of participants who endorsed use of a specific substance class in the past 12 months, those using stimulants had the highest rate of weekly usage (74.1%), followed by sedatives (51.3%), tobacco (46.8%), marijuana (31.0%), and opioids (21.6%). Among the entire sample, 26.7% ($n = 3419$) completed the DAST, with a mean score of 1.97 (SD = 1.36). Rates of low, intermediate, substantial, and severe concern were 76.0%, 20.9%, 3.0%, and 0.1%, respectively. Data collected from the DAST were found to not meet the assumptions for more advanced statistical procedures. As a result, no inferences about these data could be made.

### Mental Health
Among the sample, 11,516 participants (89.8%) completed all questions on the DASS-21. Relationships between demographic and professional characteristics and depression, anxiety, and stress subscale scores are summarized in Table 4. While men had significantly higher levels of depression ($P < 0.05$) on the DASS-21, women had higher levels of anxiety ($P < 0.001$) and stress ($P < 0.001$). DASS-21 anxiety, depression, and stress scores were found to be significantly correlated ($r = 0.37$, $P < 0.001$).

### TABLE 3. Summary Statistics for Alcohol Use Disorders Identification Test (AUDIT)

<table>
<thead>
<tr>
<th>AUDIT Statistics</th>
<th>n</th>
<th>M</th>
<th>SD</th>
<th>Problematic %</th>
<th>$P^*$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total sample</td>
<td>11,278</td>
<td>5.18</td>
<td>4.53</td>
<td>20.6%</td>
<td></td>
</tr>
<tr>
<td>Sex</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men</td>
<td>6012</td>
<td>5.75</td>
<td>4.88</td>
<td>25.1%</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>Women</td>
<td>5217</td>
<td>4.52</td>
<td>4.00</td>
<td>15.5%</td>
<td></td>
</tr>
<tr>
<td>Age category (yrs)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>30 or younger</td>
<td>1393</td>
<td>6.43</td>
<td>4.56</td>
<td>31.9%</td>
<td></td>
</tr>
<tr>
<td>31–40</td>
<td>2877</td>
<td>5.84</td>
<td>4.86</td>
<td>25.1%</td>
<td></td>
</tr>
<tr>
<td>41–50</td>
<td>2345</td>
<td>4.99</td>
<td>4.65</td>
<td>19.1%</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>51–60</td>
<td>2548</td>
<td>4.63</td>
<td>4.38</td>
<td>16.2%</td>
<td></td>
</tr>
<tr>
<td>61–70</td>
<td>1753</td>
<td>4.33</td>
<td>3.80</td>
<td>14.4%</td>
<td></td>
</tr>
<tr>
<td>71 or older</td>
<td>297</td>
<td>4.22</td>
<td>3.28</td>
<td>12.1%</td>
<td></td>
</tr>
<tr>
<td>Years in field (yrs)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0–10</td>
<td>3995</td>
<td>6.08</td>
<td>4.78</td>
<td>28.1%</td>
<td></td>
</tr>
<tr>
<td>11–20</td>
<td>2523</td>
<td>5.02</td>
<td>4.66</td>
<td>19.2%</td>
<td></td>
</tr>
<tr>
<td>21–30</td>
<td>2272</td>
<td>4.65</td>
<td>4.43</td>
<td>15.6%</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>31–40</td>
<td>1938</td>
<td>4.39</td>
<td>3.87</td>
<td>15.0%</td>
<td></td>
</tr>
<tr>
<td>41 or more</td>
<td>524</td>
<td>4.18</td>
<td>3.29</td>
<td>13.2%</td>
<td></td>
</tr>
<tr>
<td>Work environment</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private firm</td>
<td>4712</td>
<td>5.57</td>
<td>4.59</td>
<td>23.4%</td>
<td></td>
</tr>
<tr>
<td>Sole practitioner, private practice</td>
<td>2262</td>
<td>4.94</td>
<td>4.72</td>
<td>19.0%</td>
<td></td>
</tr>
<tr>
<td>In-house: government, public, or nonprofit</td>
<td>2198</td>
<td>4.94</td>
<td>4.45</td>
<td>19.2%</td>
<td></td>
</tr>
<tr>
<td>In-house: corporation or for-profit institution</td>
<td>828</td>
<td>4.91</td>
<td>4.15</td>
<td>17.8%</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>Judicial chambers</td>
<td>653</td>
<td>4.46</td>
<td>3.83</td>
<td>16.1%</td>
<td></td>
</tr>
<tr>
<td>College or law school</td>
<td>163</td>
<td>4.90</td>
<td>4.66</td>
<td>17.2%</td>
<td></td>
</tr>
<tr>
<td>Bar Administration or Lawyers Assistance Program</td>
<td>50</td>
<td>5.32</td>
<td>4.62</td>
<td>24.0%</td>
<td></td>
</tr>
<tr>
<td>Firm position</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Clerk or paralegal</td>
<td>115</td>
<td>5.05</td>
<td>4.13</td>
<td>16.5%</td>
<td></td>
</tr>
<tr>
<td>Junior associate</td>
<td>964</td>
<td>6.42</td>
<td>4.57</td>
<td>31.1%</td>
<td></td>
</tr>
<tr>
<td>Senior associate</td>
<td>938</td>
<td>5.89</td>
<td>5.05</td>
<td>26.1%</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>Junior partner</td>
<td>552</td>
<td>5.76</td>
<td>4.85</td>
<td>23.6%</td>
<td></td>
</tr>
<tr>
<td>Managing partner</td>
<td>671</td>
<td>5.22</td>
<td>4.53</td>
<td>21.0%</td>
<td></td>
</tr>
<tr>
<td>Senior partner</td>
<td>1159</td>
<td>4.99</td>
<td>4.26</td>
<td>18.5%</td>
<td></td>
</tr>
</tbody>
</table>

*The AUDIT cut-off for hazardous, harmful, or potential alcohol dependence was set at a score of 8.

Comparisons were analyzed using Mann-Whitney U tests and Kruskal-Wallis tests.

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depression, and stress scores decreased as participants’ age or years worked in the field increased ($P < 0.001$). When comparing positions within private firms, more senior positions were generally associated with lower DASS-21 subscale scores ($P < 0.001$). Participants classified as nonproblematic drinkers on the AUDIT had lower levels of depression, anxiety, and stress ($P < 0.001$), as measured by the DASS-21.

Comparisons of DASS-21 scores by AUDIT drinking classification are outlined in Table 5.

Participants were questioned regarding any past mental health concerns over the course of their legal career, and provided self-report endorsement of any specific mental health concerns they had experienced. The most common mental health conditions reported were anxiety (61.1%), followed by depression (45.7%), social anxiety (16.1%), attention deficit hyperactivity disorder (12.5%), panic disorder (8.0%), and bipolar disorder (2.4%). In addition, 11.5% of the participants reported suicidal thoughts at some point during their career, 2.9% reported self-injurious behaviors, and 0.7% reported at least 1 prior suicide attempt.

### Treatment Utilization and Barriers to Treatment

Of the 6.8% of the participants who reported past treatment for alcohol or drug use ($n = 807$), 21.8% ($n = 174$) reported utilizing treatment programs specifically tailored to legal professionals. Participants who had reported prior treatment tailored to legal professionals had significantly lower mean AUDIT scores ($M = 5.84$, $SD = 6.39$) than participants who attended a treatment program not tailored to legal professionals ($M = 7.80$, $SD = 7.09$, $P < 0.001$).

Participants who reported prior treatment for substance use were questioned regarding barriers that impacted their ability to obtain treatment services. Those reporting no prior treatment were questioned regarding hypothetical barriers in the event they were to need future treatment or services. The 2 most common barriers were the same for both groups: not wanting others to find out they needed help (50.6% and 25.7% for the treatment and nontreatment groups, respectively), and concerns regarding privacy or confidentiality (44.2% and 23.4% for the groups, respectively).
TABLE 5. Relationship AUDIT Drinking Classification and DASS-21 Mean Scores

<table>
<thead>
<tr>
<th></th>
<th>Nonproblematic M (SD)</th>
<th>Problematic* M (SD)</th>
<th>P**</th>
</tr>
</thead>
<tbody>
<tr>
<td>DASS-21 total score</td>
<td>9.36 (8.98)</td>
<td>14.77 (11.06)</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>DASS-21 subscale</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Depression scores</td>
<td>3.08 (3.93)</td>
<td>5.22 (4.97)</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>Anxiety</td>
<td>1.71 (2.59)</td>
<td>2.98 (3.41)</td>
<td>&lt;0.001</td>
</tr>
<tr>
<td>Stress</td>
<td>4.59 (3.87)</td>
<td>6.57 (4.38)</td>
<td>&lt;0.001</td>
</tr>
</tbody>
</table>

AUDIT, Alcohol Use Disorders Identification Test; DASS-21, Depression Anxiety Stress Scales-21.
*The AUDIT cut-off for hazardous, harmful, or potential alcohol dependence was set at a score of 8.
**Means were analyzed using Mann-Whitney U tests.

DISCUSSION

Our research reveals a concerning amount of behavioral health problems among attorneys in the United States. Our most significant findings are the rates of hazardous, harmful, and potentially alcohol dependent drinking and high rates of depression and anxiety symptoms. We found positive AUDIT screens for 20.6% of our sample; in comparison, 11.8% of a broad, highly educated workforce screened positive on the same measure (Matano et al., 2003). Among physicians and surgeons, Oreskovich et al. (2012) found that 15% screened positive on the AUDIT-C subscale focused on the quantity and frequency of use, whereas 36.4% of our sample screened positive on the same subscale. While rates of problematic drinking in our sample are generally consistent with those reported by Benjamin et al. (1990) in their study of attorneys (18%), we found considerably higher rates of mental health distress.

We also found interesting differences among attorneys at different stages of their careers. Previous research had demonstrated a positive association between the increased prevalence of problematic drinking and an increased amount of years spent in the profession (Benjamin et al., 1990). Our findings represent a direct reversal of that association, with attorneys in the first 10 years of their practice now experiencing the highest rates of problematic use (28.9%), followed by attorneys practicing for 11 to 20 years (20.6%), and continuing to decrease slightly from 21 years or more. These percentages correspond with our findings regarding position within a law firm, with junior associates having the highest rates of problematic use, followed by senior associates, junior partners, and senior partners. This trend is further reinforced by the fact that of the respondents who stated that they believe their alcohol use has been a problem (23%), the majority (44%) indicated that the problem began within the first 15 years of practice, as opposed to those who indicated the problem started before law school (26.7%) or after more than 15 years in the profession (14.5%). Taken together, it is reasonable to surmise from these findings that being in the early stages of one’s legal career is strongly correlated with a high risk of developing an alcohol use disorder. Working from the assumption that a majority of new attorneys will be under the age of 40, that conclusion is further supported by the fact that the highest rates of problematic drinking were present among attorneys under the age of 30 (32.3%), followed by attorneys aged 31 to 40 (26.1%), with declining rates reported thereafter.

Levels of depression, anxiety, and stress among attorneys reported here are significant, with 28%, 19%, and 23% experiencing mild or higher levels of depression, anxiety, and stress, respectively. In terms of career prevalence, 61% reported concerns with anxiety at some point in their career and 46% reported concerns with depression. Mental health concerns often co-occur with alcohol use disorders (Gianoli and Petrakis, 2013), and our study reveals significantly higher levels of depression, anxiety, and stress among those screening positive for problematic alcohol use. Furthermore, these mental health concerns manifested on a similar trajectory to alcohol use disorders, in that they generally decreased as both age and years in the field increased. At the same time, those with depression, anxiety, and stress scores within the normal range endorsed significantly fewer behaviors associated with problematic alcohol use.

While some individuals may drink to cope with their psychological or emotional problems, others may experience those same problems as a result of their drinking. It is not clear which scenario is more prevalent or likely in this population, though the ubiquity of alcohol in the legal professional culture certainly demonstrates both its ready availability and social acceptability, should one choose to cope with their mental health problems in that manner. Attorneys working in private firms experience some of the highest levels of problematic alcohol use compared with other work environments, which may underscore a relationship between professional culture and drinking. Irrespective of causation, we know that co-occurring disorders are more likely to remit when addressed concurrently (Gianoli and Petrakis, 2013). Targeted interventions and strategies to simultaneously address both the alcohol use and mental health of newer attorneys warrant serious consideration and development if we hope to increase overall well being, longevity, and career satisfaction.

Encouragingly, many of the same attorneys who seem to be at risk for alcohol use disorders are also those who should theoretically have the greatest access to, and resources for, therapy, treatment, and other support. Whether through employer-provided health plans or increased personal financial means, attorneys in private firms could have more options for care at their disposal. However, in light of the pervasive fears surrounding their reputation that many identify as a barrier to treatment, it is not at all clear that these individuals would avail themselves of the resources at their disposal while working in the competitive, high-stakes environment found in many private firms.

Compared with other populations, we find the significantly higher prevalence of problematic alcohol use among attorneys to be compelling and suggestive of the need for tailored, profession-informed services. Specialized treatment services and profession-specific guidelines for recovery management have demonstrated efficacy in the physician population, amounting to a level of care that is quantitatively and qualitatively different and more effective than that available to the general public (DuPont et al., 2009).

Our study is subject to limitations. The participants represent a convenience sample recruited through e-mails and...
news postings to state bar mailing lists and web sites. Because
the participants were not randomly selected, there may be a
voluntary response bias, over-representing individuals that
have a strong opinion on the issue. Additionally, some of those
that may be currently struggling with mental health or sub-
stance use issues may have not noticed or declined the
invitation to participate. Because the questions in the survey
asked about intimate issues, including issues that could
jeopardize participants’ legal careers if asked in other contexts
(e.g., illicit drug use), the participants may have withheld
information or responded in a way that made them seem
more favorable. Participating bar associations voiced a con-
cern over individual members being identified based on
responses to questions; therefore no IP addresses or geo-
location data were gathered. However, this also raises the
possibility that a participant took the survey more than once,
although there was no evidence in the data of duplicate
responses. Finally, and most importantly, it must be empha-
sized that estimations of problematic use are not meant to
imply that all participants in this study deemed to demonstrate
symptoms of alcohol use or other mental health disorders
would individually meet diagnostic criteria for such disorders
in the context of a structured clinical assessment.

CONCLUSIONS
Attorneys experience problematic drinking that is
hazardous, harmful, or otherwise generally consistent with
alcohol use disorders at a rate much higher than other
populations. These levels of problematic drinking have a
strong association with both personal and professional characteristics, most notably sex, age, years in practice, position within firm, and work environment. Depression, anxiety, and stress are also significant problems for this population and most notably associated with the same personal and professional characteristics. The data reported here contribute to the fund of knowledge related to behav-
ioral health concerns among practicing attorneys and serve
to inform investments in lawyer assistance programs and an
increase in the availability of attorney-specific treatment.
Greater education aimed at prevention is also indicated;
along with public awareness campaigns within the pro-
fession designed to overcome the pervasive stigma surround-
ing substance use disorders and mental health concerns. The
confidential nature of lawyer-assistance programs should be
more widely publicized in an effort to overcome the privacy
concerns that may create barriers between struggling attor-
neys and the help they need.

