

# The Intersection of Ethics and Well-Being

by Sharon D. Nelson, Esq. and John W. Simek

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## ABA RESOLUTION 105

The ABA House of Delegates adopted [Resolution 105](#) at the 2018 ABA Midyear Meeting. The resolution supports the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, judges and law students. It urges stakeholders within the legal profession to consider the recommendations set out in [The Path to Lawyer Well-Being: Practical Recommendations for Positive Change](#). The pursuit of lawyer wellness has spread rapidly through law firms, bar associations, state bars and state supreme courts.

The National Task Force on Lawyer Well-Being, assembled in August 2016 to “create a movement toward improving the health and well-being of the legal profession,” 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’s recommendations in their report entitled *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, published in August 2017, 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 authors have monitored many of these developments – and now teach several CLEs related to lawyer wellness. We applaud the actions taken to date – and there is still so much to be done. We decided to write an article that highlights some of the developments since Resolution 105 was adopted, including several sad stories that have shaken the legal profession.

## THE DEATH OF PAUL RAWLINSON

On April 16, 2019, *The ABA Journal* carried a story about the death of Baker McKenzie’s global chairman Paul Rawlinson. He had died four days earlier, six months after he took a temporary leave to deal with health issues caused by exhaustion. He was 56 years old at the time of his death.

When he took the leave, his firm was struggling with an inquiry into the firm’s handling of sexual harassment complaints and internal disagreement over associate pay. The firm at that time had 78 offices and nearly 5,000 attorneys. Reportedly, Rawlinson had visited more than half of those offices.

The exact cause of death was not released, but his death spurred the growing concern about lawyer wellness and the systematic pressures placed on many lawyers, especially at large law firms – and most especially those who lead those firms.

We do not suggest that Rawlinson's wellness issues resulted in unethical behavior of any kind. It was simply a crushing and disturbing story, suggesting that a lawyer's exhaustion could lead to their death. One thing we wondered – and still wonder – was whether there was a culture of wellness at Baker McKenzie and whether his colleagues had reason to suspect how unwell he really was. Have we, as a profession, become impervious to the symptoms of extreme stress on our colleagues?

### THE SUICIDE OF GABE MACCONAILL

Attorney Gabe Macconail, a 42-year old partner at Sidley Austin, committed suicide on October 14, 2018., His widow, Joanna Litt, wrote an open letter saying that "Big Law killed my husband."

In this case, there were signals – episodic binge drinking, the departure of several close friends at the firm which created more pressure on him, a new position chairing the summer associate program, and then a huge bankruptcy case.

He became visibly stressed, anxious and wasn't sleeping. When his wife called his closest colleague, she said he was working more and more with his door closed – and that his sense of humor had been gone for a while.

He told his wife that he felt like a phony who had fooled others about his abilities as a lawyer and he thought he would be fired at the end of the bankruptcy case. He worked himself to exhaustion, going to an ER with cardiac symptoms, but when early indications were that his health problems might be due to dehydration, he left the hospital without seeing a doctor so he could return to work.

His wife arranged a mobile IV to come to their home and give him fluids. He then flew to Delaware to file the bankruptcy case.

Here, ethics entered the situation because, as his wife found out later, he had stopped responding to work emails when he returned home to LA. Every lawyer reading that sentence knows how close someone must be to the edge of the precipice when they stop responding to work emails in the midst of a high value case.

On the last morning of his life, he kissed his wife goodbye, took his gun with him, and shot himself in the head in the garage of the firm's high-rise office building.

His wife said that he set impossible high standards for himself, that he was a "maladaptive perfectionist" who lacked self-compassion. He said he couldn't "turn off his head."

She said, "He had a deep, hereditary mental health disorder and lacked essential coping mechanisms. But these influences, coupled with a high-pressure job and a culture where's it's shameful to ask for help, shameful to be vulnerable and shameful not to be perfect, created a perfect storm."

