

“Fun with Ethics”—Lawyer Wellness

INTRODUCTION

I. A PROFESSION AT RISK: Report of the Committee on Lawyer Well-Being of the Supreme Court of Virginia

On August 14, 2017 a landmark report was published by the National Task Force on Lawyer Well Being (“National Task Force”). The National Task Force included Chief Justice Donald W. Lemons which issued the “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change.”¹ The national task force report was a clarion call for collaboration within the legal profession to confront the high rates of suicide, substance abuse, depression, and anxiety afflicting our profession from law students to aging lawyers transitioning out of practice.

Upon issuance of the report, Chief Justice Lemons established a Committee chaired by Justice William Mims and comprised of judges, law school deans, bar leaders, the Virginia Board of Bar Examiners, law firms, and public sector lawyers, including legal aid. Over the following year, the Committee studied the data and in September 2018 issued its report, “A Profession at Risk.”² Comprehensive and targeted, the report provides concrete steps to address the impairment and at-risk behaviors that compromise lawyers individually and the profession collectively and impede our ability to serve the public. The strategic and funding recommendations are as follows:

1. A position and program within the Office of the Executive Secretary of the Supreme Court (OES) to oversee the education and training of, and assistance to, lawyers, judges, and law students regarding generalized health and wellness initiatives. See report, p. 5.
2. Adequate funding to Lawyers Helping Lawyers (LHL)(now called the Virginia Judges and Lawyers Assistance Program or VJLAP). LHL is severely underfunded compared to other jurisdictions’ lawyer assistance programs. In FY 2018-19, LHL opened 74 new cases. In order to expand

¹ <https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf>

² https://www.vsb.org/docs/A_Profession_At_Risk_Report.pdf

its outreach to more effectively understand and meet the need of Virginia's 32,000 active members, LHL will grow from one Richmond office to three offices, including Roanoke and Alexandria, with 10 additional locations in Virginia with trained volunteers. LHL's staff will grow from one full-time and one part-time employee to six full-time employees. See report, p. 5.

3. Appoint a multi-disciplinary advisory board, comprised of volunteers including LHL representatives, to advise OES regarding all aspects of the comprehensive well-being initiatives. The board would provide guidance to the Mandatory Continuing Legal Education (MCLE) Board and recommend changes to the Rules of Court with respect to professional health initiatives. See report, p. 5-6.
4. Develop online professional health initiatives and CLE programming that qualify for MCLE credit and are available to Virginia lawyers free of charge. See report, p. 6.

All of these recommendations have been acted upon and then some:

1. The Supreme Court of Virginia and the Office of the Executive Secretary is moving forward to employ a staff person to oversee the education and training of, and assistance to, lawyers, judges, and law students regarding generalized health and wellness initiatives.
2. The Supreme Court of Virginia entered an order requiring an annual assessment of \$30 per VSB member to fund VJLAP and enable it to implement its strategic plan.
3. The MCLE Department of the VSB has amended its regulations and MCLE Op. 19 to encourage and approve for CLE credit courses on lawyer well-being.
4. Rule 1.1 (Competence) of the Virginia Rules of Professional Conduct was amended by adding a new Comment [7] which calls to attention the fact that maintaining well-being is an aspect of maintaining the required competence to represent clients.

5. Amendments to the VSB professional regulations and disciplinary procedures were amended to facilitate retirement for a lawyer suffering from a permanent impairment such as an irreversible cognitive decline, by allowing retirement with dignity instead of the stigma of having the lawyer suspended on impairment grounds.
 6. The disciplinary rule requirement of confidentiality during bar investigations has been amended so that bar counsel may share information of a respondent's possible mental health problems or substance abuse with a lawyer's assistance program such as VJLAP.
 7. In February 2019, the first annual Law School Summit on Wellness was held in Charlottesville. Most of the members of the Supreme Court of Virginia attended as well as the deans of all eight Virginia law schools. VJLAP, Virginia CLE and the VBA were sponsors of this event. The prominent people who attended the summit highlights the recognition and importance of wellness, mental health issues and substance abuse concerns that face law students and the legal profession at large.
 8. The Virginia Board of Bar Examiners removed entirely from its bar application the question that requires disclosure of mental health treatment. The VBBE amended a current question to read: "Within the past five (5) years, have you exhibited any conduct or behavior that could call into question your ability to perform any of the obligations and responsibilities of a practicing lawyer in a competent, ethical and professional manner?"
 9. Members of the Supreme Court of Virginia, the past-Virginia State Bar President Len Heath, VJLAP Board members, and VSB staff attorneys have spoken locally and nationally on attorney well-being issues.
 10. Presentations related to stress, substance abuse, and other mental health issues and what VJLAP is and how we might help were given at six Virginia Law Schools: University of Virginia, Liberty, Regent, George Mason, and Washington and Lee, William & Mary and the University of Richmond.
- Finally, then VSB President Len Heath appointed a Special Committee on Lawyer Well-Being which undertook to identify the specific aspects or characteristics of

the practice of law that pose risks to lawyer well-being. In May 2019 that committee issued its report, “The Occupational Risks of the Practice of Law.”³

Virginia can be proud of the fact that it has taken the lead on addressing the lawyer well-being crisis. There has not been just talk—but action!