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Confidential Support & Mental Health Assistance for the Legal Community

**Common Symptoms of Depression**

Persistent sad, anxious, “empty” mood
Feelings of hopelessness, pessimism
Feelings of guilty, worthlessness, helplessness
Loss of interest or pleasure in ordinary activities, including sex
Withdrawal from family & friends
Sleep disturbances (insomnia, early morning waking or oversleeping)
Eating disturbances (either loss or gain of appetite & weight)
Decreased energy, fatigue, being “slowed down”
Thoughts of death or suicide, suicide attempts
Restlessness or irritability
Self-medication
Difficulty concentrating, remembering, making decisions
Physical symptoms (such as headaches, digestive disorders, & chronic pain) that do not respond to treatment

**Recognizing a Colleague’s Problem**

Lawyers who work in a law firm or organization have an advantage. Depressed lawyers are not hard to recognize if other lawyers pay more attention to “interpersonal concerns.”

Even in the absence of such sensitivity, certain behaviors can signal depression. These include:

- Decreased productivity
- Absenteeism
- Morale problems
- Uncharacteristic lack of cooperation
- Complaints about always being tired
- Disruptive behavior
- Substance Abuse
Stress-Burnout

When lawyers discuss stress, they usually speak of:

- Constant pressure
- Office problems
- Difficult clients
- Exhaustion
- Loss of control
- Billable hour requirements

Recognizing stress-burnout in a colleague

- Inaccessibility
- Irritability
- Lack of team effort
- Physical ailments-frequent headaches, chest or stomach pains

Source: Florida Lawyers Assistance (FLA), Mental Health Brochure

Be aware of the most common life stressors for yourself and your colleagues. If you are aware that someone is experiencing any of these concerns, reach out to them.

1. Death of a spouse
2. Divorce
3. Marital separation
4. Imprisonment
5. Death of a close family member
6. Personal injury or illness
7. Marital reconciliation
8. Retirement
9. Change in health of family member
10. Pregnancy
11. Sexual difficulties
12. Gain a new family member business readjustment
13. Change in financial state
14. Change in frequency of arguments


For information concerning alcohol abuse, go to: [www.rethinkingdrinking.hiaa.nih.gov](http://www.rethinkingdrinking.hiaa.nih.gov)
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I. Presentation Outline

Intersection of Ethics and Lawyer Health and Wellness

PROGRAM SUMMARY AND TIMED AGENDA

SUMMARY: Studies consistently show that lawyers suffer from substance abuse and other mental health problems at alarming rates. In addition, although they happen infrequently, claims involving unethical lawyers can be significant. ALAS, a lawyers’ mutual professional liability insurer, has seen several claims over the years caused by these problems. This program reviews the studies, analyzes the claims, discusses why these claims are occurring, and provides advice about how to avoid them.

AGENDA

I. Overview of Recent Studies on Lawyer Substance Abuse

II. Overview of Impaired Lawyer Claims

III. Why Lawyers Are Prone to Mental Health Problems

IV. Preventing These Claims and Helping Lawyers Get Better

V. Overview of Ethically-Challenged Lawyer Claims

VI. How to Prevent Ethically-Challenged Lawyer Claims

V. Conclusion
II. Lawyer Impairment and Lawyer Misconduct

Section 1 Introduction

Impaired lawyers have long been a recurrent factor in claims against ALAS firms. In addition to traditional problems like chemical dependencies and depression, firms also have had to confront compulsive gambling, Internet addictions, and age-related issues, such as dementia.

Another regrettable phenomenon is claims caused by blatant moral lapses. ALAS has experienced severe claims caused or exacerbated by a lawyer’s criminal or fraudulent conduct, and serious lawyer misconduct continues to generate costly claims. We discuss this in Section 3 below.

Section 2 Lawyer Impairment

Two predominant impairments in lawyer malpractice claims are substance abuse disorders and psychological disorders, with alcohol being the most commonly abused substance. According to a 1997 study, 18–25% of lawyers had a drinking problem, compared to only 10% of adults in the United States. See Rick B. Allan, Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?, 31 Creighton L. Rev. 265, 266 (1997). In 2007, an estimated 81,000–117,000 ABA members had one or more alcohol, drug, or mental disorders. See Ellen Murphy, Coping with Challenges, 17 Bus. L. Today 35 (Jan./Feb. 2008).

In 2015, the ABA and the Hazelden Betty Ford Foundation completed a collaborative research project on the prevalence of addiction, anxiety, and depression among lawyers (ABA Hazelden study). It was the first nationwide study of the issues, with approximately 15,000 lawyers from 19 states and all geographic regions of the country participating. The results, which were published in the January/February 2016 issue of The Journal of Addiction Medicine, confirm that the profession suffers from significant levels of problematic substance abuse, anxiety, depression, and the like, and that existing resources are inadequate to address these conditions. See Patrick R. Krill, Ryan Johnson & Linda Albert, The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, J. of Addiction Med. (Jan./Feb. 2016). The ABA Hazelden study indicates that between 21% and 36% of practicing lawyers abuse alcohol—three to five times the rate of problem drinking among the general population. These figures are generally consistent with earlier studies of the profession, with the notable exception that it is now younger lawyers who are the most at-risk for alcohol use disorders.

Illicit drug abuse is likewise more prevalent among lawyers than the general population. For example, a Washington study showed that 26% of lawyers in that state had tried cocaine, compared to only 12% of the general population. See Allan at 266; see also Murphy above (stating that over 30,000 lawyers had long-standing drug disorders). Prescription drugs are another growing source of addiction for lawyers. See Patrick R. Krill, Substance Abuse and Mental Health: Going Solo Isn’t an Option, 32 GP Solo No. 3 (May/June 2015).

Depression and other mental health problems also affect the legal profession more than the general population. The ABA Hazelden study, for instance, concluded that lawyers suffer from a shockingly high rate of depression: 28% of the lawyers surveyed, compared to 8% of the general population. That study also showed that 19% of lawyers suffer from anxiety and 23% from stress. See also James Dolan, Are Lawyers Predisposed to Depression, Substance Abuse?, Texas Lawyer (Nov. 19, 2015) (archived on Lexis—subscription required). Other studies support that observation. A 2017 study of U.S. and Canadian lawyers found that the more successful the lawyer, the more likely he is to experience mental health struggles. See Michelle McQuigge, Successful Lawyers More Likely to Experience Mental Health Problems, Study Finds, The Toronto Star (Oct. 22, 2017). Recent data also ranked lawyers as the fourth-highest at risk for suicide as a profession. See Rosa Flores & Rose Marie Arce, Why are lawyers killing themselves?, CNN (Jan. 20, 2014) (noting several high profile lawyer suicides following law firm layoffs).
1990s showed lawyers had the highest incidence of depression of the 105 professions studied. See Myer J. Cohen, *Bumps in the Road*, 18 GP Solo No. 5 (July/Aug. 2001). Another researcher found that 19% of lawyers suffer from depression at any given time, compared to 7% for the general population. See Sue Shellenbarger, *Even Lawyers Get the Blues: Opening up about Depression*, Wall St. J. (Dec. 13, 2007).

The seeds of depression may be planted before lawyers begin to practice. In a 2014 survey, between one-quarter and one-third of responding law students reported frequent binge drinking or misuse of drugs. See Jerome M. Organ, David Jaffe & Katherine Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. Legal Educ. 1 (Sept. 13, 2016); see also Patrick Krill, *Law Schools Must Confront Students’ Alcohol, Mental Health Problems*, Law.com (Sept. 28, 2016). In 2011, the Illinois Lawyers’ Assistance Program (LAP) noted a significant increase in the number of law students requesting its services. Although law students historically made up 5% of all Illinois LAP cases, 16% of the cases in 2011 were law students. See Janet Piper Voss, *The Changing Face of the Lawyers’ Assistance Program*, Chi. Law., 2011 Year in Review; see also Flores and Arce (reporting estimated 40% of University of Washington law students suffered from depression by graduation); Ashby Jones, *New Lawyers Facing Economic, Emotional Depression*, Wall St. J. Law Blog (Dec. 19, 2013).

Lawyers with age-related diseases, such as dementia, present unique impairment challenges for the profession. Some expect Alzheimer’s disease, the most common form of dementia, to double from 2009 to 2030. See *Senior Lawyer Resources*, Bar of California; see also James C. Coyle, et al., *NOBC* [National Organization of Bar Counsel]—*APRL* [Association of Professional Responsibility Lawyers]—*CoLAP* [ABA Commission on Lawyer Assistance Programs], *Second Joint Committee on Aging Lawyers Final Report* (Apr. 2014). Accordingly, many LAP programs have broadened their focus to include lawyers showing signs of dementia. See ABA 2014 Comprehensive Survey of Lawyer Assistance Programs.


### 2.1 Preventing Impairments

Bar associations are well known for helping impaired lawyers through their lawyer assistance programs, but they are also taking steps to prevent lawyer impairments before they occur. Some are focusing attention on quality of life issues that can lead to impairments. One state bar association president created a task force to identify and educate the bench and bar about factors that affect the emotional and physical well-being of lawyers. See Patrick Tandy, *Diversity, Wellness Key Issues for Brown*, Maryland State Bar Ass’n Bar Bulletin (July 15, 2015). As part of the initiative, she also formed a “Special Committee on Wellness” and created a website to provide resources for lawyer well-being. See Maryland State Bar Association Special Committee on Wellness. Further, the ABA House of Delegates recently passed Resolution 106, which updates the ABA Model Rule on minimum continuing legal education to include a recommendation that all jurisdictions create a stand-alone substance abuse and mental health credit hour requirement. Currently, only five jurisdictions (California, Illinois, Nevada, North Carolina, and South Carolina) have a stand-alone CLE requirement on these issues.

In August 2016, the National Task Force on Lawyer Wellbeing (Task Force) was formed. The Task Force is a collection of entities within and outside the ABA, which includes: ABA Commission on Lawyer Assistance Programs, ABA Standing Committee on Professionalism, ABA Center for Professional Responsibility, ABA Young Lawyers Division, ABA Law Practice Division Attorney Well-Being Committee, The National Organization of Bar Counsel, Association of Professional Responsibility

Psychologists and other professionals who study lawyer behavior encourage a proactive approach to enhance lawyer resilience to the pressures of their practice. In “Managing Change, Managing Risk, Managing Your Practice: Building Resilience,” ALAS Webcast (Apr. 22, 2014), a team of psychologists (all former practicing lawyers) described typical traits that make lawyers vulnerable to stress, depression, and other psychological problems; they also suggested practical tips to improve lawyer satisfaction and happiness. Professionals from a wide range of disciplines are available to train lawyers to deal more effectively with the unavoidable stresses of the practice. See Leslie A. Gordon, *Stressed Out: How to Avoid Burnout and Debilitating Anxiety*, 101 A.B.A. J. 1 (July 2015). A number of firms have invited mental health professionals to present in-firm workshops and programs. Some focus on reducing burnout and other stress-related effects of practice. Others directly address addiction and depression and the systemic and cultural factors that contribute to the incidence of these disorders among lawyers. Several firms have brought wellness training and support in-house. One ALAS firm has been recognized for its Life XT program, which provides one-on-one coaching, live classes, and online videos to increase resiliency and productivity among its lawyers. See Leslie A. Gordon, *Firm Rolls Out Wellness Coaching and ‘Emotional Fitness’ Classes for Employees*, 102 A.B.A. J. 9 (Nov. 2016). Foreign firms seem to be heading in that direction too. Hogan Lovells has an in-house counselor to deal with mental health issues, and Linklaters appears to be especially proactive about behavioral problems. Emma Jacobs, *Mental Health Emerges as a Work Problem*, Fin. Times (Sept. 14, 2016).

Some ALAS firms try to reduce the risks of lawyer impairments by requiring partners to have annual physical examinations. Even though the results of these examinations usually remain confidential, they may identify the early stages of an impairment. They also provide lawyers with a professional, confidential source to discuss any health-related concerns. Firms should consult with employment counsel before mandating physical examinations. In addition, firms should not rely on required physical examinations to detect mental health disorders; many primary care physicians have not received training to recognize or deal with addiction. Whether firms require physical examinations, they should encourage lawyers to identify and address any substance abuse and mental health issues. It may be helpful to distribute educational materials about addictive behavior. See, e.g., Patrick Krill, *Do You Have a Drinking Problem, Counselor*, Law.com (Oct. 7, 2016) (containing 21 questions designed to give lawyers insights about their habits).

In addition to their general review of data to gauge productivity, practice group leaders in many firms now scan monthly time and billing reports for early signs of an impairment problem. They realize that unusual fluctuations in a lawyer’s billable hours or changes in billing habits may be early signs of a problem that should be investigated. One ALAS firm reported that a lawyer who was essentially “living at the office” and billing excessive hours was at the same time abusing alcohol. The only early sign of the problem was the spike in recorded hours.

It is encouraging that some firms are taking steps to prevent lawyer impairments that can lead to claims. But experts believe more should be done. See Casey Sullivan, *Addiction Counselor: Lawyers and Law Firms Need to Step Up*, Bloomberg Law (Sept. 22, 2016).

### 2.2 Identification and Intervention

Lawyers and staff may be reluctant to share their concerns about colleagues who may be suffering from alcoholism, drug abuse, or other impairments. But ignoring the problem can have adverse consequences for affected lawyers and their firms, including malpractice complaints, loss of clients, office discord, decreased morale, increased turnover, and disciplinary actions against members of law firm management and other partners for violating ABA Model Rules of Prof’l Conduct 5.1 and 5.3 (supervisory responsibilities of lawyers). Early identification is often key to addressing the impairment
and preventing serious ramifications. ALAS has long urged firms to adopt an “ombuds” policy or similar program that encourages firm personnel to report any inappropriate lawyer (or client) conduct. The policy should designate a person or persons to whom a possible impairment or other inappropriate conduct can be reported. (At a 2016 program, “Attorney Mental Health and Substance Abuse: A Call to Action,” sponsored by an ALAS firm and others, one expert on the subject suggested that firms designate a chief assistance officer to receive reports of any such concerns.) To be effective, any reporting policy should provide that all communications will be confidential to the extent feasible and that reporting in good faith will not be grounds for firm discipline or other repercussions against the reporting person.

In addition to policies and checklists on impairment, firms should consider training programs to help personnel understand and identify signs of substance abuse, mental health issues, and other forms of impairment. For example, New Mexico reportedly has produced a video to educate lawyers on how to spot age-related problems in colleagues. See Don DeBenedictis, State Bar hones in on older lawyers, Daily J. (June 6, 2013).

Firms also should remind lawyers and staff frequently of the importance of recognizing and reporting suspected problems. The orientation of new lawyers, including laterals, and staff should include expectations about reacting to problematic behavior and details of the firm’s reporting procedures. While some lawyer impairments end tragically, many ALAS firms have identified troubled lawyers who subsequently received treatment and returned to practice successfully with the firm. Success stories like these should be publicized appropriately within the firm to encourage personnel to share concerns.

Whenever a firm learns about a suspected impairment or other inappropriate behavior, it should act on the information. A firm that overlooks warning signs of a partner’s or others’ wrongdoing can face a disciplinary action against supervisory lawyers. See, e.g., In re Fonte, 905 N.Y.S.2d 173, 176–77 (App. Div. 2010) (lawyer’s failure to investigate warning signs that his partner was looting firm’s escrow account was grounds for three-year suspension of law license); see also In re Robinson, 74 A.3d 688, 695 (D.C. App. 2013) (failure to respond to signs that subordinate lawyer was mismanaging trust account); Florida Bar v. Rousso, 117 So. 3d 756, 760–61 (Fla. 2013) (failure to supervise bookkeeper). The firm should promptly advise the lawyer to discontinue any inappropriate conduct. If an impairment is a suspected cause of the conduct, the firm should direct the lawyer to seek professional help. Section 2.3 below discusses more ways to deal with impaired lawyers; Section 2.4 addresses reporting to disciplinary authority; Section 3 discusses lawyer misconduct in more detail.

It is not fair or desirable to have all the duties surrounding impairment fall on those other than the involved individual. Firms should also encourage lawyers who think they might be struggling with an addiction or mental health issue to self-report and seek help. Self-reporting should be promoted as the responsible and appropriate reaction to personal problems that can affect any lawyer. Personal responsibility and accountability should be part of a firm’s culture.

Firms should develop lists of resources to which an individual with a possible impairment can turn. These lists should include treatment centers, physicians, counselors, and consultants who provide prevention and assistance with impairments. It should also contain lawyer and employee assistance programs that typically provide professional confidential telephone and in-person counseling to address alcoholism, drug abuse, depression, and other issues. Programs that offer a confidential sounding board to discuss problems and suggest sources of help can be both an effective deterrent and an aid in treating impairment problems—but only if used. Unfortunately, survey results from the ABA Hazelden study reveal that, while the vast majority of lawyers are aware of lawyer assistance programs, many are reluctant to use them due to concerns about confidentiality, professional implications, and effectiveness.

### 2.3 Procedures for Dealing with Impaired Lawyers

A lawyer may not represent a client if the lawyer’s “physical or mental condition materially impairs the lawyer’s ability to represent the client.” ABA Model Rule of Prof’l Conduct 1.16(a)(2); see
also In re Francis, 4 P.3d 579, 580 (Kan. 2000) (lawyer whose client representation was affected by his impaired mental condition should have withdrawn).

The impaired lawyer typically is not well situated to evaluate whether the impairment warrants withdrawal. Thus, a firm that has identified an impairment should determine whether the lawyer’s impairment is sufficiently severe that the lawyer should no longer work on client matters. This usually requires an audit of the lawyer’s work to identify if the impairment has interfered with client representations. Such an audit might include a review of client files and the lawyer’s time, billing, email, and telephone records, as well as discreet interviews with others in the firm.

ABA Formal Opinion 03-429 (June 11, 2003) addresses professional conduct issues and obligations that arise when a lawyer becomes mentally impaired. According to the opinion, firm partners and supervisory lawyers must make “reasonable efforts” to ensure that a lawyer’s impairment will not result in Model Rules violations. The opinion explains that “reasonable efforts” might include confronting the impaired lawyer, adopting procedures to protect clients, convincing the lawyer to accept help, and restricting the lawyer’s representation of clients. The opinion advises that if partners and supervisory lawyers make such “reasonable efforts,” they probably will not be guilty of a professional conduct violation if an impaired lawyer breaches the Model Rules. North Carolina Opinion 2013-8 (July 25, 2014) largely tracked the ABA opinion, emphasizing that lawyers must take steps to prevent violations of the professional conduct rules. Virginia Opinion 1886 (Dec. 15, 2016) follows the principles set forth in ABA Formal Opinion 03-429 on the duty of supervisory lawyers who become aware of an impaired lawyer. The opinion also offers additional guidance, including the recommendation that firms adopt and enforce policies requiring an impaired lawyer to seek assistance or treatment as a condition of continued employment.

South Carolina amended Rule of Professional Conduct 5.1(d) to make it clear that law firm management and partners have a duty to take action when they identify an impaired lawyer even if there has not yet been any apparent misconduct or harm to clients. See also Rule 407, SCACR. Related rule amendments also provide the option of reporting concerns about an impairment to the state bar’s executive director in order to get assistance for the lawyer in question. See Amendments to South Carolina Appellate Court Rules (Aug. 24, 2015).

If the lawyer’s work has been adversely affected, the firm should take prompt remedial action. See Model Rule 5.1(c)(2). ABA Formal Opinion 03-429 states that this obligation applies to both open and closed matters. In severe situations, the firm should consider requiring the lawyer to take a leave of absence while seeking treatment. It may be advisable to condition the lawyer’s return to the firm on an evaluation and subsequent testing by an independent counselor or addiction expert. The affected lawyer should agree to disclose the results of the evaluation and tests to a designated partner or committee. Firms may use a “return to work agreement” with the impaired lawyer to make his or her return to the firm contingent on certain conditions. As discussed below, however, firms should consult with employment counsel on these issues prior to taking any employment-related action.

In many cases, an impairment will not render the lawyer incompetent to practice, and a less severe alternative is warranted. One approach is to double-assign all the impaired lawyer’s work for a period of time. Another solution is to appoint a “practice monitor.” The afflicted lawyer could meet with a practice monitor on a periodic basis and report the status of each pending matter. Careful direction and oversight by the practice monitor are important to ensure that the monitor understands and will actively undertake the required level of responsibility.

In some cases, professional help may be appropriate while the lawyer continues to practice. In 1988, the ABA created the Commission on Lawyer Assistance Programs to aid local bar associations in developing lawyer assistance programs (LAP) to help lawyers with alcoholism. The Commission subsequently expanded its activities to include drug abuse. See Allan at 273. As a result, all states have established LAPs or assistance committees. Virtually all LAPs provide counseling for lawyers with drug
and alcohol problems, and some also help with depression and other emotional problems. These programs typically are staffed by lawyers who, on a case-by-case basis, make referrals to other treatment alternatives, such as rehabilitation centers or counseling facilities. LAP services are confidential and not reported to any disciplinary committee. See generally Allan, at 275; cf. ABA Model Rule 1.6(b); see also Commission on Lawyer Assistance Programs, ABA (directory of LAPs). LAPs can be effective in addressing impairment-related problems, but only if lawyers know about them. Firms should ensure that all lawyers know what services are available and how to contact their LAP when help is needed.

Other national and local organizations may also be helpful. See generally Alcoholics Anonymous, www.aa.org; Narcotics Anonymous, www.na.org; Gamblers Anonymous, www.gamblersanonymous.org; Depressed Anonymous, www.depressedanion.com. There is also a website devoted exclusively to lawyers suffering from depression. See Lawyers with Depression, www.lawyerswithdepression.com. When an impairment problem is identified, the firm should direct the impaired lawyer to contact a private professional, the local LAP, or another appropriate assistance organization. A formal evaluation or assessment by a licensed professional often will be the first step in identifying the precise nature, scope, and severity of an impairment, and will allow firms to make an informed decision about an appropriate course of action.

When a firm believes that it has an impaired lawyer problem, the firm should consult an employment lawyer, either within or outside the firm. That lawyer can advise on issues beyond professional conduct and malpractice concerns, such as those that may arise under the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2012) (ADA); the Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2012) (FMLA); the state counterparts of those federal statutes; state confidentiality statutes; and the lawyer’s rights and responsibilities under the firm’s partnership agreement. An employment lawyer can also advise the firm on issues relating to any separation of a lawyer from the firm. These issues can be complicated. For example, the court in Hazen v. Hill Betts & Nash, LLP, 936 N.Y.S.2d 164, 172 (App. Div. 2012), reversed findings by the Human Rights Division and an administrative law judge that a firm committed statutory discrimination by terminating a contract lawyer. The lawyer claimed that his bipolar condition caused him to use a firm credit card to bill clients for personal expenses such as hotel stays, adult movies, and limousines. An employment lawyer will assist the firm in avoiding liability claims like Hazen that may emerge.

Some firms have realized the benefit of having a mental health professional available for consultation when impairment issues arise. Trained professionals can readily assess an emerging problem and provide guidance on how best to approach the impaired lawyer. By consulting with a mental health counselor in advance, a firm can familiarize the professional with the operations and management of the firm and lay the foundation for a quick response when needed. If the firm becomes aware of an impaired lawyer, it will be a relief to know that a professional is on call to advise the firm.

### 2.4 Disclosure to Disciplinary Authorities

If there is a substantial question about the lawyer’s honesty, trustworthiness, or fitness to practice law, then lawyers, including lawyers in firm management, will need to consider whether they are required to report the problem to disciplinary authorities. Most states have adopted some version of Model Rule 8.3(a), which provides that a lawyer who knows that another lawyer has violated the rules of professional conduct in a way that “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” must report the violation to the appropriate professional authority. Questions of what and when to report have led to varying interpretations of the rule. See Important Conditions Attach to Lawyers’ Mandatory Duty to Report Misconduct, 32 Law. Man. Prof. Conduct 25 (Jan. 13, 2016) (survey of authorities addressing reporting duty); South Carolina Opinion 16-04 (July 18, 2016).

ABA Formal Opinion 03-429 concluded that a firm should report a rules violation by one of its lawyers if the lawyer cannot competently represent clients but nevertheless continues to practice. The
opinion states that no report is required, however, if either: (1) the mental condition that caused the violation has ended, or (2) the firm is supervising the lawyer’s work so closely that the firm is “able to eliminate risk of future violations.” Other authorities may not agree with the ABA opinion; Model Rule 8.3(a) says that lawyers “shall inform the appropriate professional authority” of any rule violation that raises a substantial question of honesty, trustworthiness, or fitness, and neither the rule nor its comments discuss the risk of future rule violations.

Lawyers may have Model Rule 8.3(a) reporting obligations if they learn that a lawyer outside their own firm has a mental condition that materially impairs the lawyer’s ability to represent clients. See ABA Formal Opinion 03-431 (Aug. 8, 2003) (lawyer who believes that another lawyer’s mental condition materially impairs his ability to represent clients, and who knows that other lawyer continues to represent clients, must report other lawyer’s failure to withdraw as violation of Rule 1.16(b)(2)); see also North Carolina Opinion 2003-02 (Oct. 24, 2003) (lawyer must report another lawyer’s violation of professional conduct rules even if other lawyer’s unethical conduct stems from mental impairment or substance abuse). South Carolina Opinion 02-13 (2002) concluded that a lawyer who had substantial questions about another lawyer’s medical disability and fitness to practice law must report this situation to the appropriate authorities unless doing so would reveal confidential information under South Carolina Rule 1.6. The opinion considered the type of conduct that raised a substantial question as to a lawyer’s “fitness” and concluded the conduct need not amount to malpractice; rather, neglect of a client matter may be sufficient. The opinion added that Rule 8.3 requires actual knowledge or a clear belief that there has been a rule violation. Mere suspicion of misconduct does not trigger the reporting requirement. See New York City Opinion 1995-05 (Apr. 5, 1995); Pennsylvania Opinion 98-124 (Dec. 7, 1998); West Virginia Opinion 92-04 (1992). For example, Kansas Opinion 14-01 (July 1, 2014) concluded that a law firm had no duty to report its now-former partner who had suffered memory lapses, unless the firm had actual knowledge that the partner had violated professional conduct rules. The opinion also encouraged the firm to refer the partner to the Kansas LAP. Similarly, Virginia Opinion 1887 determined that a lawyer does not have a duty to proactively address the impairment of another lawyer unless the reporting lawyer has reliable information that the impaired lawyer has committed an ethical violation that raises a substantial question as to the lawyer’s honesty, trustworthiness, or fitness to practice law.

The California Rules of Professional Conduct are unusual, perhaps unique, in that they rely on self-reporting for lawyer impairment issues and do not affirmatively require lawyers to report an impairment of another lawyer. See Steven D. Wasserman et al., Addressing Substance Abuse, Cal. Law. (Dec. 2013).

What and when to report is not always clear, so lawyers should consult their loss prevention partner if the conduct of any lawyer raises a concern about reporting obligations. See Bd. of Overseers v. Warren, 34 A.3d 1103, 1113 (Me. 2011) (implicitly criticizing firm management for not referring dishonest lawyer’s conduct “to individuals in the firm who were more capable of assessing the need for action, such as the firm’s own counsel”).


As outlined below, when it comes to malpractice and lawyer disciplinary cases, courts differ as to whether a lawyer’s impairment may be a mitigating factor with respect to disciplining impaired lawyers.

California: Serious physical disabilities that “caused or contributed to” an 81-year-old lawyer’s professional misconduct warranted a three-year suspension—not disbarment—pending the lawyer’s proven rehabilitation. See In re Lawrence, Nos. 07-O-12696 (07-O-13600); 10-O10811 (State Bar Ct. Cal. Mar. 12, 2013). Emotional problems that had a nexus to a lawyer’s misconduct were not entitled to
mitigating weight because the lawyer failed to prove that he no longer suffered from those problems. See In re Schoth, Nos. 10-O-10777; 11-O-14894 (State Bar Ct. Cal. Feb. 7, 2013) (recommending that lawyer who misappropriated more than $136,000 from five clients over 18 months be disbarred). Emotional difficulties that had a nexus to at least some of a lawyer’s misconduct and from which the lawyer had recovered were not sufficiently compelling to avoid disbarment. See In re Stannard, Nos. 09-O-10787; 10-O-01324 (State Bar Ct. Cal. Feb. 7, 2013) (recommending that lawyer who misappropriated more than $68,000 from three clients over six years be disbarred).

Colorado: A good-faith effort to overcome a substance abuse problem may be a mitigating factor. See People v. Schubert, 799 P.2d 388, 393–94 (Colo. 1990).

Indiana: Treatment for depression and anger did not excuse misconduct; lawyer suspended for 12 months. See In re Freeman, 835 N.E.2d 494, 499 (Ind. 2005).

Iowa: A lawyer’s compelling need to feed his severe drug addiction did not excuse his conversion of client funds. See Iowa Supreme Court Att’y Discip. Bd. v. Stowe, 830 N.W.2d 737, 742 (Iowa 2013) (revoking lawyer’s license, holding “We do not tolerate theft by Iowa lawyers.”). Anxiety and depression were not related to the lawyer’s misconduct and therefore were not considered a mitigating factor. See Iowa Supreme Court Att’y Discip. Bd. v. Bowles, 794 N.W.2d 1, 7 (Iowa 2011). Unethical conduct can be a symptom of depression. See cf. Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Grotevold, 642 N.W.2d 288, 294–95 (Iowa 2002).

Kansas: Lawyer whose impaired mental condition affected a client representation should have withdrawn. See In re Francis, 4 P.3d 579, 580 (Kan. 2000). Cocaine addiction was an aggravating factor, but recovery was a mitigating factor. See In re Jones, 843 P.2d 709, 712 (Kan. 1992).