All of us have a role to play, none of which is more important than supporting one another so that we ensure that we are worthy of the privilege of practicing law and serving the public. To implement the cultural change necessary to address well-being, impairment, and at-risk behaviors, we should not just accept, but embrace our role as our brother’s keeper and lead by example, as the Court has done.

VJLAP’s statistics reflect that more than one-third of the cases opened are solo and small firm practitioners, who do not enjoy the infrastructure and support afforded by larger firms. VJLAP is a critical resource for these lawyers, and if we do nothing else, we should urge lawyers who may need assistance to contact VJLAP. The Rules of Professional Conduct and the Legal Ethics Opinions, which interpret the Rules, do not always require that we act to help these fellow practitioners, but they do persuade us to do the right thing—reach out to support our profession in need.

As stated in the Preamble (A Lawyer’s Responsibilities) to the Virginia Rules of Professional Conduct:

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. . . .

Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The Preamble (Scope) reminds us that we cannot always look to a specific rule as prerequisite to do what is right or ethical:

The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human

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activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

SELF-REGULATION

Why we should and must care.

We are a self-policing profession. That privilege, and it is a big one, carries with it the responsibility of assuring that our behavior – our collective behavior – conforms to the Virginia Rules of Professional Conduct, and serves the public interest. Self-regulating does not mean self-serving, it means regulating ourselves in a way that ensures we serve clients well. To do that, we must serve each other well.

The [Preamble to the Virginia Rules of Professional Conduct](#) states:

“Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.”

“Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should 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.”

If we are to achieve what we aspire to, the profession’s implementation and voluntary adherence to the Rules of Professional Conduct, such that outside intervention is unnecessary, and we make sure that we serve the public, we should be willing to act when we see lawyers who may be struggling with substance abuse issues, depression, or aging related issues.

Why are we here today? What is lawyer well-being and why should we care about it?

In [The Professional Cost of Untreated Addiction and Mental Illness in Practicing Lawyers](#)⁴, Mary T. Robinson explores **the cost of doing nothing when dealing with lawyer addiction and mental affliction**. Ms. Robinson’s perspective is

⁴ *The Professional Cost of Untreated Addiction and Mental Illness in Practicing Attorneys*, The Professional Lawyer, 2009 Symposium Issue, p. 101 (ABA Center for Professional Responsibility 2009).

informed by her work on all sides of the disciplinary system. She served for 15 years as the Administrator of the Illinois attorney Registration and Disciplinary Commission where she regulated lawyers, and she now advises attorneys and firms on ethical issues and represents attorneys in disciplinary cases. She urges us to recognize our collective responsibility, as a profession, to address addiction:

“Intrinsic to addictive illness is the ability to deny reality as others see it, and those afflicted tend to be surrounded by family, friends, and colleagues who protect them from reality, both by taking actions that save them from the consequences of their behavior and by assiduously avoiding naming what seems wrong. Treatment professionals use this analogy: there is an elephant in the living room and everyone pretends it is not there, even as they go through increasingly contorted maneuvers to step around it and clean up its messes.”⁵

The evidence of our struggles is anecdotal – we all know another lawyer who has struggled with these issues – and it is backed up by research:

ABA Commission on Lawyer Assistance Programs and Hazelden Betty Ford Study published in the January/February 2016 *Journal of Addictive Medicine*:

- 21% to 36% of lawyers qualify as problem drinkers.
- 28% struggle with depression.
- 18% suffer from anxiety.
- 23% deal with stress.

The Hazelden Study surveyed 12,825 licensed, practicing lawyers across nineteen states assessing alcohol and drug use and symptoms of depression, anxiety, and stress. The Substance Abuse and Mental Health Services Administration reports that while only 6.4% of the general population abuse alcohol and only 6.6% experience major depression, lawyers have far higher numbers in both categories. The Hazelden Study concluded that attorneys experience problematic drinking at a higher rate than other professional populations and two to three times the general population. The data also indicates that the incidence of alcohol abuse is higher among lawyers aged 30 or less.