Maryland: After a lawyer petitioned another jurisdiction to put its disciplinary proceedings against the lawyer in abeyance “due to self-professed incompetency” (depression), the court placed the lawyer on “inactive status” as a matter of reciprocal discipline. See Att’y Grievance Comm’n of Md. v. Kourtesis, 87 A.3d 1231, 1240 (Md. 2014). In cases of intentional dishonesty, disbarment is the appropriate remedy absent “utterly debilitating” mental or physical condition that is the “root cause” of the misconduct. See Att’y Grievance Comm’n v. Vanderlinde, 773 A.2d 463, 485 (Md. 2001). “Doing wrong because of alcoholism is a mitigating factor, but doing wrong while an alcoholic is not.” See Att’y Grievance Comm’n v. White, 614 A.2d 955, 959 (Md. 1992).

Minnesota: Depression and obsessive-compulsive disorder were not mitigating factors when the disabilities did not directly cause the misconduct. See In re Mayne, 783 N.W.2d 153, 158–59 (Minn. 2010).

Mississippi: A lawyer who suffered from depression that affected his representation was suspended for two years (but subsequently disbarred after disregarding suspension). See Carter v. Miss. Bar, 654 So. 2d 505, 515 (Miss. 1995).

Nebraska: Depression was one mitigating factor that, along with other mitigating factors, should have been balanced against aggravating factors. See State ex rel. Counsel for Discip. v. Switzer, 790 N.W.2d 433, 439 (Neb. 2010).

New Mexico: A lawyer was suspended indefinitely when his untreated physical and mental problems caused multiple violations of professional conduct rules. See In re O’Brien, 29 P.3d 1044, 1051 (N.M. 2001). Another suspension was justified but deferred pending diagnostic assessment and ultimately reduced to supervised probation where expert evidence indicated that the lawyer’s misconduct was caused by a previously undiagnosed and untreated bipolar condition, and would likely be prevented by current treatment. See In re Ortiz, 304 P.3d 404 (N.M. 2013).

Oklahoma: In *State ex rel. Okla. Bar Ass’n v. Demopolos*, 352 P.3d 1210 (Okla. 2015), a lawyer convicted of abusive behavior while under the influence of alcohol was suspended for one year with an additional one year deferred suspension conditioned on his continued sobriety and rehabilitation compliance. Repeated DUI offenses of nonpracticing lawyer drew a deferred suspension of two years and one day, provided that lawyer complied with additional conditions imposed by the court. See *Oklahoma Bar Ass’n v. Bernhardt*, 323 P.3d 222, 228–29 (Okla. 2014).

South Carolina: Asperger’s Syndrome was a mitigating factor, but the court ordered the suspended lawyer to follow the treatment recommendation and to submit quarterly progress reports for two years as a condition of reinstatement. See *In re Longtin*, 713 S.E.2d 297, 303 (S.C. 2011).

South Dakota: The court held that it was proper to conduct a thorough assessment of an applicant who had been diagnosed with bipolar disorder less than five years before seeking admission; applicant was denied admission due to lack of candor, poor judgment, criminal record, unreliability, and “unresolved issues” regarding his mental health. See *In re Application of Henry*, 841 N.W.2d 471, 481 (S.D. 2013).

Utah: An out-of-state lawyer who had ceased practicing due to anxiety and depression was not entitled to a waiver of the active practice requirement when he applied for admission to the Utah State Bar. See *In re Spencer v. Utah State Bar*, 293 P.3d 360, 366 (Utah 2012).

Washington: The court acknowledged the stress of litigation but did not consider it a mitigating factor where there was no indication that it caused the lawyer’s misconduct. See *In re Abele*, 358 P.3d 371 (Wash. 2015). The court did not impose the presumptive sanction of disbarment against a lawyer who was found to have abandoned his practice because the lawyer was experiencing mental health issues; the court affirmed a three-year suspension instead. See *In re Wickerson*, 310 P.3d 1237, 1249 (Wash. 2013). Bipolar disorder and the abatement of symptoms and misconduct following treatment constituted an extraordinary mitigating factor. See *In re McLendon*, 845 P.2d 1006, 1012–13 (Wash. 1993). The court gave little weight to a lawyer’s depression as a mitigating factor where the lawyer had failed to take steps to effectuate a cure. See *In re McGough*, 793 P.2d 430, 435–36 (Wash. 1990).

Wisconsin: Five drunk driving convictions reflected adversely on the lawyer’s fitness to practice law. See *In re Brandt*, 766 N.W.2d 194, 202 (Wis. 2009). In contrast, the court ordered a public reprimand but declined to impose continued monitoring because the lawyer voluntarily relinquished her driver’s license after four drunk driving convictions. See *In re Ewald-Herrick*, 847 N.W.2d 823 (Wis. 2014).

2.5 Disclosure to Clients

What should a firm tell clients about a lawyer’s impairment? Suppose a lawyer is diagnosed with an impairment, and the firm knows that some of the lawyer’s work has been adversely affected. What should the firm tell clients whose work was adversely affected? Should it notify other clients for whom the lawyer has done work? Must the firm advise prospective clients? These are troublesome issues because they implicate several, sometimes competing, interests: the firm’s obligations to its clients, the rights of the impaired lawyer, and reputational interests of both.

One court held that a law firm does not violate Rules 1.4 or 7.1 or its fiduciary obligation by failing to disclose to a client “the medical and arrest history of one of its attorneys that ‘might impair’ the quality of the law firm’s representation, but does not actually impair its quality.” See *Moye White LLP v. Beren*, 320 P.3d 373 (Colo. 2013). Another authority concluded that the professional conduct rules do not prevent a lawyer from telling a mutual client that co-counsel may not be able to represent the client effectively. See *Nassau County Opinion 02-02* (Mar. 26, 2002). Philadelphia Opinion 2000-12 (Dec. 2000) took a similar approach to these issues. A lawyer inquired whether he should inform his partner’s existing and potential clients that the partner suffered from a reading disability and stroke-related memory loss. The opinion advised that the lawyer had no obligation to warn potential clients about the impairment, but added that he was not prohibited from doing so. The opinion advised that if the lawyer
chose to inform clients, he should proceed cautiously because such an action could subject him to a lawsuit by the partner. The opinion recommended that the lawyer discourage the partner from agreeing to handle new matters. It also noted that under Pennsylvania Rule 5.1(c)(2), the inquiring lawyer might have some responsibility for his partner’s violation of the rules. The opinion said that the lawyer could discharge that obligation by urging the partner not to make misrepresentations to potential clients and then informing the disciplinary board if the lawyer refused to desist.

ABA Formal Opinion 03-429 addresses a firm’s obligation to clients when an impaired lawyer leaves the firm. The opinion adopts the rationale of Model Rule 1.4, requiring a firm to explain the facts regarding an impaired lawyer’s departure to clients to the extent necessary to enable the clients to make an informed decision whether to remain with the firm or go with the departing lawyer. The opinion implies that in some instances it may be necessary to explain the nature of the lawyer’s impairment to clients, provided the discussion is limited strictly to the facts. But, according to the opinion, firm lawyers have no obligation to inform clients that have already announced they are leaving with the departing lawyer about the lawyer’s impairment. The committee noted that even as to those clients, the firm should avoid any endorsement of the lawyer’s competence and, therefore, should not send a joint letter with the impaired lawyer about the departure. See also North Carolina Opinion 2013-8 (July 25, 2014).

Pennsylvania Opinion 98-124 took a different position, stating that a firm should explain the circumstances surrounding an impaired lawyer’s departure only if a client asks for guidance in choosing counsel. The inquiring firm advised that an elderly lawyer with short-term memory loss was leaving the firm to set up his own practice. While he was at the firm, the firm had provided extensive support for him, including a full-time associate, secretary, and a paralegal. Because the firm questioned his competence to practice without this support, it proposed writing a letter to clients stating that in the firm’s opinion it was not in the lawyer’s or his potential clients’ interest for him to continue practicing law. The opinion advised that the firm should not write such a letter because under Pennsylvania’s version of Model Rule 7.1, any firm letter to clients when a lawyer leaves must be neutral. Nevertheless, the opinion concluded that if a client asked partners at the firm for guidance about choosing counsel, they could, under Pennsylvania Rule 1.4, disclose the special measures the firm had provided when the lawyer worked there. The opinion added that the lawyers probably had an obligation under Pennsylvania Rule 8.3 to report their concerns to disciplinary authorities.

We question whether courts will agree that a firm owes no duty to warn clients who have decided to leave with the departing lawyer that their representation might be adversely affected. Model Rule 1.16 requires that when a representation ends, a lawyer must “take steps to the extent reasonably practicable to protect a client’s interests[.]” ALAS paid a substantial sum to settle a claim that a firm failed to disclose a departing lawyer’s impairment to clients who left with the lawyer. Until there is reliable case law on this issue, it may be unwise to follow this aspect of the foregoing opinions.

South Carolina Opinion 02-13 reached a different conclusion in an analogous situation. The opinion considered whether a lawyer who had referred clients to another lawyer should tell the clients that he subsequently learned the other lawyer had a medical condition that materially impaired his fitness to practice law. The committee determined that because the clients also had been clients of the referring lawyer, he was obligated to inform them of his concerns and to tell them that his advice regarding the referrals had changed. The advice would be different, the opinion noted, if the clients involved had not also been clients of the referring lawyer.

There is little additional guidance as to a firm’s responsibilities to clients when confronted with an impaired lawyer problem. If the impaired lawyer continues to represent clients competently, neither the rules of professional conduct nor any other authority of which we are aware obligates the lawyer or the firm to advise clients of the impairment. If, on the other hand, a client’s work has been adversely affected, the lawyer and the firm may be required to advise the client about the impact on the client’s work under Model Rule 1.4(a). Likewise, if the lawyer’s impairment requires the lawyer to cease working, either
permanently or temporarily, on a client matter for which the lawyer had substantial responsibility, North Carolina Opinion 2013-8 stated that “the situation must be explained to the client” so that the client can decide whether to stay with the firm or hire new counsel. See generally Ellen J. Bennett, Elizabeth J. Cohen & Helen W. Gunnarsson, Annotated Model Rules of Professional Conduct, Rule 1.4 (8th ed. 2015). Even in these instances, however, it may not be necessary to tell the client about the lawyer’s impairment. ADA and FMLA regulations generally prohibit employers from disclosing confidential medical information except on a need-to-know basis. See 29 C.F.R. §§ 1630.14(b)(1), (2) & 825.500(g) (2014). Within these general parameters, the firm’s duties to clients in cases of lawyer impairment should be evaluated on a case-specific basis in consultation with the firm’s loss prevention partner and an employment lawyer.

Section 3 Serious Lawyer Misconduct

ALAS has experienced several recent claims caused by serious lawyer misconduct. These claims accounted for 21% ($439 million) of the reserves that ALAS added to open matters in fiscal years 2011 through 2016. The misconduct involved fraudulent, quasi-criminal, or criminal conduct by ALAS firm lawyers, such as insider trading, forging or altering documents, embezzling from the law firm, or stealing from clients.

All firms should attend to this risk. These misbehaving lawyers overwhelmingly were partners, not associates, but otherwise defy easy categorization. They spanned many practice areas and hailed from firms of all sizes. They were recent laterals and longtime partners who served as firm management. They practiced throughout the United States and abroad. They included lawyers who were struggling and those who were thriving at their firms. The apparent motives for the misconduct ranged from sheer greed to alleged impairments to attempted financing and concealment of extramarital affairs. In some cases, all of the above appeared to be involved. See, e.g., Stephanie Francis Ward, Lawyers Who Self-Medicate to Deal with Stress Sometimes Steal from Those They Vowed to Protect, A.B.A. J. (Mar. 2015) (big spending lawyer with prescription drug addiction, and wife, girlfriend, and mistress, serving 25-year prison term after allegedly misappropriating $3.8 million from 58 clients).

Reports of lawyer misconduct continue to appear in the press. See, e.g., Christine Simmons, Law Firm Litigation That Quietly Went Away in 2016, N.Y. L. J. (Dec. 22, 2016); The Hot Seat, Law.com, which includes “Lawyers Behaving Badly: The Worst of 2015” (Dec. 21, 2015). In one non-ALAS example, a disciplinary body recommended the indefinite suspension of a former managing partner of a 50-lawyer firm for extensive billing fraud. See In re Smith, No. 11-072 (Ohio Sup. Ct. Bd. of Comm’rs on Grievances & Discipline, Feb. 3, 2014); see also Debra Cassens Weiss, Former Greenberg Traurig Partner Resigns from Bar amid Probe into Improper Expense Requests, A.B.A. J. (Nov. 1, 2016); Christine Simmons, Former Dewey Chairman Ordered to Pay Bank $400K, N.Y. L. J. (July 1, 2016); Debra Cassens Weiss, Former Sidley partner who faked $69K in Cab Receipts is suspended, A.B.A. J. (Mar. 16, 2015); Cheryl Miller, Big Law Tax Partner Pleads Guilty to Tax Evasion, The Recorder (Feb. 15, 2014); Michelle Smith, Lawyer gets 6 years in $46M RI scam against dying, Associated Press (Dec. 16, 2013) (lawyer was prominent philanthropist).

No one, including ALAS, can pinpoint a particular reason for the increase in lawyer misconduct. See Jeff German, Nevada U.S. Attorney sees rise in number of lawyers prosecuted, Las Vegas Rev. J. (June 9, 2014) (quoting local U.S. Attorney: “In the last several years, the number of lawyers charged with federal crimes has increased dramatically,” and “we cannot speculate as to the reason for the rise in numbers”); see also Abby Simons, Rising number of Minnesota lawyers punished for misconduct, Star Tribune (May 13, 2013) (“Experts on disciplining lawyers … say it’s difficult to explain the apparent spikes in bad behavior”).

Bad conduct has obvious implications for the misbehaving lawyers. Even if they escape jail time, their license is at risk. A finding of misconduct under the rules of professional conduct in one jurisdiction can also put a lawyer’s license in other jurisdictions at risk. For example, after the Delaware Supreme

Lawyer misconduct also subjects the lawyer’s firm to professional liability risks, including claims alleging conflicts of interest, breach of fiduciary duty, violation of client confidences, and negligent failure to supervise. Moreover, even if the involved lawyer’s misconduct had nothing to do with the claimant’s matter, it is a factor that can drastically impede the defense of claims. In New Jersey, the allegation of a lawyer’s intentional misconduct eliminated the statutory requirement of an expert’s affidavit that applies in malpractice cases. See Perez v. Zagami, LLC, 2016 N.J. Super. LEXIS 3, 2016 WL 510313 (Jan. 12, 2016) (abuse of process is intentional not negligent).

Another major risk from lawyer misconduct is disciplinary actions against firm management and other partners for not fulfilling their supervisory or reporting duties under ABA Model Rules 5.1, 5.3, 8.3, and 8.4 (or more exacting non-U.S. rules, such as those discussed in Tab IV.G, Section 2.8.2). In 2016, Model Rule of Professional Conduct 8.4(g) was amended to expand professional misconduct to include harassment and knowing discrimination related to the practice of law. See Peter Geraghty, ABA adopts new anti-discrimination Rule 8.4(g), YourABA (Sept. 2016) (with links to rule amendments and explanatory memorandum). The amendment includes a new Comment [4] expressly noting that Rule 8.4(g) would apply to conduct involving “operating and managing a law firm or law practice.”

A law firm partner with management duties violated her supervisory duties under District of Columbia Rule 5.1 by failing to prevent her partner’s theft of almost $1.5 million from estate planning clients. See In re Dickens, et al., Docket No. 13-BD-094 (D.C. Ct. App. Bd. Prof. Resp. Apr. 2015). In a 182-page opinion, the District of Columbia tribunal identified numerous warning signs that the managing partner disregarded, including extended disappearances, use of the firm’s credit card for personal expenses, and failure to follow policies on engagement letters, recording and billing time, and document management. Despite the conclusion that the managing partner missed clues about her partner’s misappropriations because she did not understand her partner’s work, the board assailed her for her laissez-faire approach to assuring compliance with the rules of professional conduct. See “D.C. Lawyer Suspended for Oversight Failures,” E-Newsletter (June 9, 2015). The Maine Supreme Court found that each lawyer on a firm’s executive committee violated Bar Rule 3.13 (Maine’s version of ABA Model Rule 5.1) by failing to implement practices and policies on when to report a colleague who had violated professional conduct rules. See Warren, 34 A.3d at 1113; cf. Martha Neil, Law partner won’t be disciplined over attorney’s $5.9M theft from their firm, A.B.A. J. (May 28, 2014); see generally Important Conditions Attach to Lawyers’ Mandatory Duty to Report Misconduct, 32 Law. Man. Prof. Conduct 25 (Jan. 13, 2015).

Nonlawyer employees at law firms also have committed misconduct. See, e.g., Ex-Silicon Valley law firm worker gets two years prison for insider trading, Reuters.com (July 29, 2015); Clerk Admits Stealing Material from Prominent Law Firm for Use in $5.6 Million Insider Trading Scheme, FBI Newark Division Press Release (Nov. 12, 2015); Ex-Linklaters employee barred after £86,000 fraud, The Law Society Gazette (June 5, 2015); Former Controller for Washington, D.C. Law Firm Pleads Guilty to Federal Charge in Theft of More Than $960,000, FBI Washington Field Office Press Release (Sept. 16, 2014). This misconduct can directly threaten lawyers, including firm management. The Supreme Court of Florida disbarred two lawyers after the firm’s bookkeeper embezzled over $4 million from the firm’s trust account. See In re Roussso, 117 So. 3d 756 (Fla. 2013):
A lawyer’s responsibility for safekeeping of trust account funds cannot be delegated to a non-lawyer employee of the firm. Misappropriation by office staff does not relieve the lawyer from the requirements of the minimum standards regarding a trust account. See Id. at 760–61. The court also imposed the severe punishment of disbarment because, among other things, the lawyers decided to cover the losses quietly instead of promptly informing clients about the embezzlement. See Id. at 762. In In re Galasso, 961 N.Y.S.2d 475, 478 (App. Div. 2013), the court confirmed a two-year suspension of the firm’s name partner for his failure to supervise the firm’s bookkeeper who had embezzled millions in client funds. See also In re Druce, No. D2014-13 (USPTO Office of Enrollment & Discipline Sept. 5, 2014) (imposing two-year suspension, stayed pending probationary period, on lawyer for failing to supervise paralegal who, without lawyer’s knowledge, knowingly submitted false and forged papers to USPTO); Robinson, 74 A.3d at 697 (D.C. App. 2013) (suspending lawyer for failing to adequately supervise subordinate lawyer’s management of firm’s trust account); In re Peloquin, 338 P.3d 568, 574 (Kan. 2014) (suspending lawyer because he failed to supervise his office manager, who stole settlement funds, and failed to act diligently in other client matters); In re Donohue, 2016 WL 4079666 (Nev. 2016) (unpublished) (one year suspension for lawyer’s failure to investigate and protect client funds from thieving paralegal); Disciplinary Bd. v. Kellington, 852 N.W.2d 395, 401–03 (N.D. 2014) (suspending lawyer for failing to train and supervising staff, among other things). The U.K. Solicitors Disciplinary Tribunal fined and prohibited a solicitor from future ownership of a firm for allowing a nonlawyer fraudster to have too much influence over the firm. See Max Walters, Solicitor Fined after Giving Fraudster ‘Inappropriate Influence’ in Firm, Law Society Gazette (Oct. 19, 2016).

No firm policy and no amount of firm culture can eliminate the risk of bad actors. But the risk can be controlled, much like the risk of impaired lawyers. A hallmark of a healthy organization is a willingness to deliver bad news to management. The keys to preventing lawyer misconduct are a firm culture of compliance supplemented by audit procedures. With respect to culture, firms regularly should remind all personnel to report aberrant or troubling behavior. See Section 2.1 above. The Association of Certified Fraud Examiners (ACFE) reported that employee fraud hotlines were the most effective way to catch corporate criminals, accounting for 40% of the cases included in an ACFE study. See Vincent Ryan, Hotlines, Not Audits, Catch Crooked Employees, CFO.com (June 5, 2014). Although the study appeared to reject audits as effective tools, ALAS believes that basic audit and verification procedures are an important component of law firm risk management.

Firms should consider implementing procedures, such as those listed in the ALAS “Tools for Detecting and Preventing Possible Billing Fraud and Other Improprieties,” including:

1. Requiring daily time submissions;
2. Running all edits to pro forma bills through the accounting department;
3. Issuing all bills from, and receiving all payments in, the accounting department;
4. Administrative review and approval of all expense reports;
5. Systems that flag excessive, irregular, or other troublesome lawyer billing or reimbursement patterns;
6. Dual signature requirements for disbursement of firm or client funds; and
7. Mandatory vacation policies for employees in sensitive areas such as the accounting department.

See 2012 ALAS AGM Written Materials, pages C35–C37; see also Joseph Kenyon, Spotting and Responding to the Red Flags of Fraud, Corp. Couns. (Aug. 14, 2013). Basic “trust but verify” audit controls—like dual signatures to release firm and client funds—could have prevented some lawyer misconduct claims. Of course, the person who provides the second signature needs personal fortitude and
the support of firm management to avoid becoming a “rubber stamp” for requests submitted by heavyweight partners. We encourage firms to maintain clear guidelines on: (1) what client development efforts, travel costs, and similar expenses are properly reimbursable; and (2) the process for obtaining that reimbursement. Some of the claims discussed in this section arose when a lawyer abused firm marketing or travel reimbursements. Firms that tolerate ambiguous or inconsistent reimbursement practices may be tempting some to game the system and others to ignore abuses.

Once firm management learns of lawyer misconduct, it will want to consider discipline and termination issues. Management’s duties to disclose lawyer misconduct to disciplinary authorities and clients are addressed in Sections 2.4 and 2.5 above.

A final cautionary note: these bad-acting lawyers are on the move. Those who were not imprisoned or otherwise involuntarily exited from the practice of law are landing at high-quality firms, including some ALAS firms. ALAS recommends that firms thoroughly vet all lateral candidates. See Rebecca Cohen, Law Firms Struggle With Lateral Partner Due Diligence, Report Finds, Am. Law. (Dec. 12, 2016). This advice applies with special force in light of lawyer misconduct issues.
III. Presenter Biography

KENNETH R. LANDIS, ESQ.

Vice President—Senior Loss Prevention Counsel
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Ken Landis received his undergraduate degree with high honors from the University of Pittsburgh in 1986. He graduated with honors in 1992 from the George Washington University Law School, where he served as a Student Articles Editor of the Law Journal. Ken spent the next 13 years as a commercial litigator and partner with two major Chicago law firms. His experience included jury and non-jury trial and appellate work in state and federal courts in Illinois and elsewhere, as well as arbitration and mediation proceedings.

In January 2005, Ken joined the Attorneys’ Liability Assurance Society, and currently serves as Vice President—Senior Loss Prevention Counsel. ALAS is a mutual insurance company providing lawyers’ professional liability insurance to over 200 large law firms located throughout the United States. Ken’s duties include extensive writing and speaking on topics related to professional responsibility and lawyer liability.
Chapter 3

Defending Lawyers in Grievance Proceedings

Author and Speaker:

Henry Lee Paul
MASTERS OF ETHICS: DEFENDING LAWYERS IN GRIEVANCE PROCEEDINGS

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Disciplinary Landscape in Florida
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- 105,000+ Members of The Florida Bar/12 Law Schools
- ACAP – Approximately 21,000 RFA’s and 5,000 Complaints each year
- Supreme Court Imposing Harsher Sanctions
- Migration of Lack of Professionalism in Discipline (In re Code for Resolving Professionalism Complaints, 116 So. 3d 280 (Fla. 2013))

Best Practices are Best Defenses

Best Practices

- TFB Does Not Keep Practice Area Statistics – Family Law, Trusts & Estates, Criminal are high risk for complaints
- Document Your File – Avoids “He Said – She Said” scenario. Written Fee Agreement is recommended, Keep Time Records
- Phone Calls and Communication – Train and Supervise Staff
- Trust Account Compliance – Third Rail of Lawyer Discipline
- Competence Includes Competence with Technology
Best Practices

- New Lawyers – Find a Mentor and Practice with Professionalism
- TFB Resources - Ethics Hotline, Practicing Resource Institute, Best Practices for Effective Electronic Communication, Mentoring
- Read the Rules Regularly
- Think Before you Send or Post – Social Media is Advertising. Rule 4-7.11

Overview of the Disciplinary System

- ACAP – Intake – Respondor is Required - Dismiss or Send to Branch – Extensions, Six-Year SOL – Rule 3-7.16
- 5 Branches (Tallahassee, Orlando, Tampa, Broward, Miami-Dade). Branch Bar Counsel Actions:
  - Source
  - Staff-SC Chair Involvcal
  - Dismiss
  - Offer Diversion
  - Send to Grievance Committee
- 80 Grievance Committees – 3 year terms, 6 lawyers, 3 lay members
- Role is Similar to Grand Jury – Subpoena Power, Hearing Required for Probable Cause Determination. Respondent is Entitled to Materials Provided to GC – Rule 3-7.4(h). Complainant is not a Party
- Florida Lawyers Assistance

Disciplinary System

- Grievance Committee Actions:
  - Dismiss Complaint,
  - Dismiss w. Letter of Advice
  - Offer Diversion
  - Offer or Accept Admonishment for Minor Misconduct
  - Finding of Probable Cause for Further Disciplinary Action
- Advertising has one Dedicated Statewide Grievance Committee
Disciplinary System

- Formal Complaint Filed with Supreme Court (Emergency Suspensions Have Expedited Procedures – Rule 3-5.2)
- Court Assigns Case to Circuit and Chief Judge of Circuit Appoints Referee
- Relaxed Evidentiary Standards:
  - Hearsay may be Admissible
  - Judicial Findings may be Adopted by Referee
- Clear and Convincing Evidence

Disciplinary System

- Duty to Self Report
  - Felony/Misdemeanor – Rule 3-7.2,
  - Trust Account – Dues Statement Compliance Certification
  - Trust Account Replenishment – Rule 5.11 (a)(1)(B)
- Standing Board Policies:
  - 15.55 Deferral
  - 15.70 Competence
  - 15.77 Communication with Designated Reviewer
  - 15.91 Judicial Referrals
- Confidentiality - Rule 3-7.1

Disciplinary System

- Timeline – Processing Guidelines (Rules and BOG Policy 15.56)
  - 90 Days Staff Level
  - 120 Days GC Level
  - 45 Days Formal Complaint
  - 14 Days to Appoint Referee
  - 60 Days Case Management Conference
  - 6 Months for Trial
  - Report of Referee 30 Days After Trial
  - 60 Days to Petition for Review
  - Exceptions Report for Bar Counsel
The Bar Complaint

How to Respond to a Bar Complaint

• Chart a Course From the Start - Try to Define the Issues

• Turn the Disciplinary Ship Towards Safe Harbor

How to Respond to a Bar Complaint

• Whether to Retain Counsel. Insurance Coverage and Notification

• 15 Day Letter – Response Should be Roadmap of the Defense

• Complainant Must be Copied on Initial Response

• Client Confidentiality 4-1.6(e)– Limited Waiver – But Not a License to Unnecessarily Disparage Client. The Florida Bar v. Knowles, 99 So. 3d 918 (Fla. 2012)
Strategy of Defense

• Akin to Fighting the IRS – Even if you Win – you Lose. The Supreme Court is the “Elephant In the Room”

• Disciplinary Process is Not Like Other Litigation.

• Decision to Hire Lawyer and Role of Defense Lawyer

• Scorched Earth can Scorch the Defense. The Florida Bar v. Adams, 198 So. 3d 593 (Fla. 2016)

• Florida Lawyers Assistance

Strategy of Defense

• Do Not Attempt to Negotiate Away Bar Complaint with Complainant. The Florida Bar v. Fredericks, 756 So. 2d 79 (Fla. 2000)

• Choose a Reasonable Theory of Defense – From Start to Finish

• Florida Standards for Imposing Lawyer Sanctions – Substantive Conduct, Aggravation, Mitigation

• Grievance Committee Practice
  • Opportunity to Personally Present Defense to Local Practitioners/Investigating Member – Unless Precluded by TFB
  • Due Process and The Florida Bar v. Swickle, 589 So. 2d 901 (Fla. 1991)

Strategy of Defense

• Consent Judgment Negotiation – Parties Involved and Dynamics of Settlement. TFB v. Wynn, 210 So. 3d 1271 (Fla. 2017).

• Costs Assessed Against Respondent

• Limited Fee Forfeiture/Restitution (Theft, Clearly Excessive, Solicitation). The Florida Bar v. Della Donna, 583 So. 2d 307 (Fla. 1989)

• Trial
  • To Bifurcate or not to Bifurcate
  • Subpoenas Must be Signed by Referee
  • Venue
Strategy of Defense

- Types of Discipline and Diversion—Rule 3-5.1
  - Diversion is Not Discipline—PPEP’s and Limitations 3-5.3 and 3-5.1(b)
  - Admonishment for Minor Misconduct—Limitations 3-5.1(b)
  - Probation
  - Public Reprimand
  - Suspension: Non-Rehabilitative up to 90 Days - Rehabilitative 91 Days to 3 years
  - Disbarment
  - Permanent Disbarment
  - Disciplinary Resignation

- TFB Petition for Reinstatement/FBBE Application for Readmission

- The Supreme Court Reviews all Disciplinary Matters, with Few Exceptions
RULE 3-7.1 CONFIDENTIALITY

(a) Scope of Confidentiality. All records including files, preliminary investigation reports, interoffice memoranda, records of investigations, and the records in trials and other proceedings under these rules, except those disciplinary matters conducted in circuit courts, are property of The Florida Bar. All of those matters are confidential and will not be disclosed except as provided in these rules. When disclosure is permitted under these rules, it will be limited to information concerning the status of the proceedings and any information that is part of the public record as defined in these rules.