⁵*Id.*

Law Student Well-Being Survey published in 2016:

- 25% of students at risk for alcoholism.
- 17% of students experience depression.
- 14% of students suffer from severe anxiety.
- 23% suffer from mild or moderate anxiety.
- 6% had suicidal thoughts in the past year.

Particularly scary is the data on suicides: 9,100 attempts out of a population of 1.3 million lawyers. And, worse than the numbers are the lawyers we know who suffered. There are names behind the numbers, and we all care about them.

Most of us believe in and respect right to privacy and work hard to protect it. We do not want to intrude on others' personal lives. It is not lack of compassion that deters us. There is still a thought that by circling the lawyer, we are helping him/her. Nothing could be further from the truth, and we owe it to the lawyers we care about and the public we serve to do better.

The failure to recognize and confront the data and the failure to address it exacts costs far worse than efforts to be proactive. The monetary costs to law firms, malpractice insurers, client protection funds, and the damage to the profession, as well as the personal heartache and suffering caused by lawyer addiction and depression far outweigh a dedicated focus on preventing harm and supporting lawyer well-being.

[The Path to Lawyer Well-Being: Practical Recommendations for Positive Change is a report by the National Task Force on Lawyer Well-Being \(Report\) which:](#)

1. identifies the lack of lawyer well-being as a crisis in the profession which exacts costs and must be addressed;
2. defines well-being as “[a continuous process in which lawyers strive for thriving in each dimension of their lives: emotional, occupational, intellectual, social, physical, and spiritual](#)”;
3. urges each “stakeholder” (judges, regulators, law firms and legal employers, law schools, bar associations, boards of bar examiners, professional liability carriers, and lawyer assistance programs) **to acknowledge the crisis** and to work together to address the crisis; and

4. offers concrete steps for each stakeholder.

The Report's Call to Action identifies five core steps to all stakeholders:

1. Identify stakeholders and our respective roles in reducing toxicity.
2. End stigma surrounding help-seeking behaviors, which prevent lawyers from seeking help. Research shows that most effective way to reduce stigma is through contact with someone who has experienced a relevant disorder.
3. Emphasize well-being is an indispensable part of a lawyer's duty of competence.
4. Expand educational outreach and programming.
5. Change the tone of the profession one small step at a time. Chronic incivility depletes energy and motivation, increases burnout, inflicts emotional and physiological damage, diminishes productivity and performance.

These materials specifically cover what the Virginia State Bar has done and is doing to address the crisis and Virginia's lawyers assistance program, VJLAP, as a resource for lawyers in need.

LEOs 1886 and 1887

Additionally, and prior to the Report, the Court approved LEOs 1886 and 1887, which respectively discuss supervisory lawyers' obligations to address lawyer impairment within a firm and offer suggestions on how to address such impairment, including working with LHL (LEO 1886), and whether and under what circumstances non-supervisory lawyers may have a duty to reach out to lawyers in the firm who may have an impairment, and whether lawyers have a duty to reach out to a potentially impaired lawyer, who is not in the same firm (LEO 1887). It is my hope that this talk will make us consider whether we should be our brothers' keeper, regardless of whether the Rules direct such action.

The Court also approved Comment [7] to Rule 1.1 which requires a lawyer to represent a client competently:

[7] A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. *See* also Rule 1.16(a)(2).

(Rule 1.16(a)(2) addresses a lawyer's duty to withdraw from representation if he/she suffers from a physical or mental condition that materially impairs his/her ability to represent a client. Rule 1.16(c) states that if the matter is in court, the court determines whether the lawyer may withdraw.)

Comment 7 does not define well-being, nor does it require specific actions to be taken, but it establishes the fact that lawyers must be aware of the role of well-being in maintaining competence to practice law. It is important to note that the VSB is not attempting to define well-being, and the inclusion as a Comment seeks to encourage lawyers to be proactive in considering their well-being. The inclusion as a Comment, instead of in the Rule itself, reflects the intent to be proactive, not punitive. The Comment does not threaten lawyers with discipline for ill health; instead, it reminds all of us of the importance of well-being in client representations.

Conclusion

This past year the profession has taken steps to acknowledge and address lawyer well-being and impairment. Regulatory and rule changes proposed by the VSB

Ethics Committee and the Committee on Lawyer Discipline have been adopted by VSB Council and are under review by the Court. Even more critically, under the Court's leadership, the Committee has recommended substantial additional funding to LHL in order to help make greater outreach a reality. Moreover, the Committee has recommended the creation of a new program within OES to educate and support lawyers, proactively. It is critical that we continue to work together to support the changes recommended by the Committee and to support each other. To that end, I urge you to let know of any suggestions you might have to assist in this effort.