Unless otherwise ordered by this court or the referee in proceedings under these rules, nothing in these rules prohibits the complainant, respondent, or any witness from disclosing the existence of proceedings under these rules, or from disclosing any documents or correspondence served on or provided to those persons except where disclosure is prohibited in Chapter 4 of these rules or by statutes and caselaw regarding attorney-client privilege.

1. Pending Investigations. Disciplinary matters pending at the initial investigatory and grievance committee levels are treated as confidential by The Florida Bar, except as provided in rules 3-7.1(e) and (k).

2. Minor Misconduct Cases. Any case in which a finding of minor misconduct has been entered by action of the grievance committee or board is public information.

3. Probable Cause Cases. Any disciplinary case in which a finding of probable cause for further disciplinary proceedings has been entered is public information. For purposes of this subdivision a finding of probable cause is deemed in those cases authorized by rule 3-3.2(a), for the filing of a formal complaint without the requirement of a finding of probable cause.

4. No Probable Cause Cases. Any disciplinary case that has been concluded by a finding of no probable cause for further disciplinary proceedings is public information.

5. Diversion or Referral to Grievance Mediation Program. Any disciplinary case that has been concluded by diversion to a practice and professionalism enhancement program or by referral to the grievance mediation program is public information on the entry of such a recommendation.

6. Contempt Cases. Contempt proceedings authorized elsewhere in these rules are public information even if the underlying disciplinary matter is confidential as defined in these rules.

7. Incapacity Not Involving Misconduct. Proceedings for placement on the inactive list for incapacity not involving misconduct are public information on the filing of the petition with the Supreme Court of Florida.

8. Petition for Emergency Suspension or Probation. Proceedings seeking a petition for emergency suspension or probation are public information.

9. Proceedings on Determination or Adjudication of Guilt of Criminal Misconduct. Proceedings on determination or adjudication of guilt of criminal misconduct, as provided elsewhere in these rules, are public information.
(10) **Professional Misconduct in Foreign Jurisdiction.** Proceedings based on disciplinary sanctions entered by a foreign court or other authorized disciplinary agency, as provided elsewhere in these rules, are public information.

(11) **Reinstatement Proceedings.** Reinstatement proceedings, as provided elsewhere in these rules, are public information.

(12) **Disciplinary Resignations and Disciplinary Revocations.** Proceedings involving petitions for disciplinary resignation or for disciplinary revocation as provided elsewhere in these rules, are public information.

(b) **Public Record.** The public record consists of the record before a grievance committee, the record before a referee, the record before the Supreme Court of Florida, and any reports, correspondence, papers, recordings, and/or transcripts of hearings furnished to, served on, or received from the respondent or the complainant.

(c) **Circuit Court Proceedings.** Proceedings under rule 3-3.5 are public information.

(d) **Limitations on Disclosure.** Any material provided to The Florida Bar that is confidential under applicable law will remain confidential and will not be disclosed except as authorized by the applicable law. If this type of material is made a part of the public record, that portion of the public record may be sealed by the grievance committee chair, the referee, or the Supreme Court of Florida.

The procedure for maintaining the required confidentiality is set forth in subdivision (m) below.

(e) **Response to Inquiry.** Authorized representatives of The Florida Bar will respond to specific inquiries concerning matters that are in the public domain, but otherwise confidential under the rules, by acknowledging the status of the proceedings.

(f) **Notice to Law Firms.** When a disciplinary file is opened the respondent must disclose to the respondent's current law firm and, if different, the respondent's law firm at the time of the act or acts giving rise to the complaint, the fact that a disciplinary file has been opened. Disclosure must be in writing and in the following form:

A complaint of unethical conduct against me has been filed with The Florida Bar. The nature of the allegations are ___________________. This notice is provided pursuant to rule 3-7.1(f) of the Rules Regulating The Florida Bar.

The notice must be provided within 15 days of notice that a disciplinary file has been opened and a copy of the above notice must be served on The Florida Bar.

(g) **Production of Disciplinary Records Pursuant to Subpoena.** The Florida Bar, pursuant to a valid subpoena issued by a regulatory agency, may provide any documents that are a portion of the public record, even if the disciplinary proceeding is confidential under these rules. The Florida Bar may charge a reasonable fee for identification of and photocopying the documents.

(h) **Notice to Judges.** Any judge of a court of record upon inquiry of the judge will be advised and, absent an inquiry, may be advised as to the status of a confidential disciplinary case and may be provided with a copy of documents in the file that would be part of the public record.
if the case was not confidential. The judge must maintain the confidentiality of the records and not otherwise disclose the status of the case.

(i) **Evidence of Crime.** The confidential nature of these proceedings does not preclude the giving of any information or testimony to authorities authorized to investigate alleged criminal activity.

(j) **Chemical Dependency and Psychological Treatment.** That a lawyer has voluntarily sought, received, or accepted treatment for chemical dependency or psychological problems is confidential and will not be admitted as evidence in disciplinary proceedings under these rules unless agreed to by the attorney who sought the treatment.

For purposes of this subdivision, a lawyer is deemed to have voluntarily sought, received, or accepted treatment for chemical dependency or psychological problems if the lawyer was not under compulsion of law or rule to do so, or if the treatment is not a part of conditional admission to The Florida Bar or of a disciplinary sanction imposed under these rules.

It is the purpose of this subdivision to encourage lawyers to voluntarily seek advice, counsel, and treatment available to lawyers, without fear that the fact it is sought or rendered will or might cause embarrassment in any future disciplinary matter.

(k) **Response to False or Misleading Statements.** If public statements that are false or misleading are made about any otherwise confidential disciplinary case, The Florida Bar may disclose all information necessary to correct such false or misleading statements.

(l) **Disclosure by Waiver of Respondent.** Upon written waiver executed by a respondent, The Florida Bar may disclose the status of otherwise confidential disciplinary proceedings and provide copies of the public record to:

1. the Florida Board of Bar Examiners or the comparable body in other jurisdictions for the purpose of evaluating the character and fitness of an applicant for admission to practice law in that jurisdiction; or
2. Florida judicial nominating commissions or the comparable body in other jurisdictions for the purpose of evaluating the character and fitness of a candidate for judicial office; or
3. The Florida Bar Board of Legal Specialization and Education and any of its certification committees for the purpose of evaluating the character and fitness of a candidate for board certification or recertification; or
4. the governor of the State of Florida for the purpose of evaluating the character and fitness of a nominee to judicial office.

(m) **Maintaining Confidentiality Required by Rule or Law.** The bar will maintain confidentiality of documents and records in its possession and control as required by applicable federal or state law in accordance with the requirements of Fla. R. Jud. Admin 2.420. It will be the duty of respondents and other persons submitting documents and information to the bar to notify bar staff that such documents or information contain material that is exempt from disclosure under applicable rule or law and to request that such exempt material be protected and not be considered public record. Requests to exempt from disclosure all or part of any documents or records must be accompanied by reference to the statute or rule applicable to the information for which exemption is claimed.
RULE 3-7.2 PROCEDURES UPON CRIMINAL OR PROFESSIONAL MISCONDUCT; DISCIPLINE UPON DETERMINATION OR JUDGMENT OF GUILT OF CRIMINAL MISCONDUCT

(a) Definitions.

(1) **Judgment of Guilt.** For the purposes of these rules, “judgment of guilt” includes only those cases in which the trial court in the criminal proceeding enters an order adjudicating the respondent guilty of the offense(s) charged.

(2) **Determination of Guilt.** For the purposes of these rules, “determination of guilt” includes those cases in which the trial court in the criminal proceeding enters an order withholding adjudication of the respondent’s guilt of the offense(s) charged, those cases in which the convicted lawyer has entered a plea of guilty to criminal charges, those cases in which the convicted lawyer has entered a no contest plea to criminal charges, those cases in which the jury has rendered a verdict of guilty of criminal charges, and those cases in which the trial judge in a bench trial has rendered a verdict of guilty of criminal charges.

(3) **Convicted Lawyer.** For the purposes of these rules, “convicted lawyer” means a lawyer who has had either a determination or judgment of guilt entered by the trial court in the criminal proceeding.

(b) **Determination or Judgment of Guilt, Admissibility; Proof of Guilt.** Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial of or plea to any crime under the laws of this state, or under the laws under which any other court making such determination or entering such judgment exercises its jurisdiction, is admissible in proceedings under these rules and is conclusive proof of guilt of the criminal offense(s) charged for the purposes of these rules.

(c) **Notice of Institution of Felony Criminal Charges.** Upon the institution of a felony criminal charge against a member of The Florida Bar by the filing of an indictment or information the member must within 10 days of the institution of the felony criminal charges notify the executive director of The Florida Bar of such charges. Notice includes a copy of the document(s) evidencing institution of the charges.

If the state attorney whose office is assigned to a felony criminal case is aware that the defendant is a member of The Florida Bar, the state attorney must provide a copy of the indictment or information to the executive director.

(d) **Notice of Determination or Judgment of Guilt of Felony Charges.**

(1) **Trial Judge.** If any such determination or judgment is entered in a court of the State of Florida, the trial judge must, within 10 days of the date on which the determination or judgment is entered, give notice to the executive director of The Florida Bar and include a certified copy of the document(s) on which the determination or judgment was entered.
(2) Clerk of Court. If any such determination or judgment is entered in a court of the State of Florida, the clerk of that court must, within 10 days of the date on which the determination or judgment is entered, give notice to the executive director and include a certified copy of the document(s) on which the determination or judgment was entered.

(3) State Attorney. If the state attorney whose office is assigned to a felony criminal case is aware that the defendant is a member of The Florida Bar, the state attorney must give notice of the determination or judgment of guilt to the executive director and include a copy of the document(s) evidencing such determination or judgment.

(e) Notice by Members of Determination or Judgment of Guilt of All Criminal Charges. A member of The Florida Bar must within 10 days of entry of a determination or judgment for any criminal offense, which was entered on or after August 1, 2006, notify the executive director of The Florida Bar of such determination or judgment. Notice must include a copy of the document(s) on which such determination or judgment was entered.

(f) Suspension by Judgment of Guilt (Felonies). Upon receiving notice that a member of the bar has been determined to be or adjudicated guilty of a felony, the bar will file a “Notice of Determination or Judgment of Guilt” or a consent judgment for disbarment or disciplinary revocation in the Supreme Court of Florida. A copy of the document(s) on which the determination or judgment is based must be attached to the notice. Upon the filing of the notice with the Supreme Court of Florida and service of such notice upon the respondent, the respondent is suspended as a member of The Florida Bar as defined in rule 3-5.1(e).

(g) Petition to Modify or Terminate Suspension. At any time after the filing of a notice of determination or judgment of guilt, the respondent may file a petition with the Supreme Court of Florida to modify or terminate such suspension and must serve a copy of the petition on the executive director. The filing of such petition will not operate as a stay of the suspension imposed under the authority of this rule.

(h) Appointment of Referee. Upon the entry of an order of suspension, as provided above, the supreme court must promptly appoint or direct the appointment of a referee.

(1) Hearing on Petition to Terminate or Modify Suspension. The referee must hear a petition to terminate or modify a suspension imposed under this rule within 7 days of appointment and submit a report and recommendation to the Supreme Court of Florida within 7 days of the date of the hearing. The referee will recommend termination or modification of the suspension only if the suspended member can demonstrate that the member is not the convicted person or that the criminal offense is not a felony.

(2) Hearing on Sanctions. In addition to conducting a hearing on a petition to terminate or modify a suspension entered under this rule, the referee may also hear argument concerning the appropriate sanction to be imposed and file a report and recommendation with the supreme court in the same manner and form as provided in rule 3-7.6(m) of these rules. The hearing must be held and a report and recommendation filed with the supreme court within 90 days of assignment as referee.
The respondent may challenge the imposition of a sanction only on the grounds of mistaken identity or whether the conduct involved constitutes a felony under applicable law. The respondent may present relevant character evidence and relevant matters of mitigation regarding the proper sanction to be imposed. The respondent cannot contest the findings of guilt in the criminal proceedings. A respondent who entered a plea in the criminal proceedings is allowed to explain the circumstances concerning the entry of the plea for purposes of mitigation.

The report and recommendations of the referee may be reviewed in the same manner as provided in rule 3-7.7 of these rules.

(i) Appeal of Conviction. If an appeal is taken by the respondent from the determination or judgment in the criminal proceeding, the suspension will remain in effect during the appeal. If on review the cause is remanded for further proceedings, the suspension will remain in effect until the final disposition of the criminal cause unless modified or terminated by the Supreme Court of Florida as elsewhere provided.

Further, the suspension imposed will remain in effect until civil rights have been restored and until the respondent is reinstated.

(j) Expunction. Upon motion of the respondent, the Supreme Court of Florida may expunge a sanction entered under this rule when a final disposition of the criminal cause has resulted in acquittal or dismissal. A respondent who is the subject of a sanction that is expunged under this rule may lawfully deny or fail to acknowledge the sanction, except when the respondent is a candidate for election or appointment to judicial office, or as otherwise required by law.

(k) Waiver of Time Limits. The respondent may waive the time requirements set forth in this rule by written request made to and approved by the referee or supreme court.

(l) Professional Misconduct in Foreign Jurisdiction.

(1) Notice of Discipline by a Foreign Jurisdiction. A member of The Florida Bar who has submitted a disciplinary resignation or otherwise surrendered a license to practice law in lieu of disciplinary sanction, or has been disbarred or suspended from the practice of law by a court or other authorized disciplinary agency of another state or by a federal court must within 30 days after the effective date of the disciplinary resignation, disbarment or suspension file with the Supreme Court of Florida and the executive director of The Florida Bar a copy of the order or judgment effecting such disciplinary resignation, disbarment or suspension.

(2) Effect of Adjudication or Discipline by a Foreign Jurisdiction. On petition of The Florida Bar supported by a copy of a final adjudication by a foreign court or disciplinary authority, the Supreme Court of Florida may issue an order suspending on an emergency basis the member who is the subject of the final adjudication. All of the conditions not in conflict with this rule applicable to issuance of emergency suspension orders elsewhere
within these Rules Regulating The Florida Bar are applicable to orders entered under this rule.

(m) Discipline Upon Removal From Judicial Office.

(1) Notice of Removal. If an order of the Supreme Court of Florida removes a member of The Florida Bar from judicial office for judicial misconduct, the clerk of the supreme court will forward a copy of the order of removal to the executive director of The Florida Bar.

(2) Filing of Formal Complaint. Upon receipt of an order removing a member from judicial office for judicial misconduct, the bar may file a formal complaint with the court and seek appropriate discipline.

(3) Admissibility of Order; Conclusive Proof of Facts. The order of removal is admissible in proceedings under these rules and is conclusive proof of the facts on which the judicial misconduct was found by the court.

(4) Determination of Lawyer Misconduct. The issue of whether the facts establishing the judicial misconduct also support a finding of lawyer misconduct are determined by the referee based on the record of the proceedings.
RULE 5-1.1 TRUST ACCOUNTS

(a) Nature of Money or Property Entrusted to Attorney.

   (1) Trust Account Required; Location of Trust Account; Commingling Prohibited. A lawyer must hold in trust, separate from the lawyer’s own property, funds and property of clients or third persons that are in a lawyer’s possession in connection with a representation. All funds, including advances for fees, costs, and expenses, must be kept in a separate bank or savings and loan association account maintained in the state where the lawyer’s office is situated or elsewhere with the consent of the client or third person and clearly labeled and designated as a trust account except:

   (A) A lawyer may maintain funds belonging to the lawyer in the lawyer’s trust account in an amount no more than is reasonably sufficient to pay bank charges relating to the trust account; and

   (B) A lawyer may deposit the lawyer’s own funds into trust to replenish a shortage in the lawyer’s trust account. Any deposits by the lawyer to cover trust account shortages must be no more than the amount of the trust account shortage, but may be less than the amount of the shortage. The lawyer must notify the bar’s lawyer regulation department immediately of the shortage in the lawyer’s trust account, the cause of the shortage, and the amount of the replenishment of the trust account by the lawyer.

   (2) Compliance with Client Directives. Trust funds may be separately held and maintained other than in a bank or savings and loan association account if the lawyer receives written permission from the client to do so and provided that written permission is received before maintaining the funds other than in a separate account.

   (3) Safe Deposit Boxes. If a lawyer uses a safe deposit box to store trust funds or property, the lawyer must advise the institution in which the deposit box is located that it may include property of clients or third persons.

(b) Application of Trust Funds or Property to Specific Purpose. Money or other property entrusted to an attorney for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney’s fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion.

(c) Liens Permitted. This subchapter does not preclude the retention of money or other property upon which the lawyer has a valid lien for services nor does it preclude the payment of agreed fees from the proceeds of transactions or collection.

(d) Controversies as to Amount of Fees. Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or fraudulent. In a controversy alleging a clearly excessive, extortionate, or
fraudulent fee, announced willingness of an attorney to submit a dispute as to the amount of a fee to a competent tribunal for determination may be considered in any determination as to intent or in mitigation of discipline; provided, such willingness shall not preclude admission of any other relevant admissible evidence relating to such controversy, including evidence as to the withholding of funds or property of the client, or to other injury to the client occasioned by such controversy.

(e) Notice of Receipt of Trust Funds; Delivery; Accounting. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(f) Disputed Ownership of Trust Funds. When in the course of representation a lawyer is in possession of property in which 2 or more persons (1 of whom may be the lawyer) claim interests, the property shall be treated by the lawyer as trust property, but the portion belonging to the lawyer or law firm shall be withdrawn within a reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(g) Interest on Trust Accounts (IOTA) Program.

(1) Definitions. As used in this rule, the term:

(A) “Nominal or short term” describes funds of a client or third person that, pursuant to subdivision (3), below, the lawyer has determined cannot earn income for the client or third person in excess of the costs to secure the income.

(B) “Foundation” means The Florida Bar Foundation, Inc.

(C) “IOTA account” means an interest or dividend-bearing trust account benefiting The Florida Bar Foundation established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons.

(D) “Eligible Institution” means any bank or savings and loan association authorized by federal or state laws to do business in Florida and insured by the Federal Deposit Insurance Corporation, or any successor insurance corporation(s) established by federal or state laws, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Florida, all of which must meet the requirements set out in subdivision (5), below.

(E) “Interest or dividend-bearing trust account” means a federally insured checking account or investment product, including a daily financial institution repurchase agreement or a money market fund. A daily financial institution repurchase agreement must be fully collateralized by, and an open-end money market fund must consist solely of, United States Government Securities. A daily financial institution repurchase agreement...
agreement may be established only with an eligible institution that is deemed to be “well capitalized” or “adequately capitalized” as defined by applicable federal statutes and regulations. An open-end money market fund must hold itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940, and have total assets of at least $250 million. The funds covered by this rule shall be subject to withdrawal upon request and without delay.

(2) Required Participation. All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of The Florida Bar practicing law from an office or other business location within the state of Florida shall be deposited into one or more IOTA accounts, unless the funds may earn income for the client or third person in excess of the costs incurred to secure the income, except as provided elsewhere in this chapter. Only trust funds that are nominal or short term shall be deposited into an IOTA account. The member shall certify annually, in writing, that the member is in compliance with, or is exempt from, the provisions of this rule.

(3) Determination of Nominal or Short-Term Funds. The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short term. In the exercise of this good faith judgment, the lawyer shall consider such factors as:

(A) the amount of a client’s or third person’s funds to be held by the lawyer or law firm;

(B) the period of time such funds are expected to be held;

(C) the likelihood of delay in the relevant transaction(s) or proceeding(s);

(D) the cost to the lawyer or law firm of establishing and maintaining an interest-bearing account or other appropriate investment for the benefit of the client or third person; and

(E) minimum balance requirements and/or service charges or fees imposed by the eligible institution.

The determination of whether a client’s or third person’s funds are nominal or short term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with ethical impropriety or other breach of professional conduct based on the exercise of such good faith judgment.

(4) Notice to Foundation. Lawyers or law firms shall advise the Foundation, at Post Office Box 1553, Orlando, Florida 32802-1553, of the establishment of an IOTA account for funds covered by this rule. Such notice shall include: the IOTA account number as assigned by the eligible institution; the name of the lawyer or law firm on the IOTA account; the eligible institution name; the eligible institution address; and the name and Florida Bar attorney number of the lawyer, or of each member of The Florida Bar in a law firm, practicing from an office or other business location within the state of Florida that has established the IOTA account.
(5) **Eligible Institution Participation in IOTA.** Participation in the IOTA program is voluntary for banks, savings and loan associations, and investment companies. Institutions that choose to offer and maintain IOTA accounts must meet the following requirements:

(A) Interest Rates and Dividends. Eligible institutions shall maintain IOTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOTA account customers when IOTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any.

(B) Determination of Interest Rates and Dividends. In determining the highest interest rate or dividend generally available from the institution to its non-IOTA accounts in compliance with subdivision (5)(A), above, eligible institutions may consider factors, in addition to the IOTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOTA accounts and accounts of non-IOTA customers, and that these factors do not include that the account is an IOTA account.

(C) Remittance and Reporting Instructions. Eligible institutions shall:

(i) calculate and remit interest or dividends on the balance of the deposited funds, in accordance with the institution’s standard practice for non-IOTA account customers, less reasonable service charges or fees, if any, in connection with the deposited funds, at least quarterly, to the Foundation;

(ii) transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm from whose IOTA account the remittance is sent, the lawyer’s or law firm’s IOTA account number as assigned by the institution, the rate of interest applied, the period for which the remittance is made, the total interest or dividend earned during the remittance period, the amount and description of any service charges or fees assessed during the remittance period, and the net amount of interest or dividend remitted for the period; and

(iii) transmit to the depositing lawyer or law firm, for each remittance, a statement showing the amount of interest or dividend paid to the Foundation, the rate of interest applied, and the period for which the statement is made.

(6) **Small Fund Amounts.** The Foundation may establish procedures for a lawyer or law firm to maintain an interest-free trust account for client and third-person funds that are nominal or short term when their nominal or short-term trust funds cannot reasonably be expected to produce or have not produced interest income net of reasonable eligible institution service charges or fees.

(7) **Confidentiality and Disclosure.** The Foundation shall protect the confidentiality of information regarding a lawyer’s or law firm’s trust account obtained by virtue of this rule. However, the Foundation shall, upon an official written inquiry of The Florida Bar made in the course of an investigation conducted under these Rules Regulating The Florida Bar, disclose requested relevant information about the location and account numbers of lawyer or law firm trust accounts.
(h) Interest on Funds That Are Not Nominal or Short-Term. A lawyer who holds funds for a client or third person and who determines that the funds are not nominal or short-term as defined elsewhere in this subchapter shall not receive benefit from interest on funds held in trust.

(i) Unidentifiable Trust Fund Accumulations and Trust Funds Held for Missing Owners. When an attorney’s trust account contains an unidentifiable accumulation of trust funds or property, or trust funds or property held for missing owners, such funds or property shall be so designated. Diligent search and inquiry shall then be made by the attorney to determine the beneficial owner of any unidentifiable accumulation or the address of any missing owner. If the beneficial owner of an unidentified accumulation is determined, the funds shall be properly identified as the lawyer’s trust property. If a missing beneficial owner is located, the trust funds or property shall be paid over or delivered to the beneficial owner if the owner is then entitled to receive the same. Trust funds and property that remain unidentifiable and funds or property that are held for missing owners after being designated as such shall, after diligent search and inquiry fail to identify the beneficial owner or owner’s address, be disposed of as provided in applicable Florida law.

(j) Disbursement against Uncollected Funds. A lawyer generally may not use, endanger, or encumber money held in trust for a client for purposes of carrying out the business of another client without the permission of the owner given after full disclosure of the circumstances. However, certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients owning trust account funds subject to possibly being affected. Except for disbursements based upon any of the 6 categories of limited-risk uncollected deposits enumerated below, a lawyer may not disburse funds held for a client or on behalf of that client unless the funds held for that client are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled, and credited to the lawyer’s trust account. Notwithstanding that a deposit made to the lawyer’s trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit:

1. when the deposit is made by certified check or cashier’s check;

2. when the deposit is made by a check or draft representing loan proceeds issued by a federally or state-chartered bank, savings bank, savings and loan association, credit union, or other duly licensed or chartered institutional lender;

3. when the deposit is made by a bank check, official check, treasurer’s check, money order, or other such instrument issued by a bank, savings and loan association, or credit union when the lawyer has reasonable and prudent grounds to believe the instrument will clear and constitute collected funds in the lawyer’s trust account within a reasonable period of time;

4. when the deposit is made by a check drawn on the trust account of a lawyer licensed to practice in the state of Florida or on the escrow or trust account of a real estate broker licensed under applicable Florida law when the lawyer has a reasonable and prudent
belief that the deposit will clear and constitute collected funds in the lawyer’s trust account within a reasonable period of time;

(5) when the deposit is made by a check issued by the United States, the State of Florida, or any agency or political subdivision of the State of Florida;

(6) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the state of Florida and the lawyer has a reasonable and prudent belief that the instrument will clear and constitute collected funds in the trust account within a reasonable period of time.

A lawyer’s disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those set forth above, when it results in funds of other clients being used, endangered, or encumbered without authorization, may be grounds for a finding of professional misconduct. In any event, such a disbursement is at the risk of the lawyer making the disbursement. If any of the deposits fail, the lawyer, upon obtaining knowledge of the failure, must immediately act to protect the property of the lawyer’s other clients. However, if the lawyer accepting any such check personally pays the amount of any failed deposit or secures or arranges payment from sources available to the lawyer other than trust account funds of other clients, the lawyer shall not be considered guilty of professional misconduct.

(k) **Overdraft Protection Prohibited.** An attorney shall not authorize overdraft protection for any account that contains trust funds.

**Comment**

A lawyer must hold property of others with the care required of a professional fiduciary. This chapter requires maintenance of a bank or savings and loan association account, clearly labeled as a trust account and in which only client or third party trust funds are held.

Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances.

All property that is the property of clients or third persons should be kept separate from the lawyer’s business and personal property and, if money, in 1 or more trust accounts, unless requested otherwise in writing by the client. Separate trust accounts may be warranted when administering estate money or acting in similar fiduciary capacities.

A lawyer who holds funds for a client or third person and who determines that the funds are not nominal or short term as defined elsewhere in this subchapter should hold the funds in a separate interest-bearing account with the interest accruing to the benefit of the client or third person unless directed otherwise in writing by the client or third person.

Lawyers often receive funds from which the lawyer’s fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed.

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However, a lawyer may not hold funds to coerce a client into accepting the lawyer’s contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client’s creditors, may have lawful claims against funds or other property in a lawyer’s custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. When the lawyer has a duty under applicable law to protect the third-party claim and the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, and, where appropriate, the lawyer should consider the possibility of depositing the property or funds in dispute into the registry of the applicable court so that the matter may be adjudicated.

The Supreme Court of Florida has held that lawyer trust accounts may be the proper target of garnishment actions. See *Arnold, Matheny and Eagan, P.A. v. First American Holdings, Inc.*, 982 So.2d 628 (Fla. 2008).

The obligations of a lawyer under this chapter are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

Each lawyer is required to be familiar with and comply with the Rules Regulating Trust Accounts as adopted by the Supreme Court of Florida.

Money or other property entrusted to a lawyer for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for attorney’s fees, and a refusal to account for and deliver over such property upon demand shall be a conversion. This does not preclude the retention of money or other property upon which a lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collections.

Advances for fees and costs (funds against which costs and fees are billed) are the property of the client or third party paying same on a client’s behalf and are required to be maintained in trust, separate from the lawyer’s property. Retainers are not funds against which future services are billed. Retainers are funds paid to guarantee the future availability of the lawyer’s legal services and are earned by the lawyer upon receipt. Retainers, being funds of the lawyer, may not be placed in the client’s trust account.

The test of excessiveness found elsewhere in the Rules Regulating The Florida Bar applies to all fees for legal services including retainers, nonrefundable retainers, and minimum or flat fees.
(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with the Rules Regulating The Florida Bar; or

(6) to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.

(e) Inadvertent Disclosure of Information. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(f) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.
Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(c) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of confidential information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based on experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose confidential information except as authorized or required by the Rules Regulating The Florida Bar or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information
by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In this situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer must reveal information in order to prevent these consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the lawyer to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.
Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure this advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (c)(5) permits this disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges complicity, so that the defense may be established by responding directly to a third party who has made the assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. A charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action
to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

**Disclosures otherwise required or authorized**

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against a supersession.

**Detection of Conflicts of Interest**

Subdivision (c)(6) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, for example, when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See comment to rule 4-1.17. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. The disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person’s intentions are known to the person’s spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, subdivision (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer’s fiduciary duty to the lawyer’s firm may also govern a lawyer’s conduct when exploring an association with another firm and is beyond the scope of these rules.

Any information disclosed under this subdivision may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. This subdivision does not restrict the use of information acquired by means independent of any disclosure under this subdivision.
This subdivision also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, for example, when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

**Acting Competently to Preserve Confidentiality**

Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See rules 4-1.1, 4-5.1 and 4-5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forgo security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, for example state and federal laws that govern data privacy or that impose notification requirements on the loss of, or unauthorized access to, electronic information, is beyond the scope of these rules. For a lawyer’s duties when sharing information with nonlawyers outside the lawyer’s own firm, see the comment to rule 4-5.3.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, for example state and federal laws that govern data privacy, is beyond the scope of these rules.

**Former client**

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.
RULE 3-5.1 GENERALLY

A judgment entered, finding a member of The Florida Bar guilty of misconduct, will include 1 or more of the following disciplinary measures:

(a) **Admonishments.** A Supreme Court of Florida order finding minor misconduct and adjudging an admonishment may direct the respondent to appear before the Supreme Court of Florida, the board of governors, grievance committee, or the referee for administration of the admonishment. A grievance committee report and finding of minor misconduct or the board of governors, on review of the report, may direct the respondent to appear before the board of governors or the grievance committee for administration of the admonishment. A memorandum of administration of an admonishment will be made a part of the record of the proceeding after the admonishment is administered.

(b) **Minor Misconduct.** Minor misconduct is the only type of misconduct for which an admonishment is an appropriate disciplinary sanction.

(1) **Criteria.** In the absence of unusual circumstances misconduct will not be regarded as minor if any of the following conditions exist:
   
   (A) the misconduct involves misappropriation of a client's funds or property;
   
   (B) the misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights, or valuable property rights) to a client or other person;
   
   (C) the respondent has been publicly disciplined in the past 3 years;
   
   (D) the misconduct involved is of the same nature as misconduct for which the respondent has been disciplined in the past 5 years;
   
   (E) the misconduct includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent; or
   
   (F) the misconduct constitutes the commission of a felony under applicable law.

(2) **Discretion of Grievance Committee.** A grievance committee may recommend an admonishment for minor misconduct or diversion to a practice and professionalism enhancement program when unusual circumstances are present, despite the presence of 1 or more of the criteria described in subpart (1) of this rule. When the grievance committee recommends an admonishment for minor misconduct or diversion to a practice and professionalism enhancement program under these circumstances, its report will contain a detailed explanation of the circumstances giving rise to the committee's recommendation.

(3) **Recommendation of Minor Misconduct.** If a grievance committee finds the respondent guilty of minor misconduct or if the respondent admits guilt of minor misconduct and the committee concurs, the grievance committee will file its report recommending an admonishment, the manner of administration, the taxing of costs, and an assessment or administrative fee in the amount of $1,250 against the respondent. The report recommending an admonishment will be forwarded to staff counsel and the designated reviewer for review. If staff counsel does not return the report to the grievance
committee to remedy a defect in the report, or if the report is not referred to the disciplines review committee by the designated reviewer [as provided in rule 3-7.5(b)], the report will then be served on the respondent by bar counsel. The report and finding of minor misconduct becomes final unless rejected by the respondent within 15 days after service of the report. If rejected by the respondent, the report will be referred to bar counsel and referee for trial on complaint of minor misconduct to be prepared by bar counsel as in the case of a finding of probable cause. If the report of minor misconduct is not rejected by the respondent, notice of the finding of minor misconduct will be given, in writing, to the complainant.

(4) Rejection of Minor Misconduct Reports. The rejection by the board of governors of a grievance committee report of minor misconduct, without dismissal of the case, or remand to the grievance committee, is deemed a finding of probable cause. The rejection of a report by a respondent is deemed a finding of probable cause for minor misconduct. At trial before a referee following rejection by a respondent of a report of minor misconduct, the referee may recommend any discipline authorized under these rules.

(5) Admission of Minor Misconduct. A respondent may tender a written admission of minor misconduct to bar counsel or to the grievance committee within 15 days after a finding of probable cause by a grievance committee. An admission of minor misconduct may be conditioned on acceptance by the grievance committee, but the respondent may not condition the admission of minor misconduct on the method of administration of the admonishment or on nonpayment of costs incurred in the proceedings. An admission may be tendered after a finding of probable cause (but before the filing of a complaint) only if an admission has not been previously tendered. If the admission is tendered after a finding of probable cause, the grievance committee may consider the admission without further evidentiary hearing and may either reject the admission, affirming its prior action, or accept the admission and issue its report of minor misconduct. If a respondent’s admission is accepted by the grievance committee, the respondent may not later reject a report of the committee recommending an admonishment for minor misconduct. If the admission of minor misconduct is rejected, the admission may not be considered or used against the respondent in subsequent proceedings.

(c) Probation. The respondent may be placed on probation for a stated period of time of not less than 6 months nor more than 5 years or for an indefinite period determined by conditions stated in the order. The judgment will state the conditions of the probation, which may include but are not limited to the following:

(1) completion of a practice and professionalism enhancement program as provided elsewhere in these rules;
(2) supervision of all or part of the respondent's work by a member of The Florida Bar;
(3) required reporting to a designated agency;
(4) satisfactory completion of a course of study or a paper on legal ethics approved by the Supreme Court of Florida;
(5) supervision over fees and trust accounts as the court directs; or
restrictions on the ability to advertise legal services, either in type of advertisement or a general prohibition for a stated period of time, in cases in which rules regulating advertising have been violated or the legal representation in which the misconduct occurred was obtained by advertising.

The respondent will reimburse the bar for the costs of supervision. The respondent may be punished for contempt on petition by The Florida Bar, as provided elsewhere in these Rules Regulating The Florida Bar, on failure of a respondent to comply with the conditions of the probation or a finding of probable cause as to conduct of the respondent committed during the period of probation. An order of the court imposing sanctions for contempt under this rule may also terminate the probation previously imposed.

(d) Public Reprimand. A public reprimand will be administered in the manner prescribed in the judgment but all reprimands will be reported in the Southern Reporter. Due notice will be given to the respondent of any proceeding set to administer the reprimand. The respondent must appear personally before the Supreme Court of Florida, the board of governors, any judge designated to administer the reprimand, or the referee, if required, and this appearance will be made a part of the record of the proceeding.

(e) Suspension. The respondent may be suspended from the practice of law for a period of time to be determined by the conditions imposed by the judgment or order or until further order of the court. During this suspension the respondent continues to be a member of The Florida Bar but without the privilege of practicing. A suspension of 90 days or less does not require proof of rehabilitation or passage of the Florida bar examination and the respondent will become eligible for all privileges of members of The Florida Bar on the expiration of the period of suspension. A suspension of more than 90 days requires proof of rehabilitation and may require passage of all or part of the Florida bar examination and the respondent will not become eligible for all privileges of members of The Florida Bar until the court enters an order reinstating the respondent to membership in The Florida Bar. No suspension will be ordered for a specific period of time more than 3 years.

An order or opinion imposing a suspension of 90 days or less will include a provision that prohibits the respondent from accepting new business from the date of the order or opinion until the end of the term of the suspension and will provide that the suspension is effective 30 days from the date of the order or opinion so that the respondent may close out the practice of law and protect the interests of existing clients, unless the court orders otherwise.

An order or opinion imposing a suspension of more than 90 days will include a provision that prohibits the respondent from accepting new business from the date of the order or opinion until the date of the court’s order of reinstatement and will provide that the suspension is effective 30 days from the date of the order or opinion so that the respondent may close out the practice of law and protect the interests of existing clients, unless the court orders otherwise.

(f) Disbarment. A judgment of disbarment terminates the respondent’s status as a member of the bar. Permanent disbarment precludes readmission. A former member who has not been permanently disbarred may only be admitted again on full compliance with the rules and regulations governing admission to the bar. Except as otherwise provided in these rules, no application for readmission may be tendered within 5 years after the date of
disbarment or a longer period ordered by the court in the disbarment order or at any time after that date until all court-ordered restitution and outstanding disciplinary costs have been paid.

Disbarment is the presumed sanction for lawyers found guilty of theft from a lawyer’s trust account or special trust funds received or disbursed by a lawyer as guardian, personal representative, receiver, or trustee. A respondent found guilty of theft will have the opportunity to offer competent, substantial evidence to rebut the presumption that disbarment is appropriate.

Unless waived or modified by the court on motion of the respondent, an order or opinion imposing disbarment will include a provision that prohibits the respondent from accepting new business from the date of the order or opinion and will provide that the disbarment is effective 30 days from the date of the order or opinion so that the respondent may close out the practice of law and protect the interests of existing clients.

(g) Disciplinary Revocation. A disciplinary revocation is tantamount to a disbarment. A respondent may petition for disciplinary revocation in lieu of defending against allegations of disciplinary violations. If accepted by the Supreme Court of Florida, a disciplinary revocation terminates the respondent’s status as a member of the bar. A former bar member whose disciplinary revocation has been accepted may only be admitted again upon full compliance with the rules and regulations governing admission to the bar. Like disbarment, disciplinary revocation terminates the respondent’s license and privilege to practice law and requires readmission to practice under the Rules of the Supreme Court Relating to Admissions to the Bar. No application for readmission may be tendered until the later of 5 years after the date of the order of the Supreme Court of Florida granting the petition for disciplinary revocation, or such other period of time in excess of 5 years contained in said order.

(h) Notice to Clients. Unless the court orders otherwise, when the respondent is served with an order of disbarment, disbarment on consent, disciplinary revocation, suspension, emergency suspension, emergency probation, or placement on the inactive list for incapacity not related to misconduct, the respondent must, immediately furnish a copy of the order to:

1. all of the respondent's clients with matters pending in the respondent's practice;
2. all opposing counsel or co-counsel in the matters listed in (1), above;
3. all courts, tribunals, or adjudicative agencies before which the respondent is counsel of record; and
4. all state, federal, or administrative bars of which respondent is a member.

Within 30 days after service of the order the respondent must furnish bar counsel with a sworn affidavit listing the names and addresses of all persons and entities that have been furnished copies of the order.

(i) Forfeiture of Fees. An order of the Supreme Court of Florida or a report of minor misconduct adjudicating a respondent guilty of entering into, charging, or collecting a fee prohibited by the Rules Regulating The Florida Bar may order the respondent to forfeit the fee or any part thereof. In the case of a clearly excessive fee, the excessive amount of the fee may be ordered returned to the client, and a fee otherwise prohibited by the Rules Regulating
The Florida Bar may be ordered forfeited to The Florida Bar Clients' Security Fund and disbursed in accordance with its rules and regulations.

(j) **Restitution.** In addition to any of the foregoing disciplinary sanctions and any disciplinary sanctions authorized elsewhere in these rules, the respondent may be ordered or agree to pay restitution to a complainant or other person if the disciplinary order finds that the respondent has received a clearly excessive, illegal, or prohibited fee or that the respondent has converted trust funds or property. The amount of restitution will be specifically set forth in the disciplinary order or agreement and will not exceed the amount by which a fee is clearly excessive, in the case of a prohibited or illegal fee will not exceed the amount of the fee, or in the case of conversion will not exceed the amount of the conversion established in disciplinary proceedings. The disciplinary order or agreement will also state to whom restitution must be made and the date by which it must be completed. Failure to comply with the order or agreement will cause the respondent to become a delinquent member and will not preclude further proceedings under these rules. The respondent must provide the bar with telephone numbers and current addresses of all individuals or entities to whom the respondent is ordered to pay restitution.
RULE 3-5.3 DIVERSION OF DISCIPLINARY CASES TO PRACTICE AND PROFESSIONALISM ENHANCEMENT PROGRAMS

(a) Authority of Board. The board of governors is hereby authorized to establish practice and professionalism enhancement programs to which eligible disciplinary cases may be diverted as an alternative to disciplinary sanction.

(b) Types of Disciplinary Cases Eligible for Diversion. Disciplinary cases that otherwise would be disposed of by a finding of minor misconduct or by a finding of no probable cause with a letter of advice are eligible for diversion to practice and professionalism enhancement programs.

(c) Limitation on Diversion. A respondent who has been the subject of a prior diversion is not eligible for diversion for the same type of rule violation for a period of 5 years after the earlier diversion. However, a respondent who has been the subject of a prior diversion and then is alleged to have violated a completely different type of rule at least 1 year after the initial diversion, will be eligible for a practice and professionalism enhancement program.

(d) Approval of Diversion of Cases at Staff or Grievance Committee Level Investigations. The bar shall not offer a respondent the opportunity to divert a disciplinary case that is pending at staff or grievance committee level investigations to a practice and professionalism enhancement program unless staff counsel, the grievance committee chair, and the designated reviewer concur.

(e) Contents of Diversion Recommendation. If a diversion recommendation is approved as provided in subdivision (d), the recommendation shall state the practice and professionalism enhancement program(s) to which the respondent shall be diverted, shall state the general purpose for the diversion, and the costs thereof to be paid by the respondent.

(f) Service of Recommendation on and Review by Respondent. If a diversion recommendation is approved as provided in subdivision (d), the recommendation shall be served on the respondent who may accept or reject a diversion recommendation in the same manner as provided for review of recommendations of minor misconduct. The respondent shall not have the right to reject any specific requirement of a practice and professionalism enhancement program.

(g) Effect of Rejection of Recommendation by Respondent. In the event that a respondent rejects a diversion recommendation the matter shall be returned for further proceedings under these rules.

(h) Diversion at Trial Level.

(1) Agreement of the Parties. A referee may recommend diversion of a disciplinary case to a practice and professionalism enhancement program if the bar approves diversion and the respondent agrees. The procedures for approval of
conditional pleas provided elsewhere in these rules shall apply to diversion at the trial level.

(2) After Submission of Evidence. A referee may recommend diversion of a disciplinary case to a practice and professionalism enhancement program if, after submission of evidence, but before a finding of guilt, the referee determines that, if proven, the conduct alleged to have been committed by the respondent is not more serious than minor misconduct.

(3) Costs of Practice and Professionalism Enhancement Program. A referee’s recommendation of diversion to a practice and professionalism enhancement program shall state the costs thereof to be paid by the respondent.

(4) Appeal of Diversion Recommendation. The respondent and the bar shall have the right to appeal a referee’s recommendation of diversion, except in the case of diversion agreed to under subdivision (h)(1).

(5) Authority of Referee to Refer a Matter to a Practice and Professionalism Enhancement Program. Nothing in this rule shall preclude a referee from referring a disciplinary matter to a practice and professionalism enhancement program as a part of a disciplinary sanction.

(i) Effect of Diversion. When the recommendation of diversion becomes final, the respondent shall enter the practice and professionalism enhancement program(s) and complete the requirements thereof. Upon respondent’s entry into a practice and professionalism enhancement program, the bar shall terminate its investigation into the matter and its disciplinary files shall be closed indicating the diversion. Diversion into the practice and professionalism enhancement program shall not constitute a disciplinary sanction.

(j) Effect of Completion of the Practice and Professionalism Enhancement Program. If a respondent successfully completes all requirements of the practice and professionalism enhancement program(s) to which the respondent was diverted, the bar’s file shall remain closed.

(k) Effect of Failure to Complete the Practice and Professionalism Enhancement Program. If a respondent fails to fully complete all requirements of the practice and professionalism enhancement program(s) to which the respondent was diverted, including the payment of costs thereof, the bar may reopen its disciplinary file and conduct further proceedings under these rules. Failure to complete the practice and professionalism enhancement program shall be considered as a matter of aggravation when imposing a disciplinary sanction.

(l) Costs of Practice and Professionalism Enhancement Programs. The Florida Bar shall annually determine the costs of practice and professionalism enhancement programs and publish the amount of the costs thereof that shall be assessed against and paid by a respondent.
Comment

As to subdivision (c) of 3-5.3, a lawyer who agreed to attend the Advertising Workshop in 1 year would not be eligible for another such diversion for an advertising violation for a period of 5 years following the first diversion. However, that same lawyer would be eligible to attend the Advertising Workshop 1 year and a Trust Account Workshop for a completely different violation 1 year after the first diversion is completed.