Remember that these are the words of a grieving widow. The description of the law firm is certainly accusatory and we cannot know how much is an accurate depiction.

Sidney Austin told the press that the firm handled the situation well, and that it was MacConaill's responsibility to come forward and ask for help when he was overwhelmed. The firm has a wellness program, but an anonymous source at the firm told Financial Times that folks at Sidley aren't comfortable using it. The source said "There is not a culture or feeling of safety right now in that set of offices. You can have resources in place, but unless you have the right culture, people aren't going to feel safe using them or approaching someone to ask for help."

That assessment, if true, certainly cries out for remediation.

## THE STRESS OF PRACTICING LAW TODAY

Clearly, the personal stories above had a profound impact on the authors. Author Nelson, a former president of the Virginia State Bar, worked on the VSB's Special Committee on Lawyer Well-Being, chaired by then VSB President Len Heath, and was one of the many authors who worked on its May 2019 report, "[The Occupational Risks of the Practice of Law](#)." For anyone who works on such endeavors, what one learns often comes as something of a revelation.

The demands of being a lawyer can often hide substance or mental health issues and the high-achieving people who become lawyers often do not avail themselves of available resources to help them. There is a stigma attached to asking for help and a fear that one will seem "weak" or perhaps not worthy of rising within the firm.

The authors live in Virginia but frequently lecture across the nation. We have heard a lot of sad stories. After one CLE, a lawyer in another state called to ask for help because, as he said, "I just can't practice law anymore." It is amazing to think how many ethical rules he must have violated, because he flatly acknowledged that he wasn't able to adequately do his work for his clients.

In his case, he was simply distracted by everything – he had lost the ability to focus. Everything distracted him – the turbulent politics of our time, sports, online games, social media. He could no longer keep his nose to the grindstone and get his work done. He was ignoring emails, missing deadlines, failing to call clients back or respond to their email – and very much afraid of getting in disciplinary trouble. Fortunately, there are confidential resources in his state and we were able to persuade him to contact those resources.

## ATTORNEY IMPAIRMENT

The ABA, in conjunction with the Hazelden Betty Ford Foundation, funded a large study dealing with attorneys and substances abuse. The Journal of Addiction Medicine published "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys" in 2016. The study surveyed nearly 13,000 attorneys.

Some of the findings: 20.6 percent reported problematic drinking, 31.9 percent of them attorneys age 30 or younger.

Of those who used drugs, both legal and illegal, respondents reported using stimulants the most—74.1 percent. Additionally, of those who used drugs, 51.3 percent of respondents reported using sedatives, 46.8 percent tobacco, 31 percent used marijuana and 21.6 percent used opioids.

It should be noted that this study relied on the attorneys self-reporting. Only 3,419 lawyers out of 14,895 surveyed answered questions about drug use. Peter Krill, one of the authors of the study,

remarked: "It's left to speculation what motivated 75 percent of attorneys to skip over the section on drug use as if it wasn't there."

The most common mental health concerns were:

- Anxiety, 61.1 percent.
- Depression, 45.7 percent.
- Social anxiety, 16.1 percent.
- Attention deficit hyperactivity disorder, 12.5 percent.
- Panic disorder, 8 percent.
- Bipolar disorder, 2.4 percent.

How did those with alcohol and drug problems feel about getting treatment? The main concern, and it is huge, is confidentiality. Only 6.8 percent sought treatment and of those who did, only 21.8 percent went through a program designed for legal professionals.

### ETHICAL MISSTEPS MAY INDICATE A PROBLEM

In many cases, the actions an attorney takes (or perhaps inactions) can lead to professional discipline or malpractice AND indicate the presence of mental illness or a substance use disorder.

Examples? An attorney could demonstrate a pattern of conduct - missed deadlines, missed appointments, last-minute requests for continuances, frequent absenteeism, failing to return client phone calls or respond to mail, co-mingling or inappropriately taking client trust funds, or making false representations. The attorney may also demonstrate behaviors at work that appear different from their prior functioning. For example, an attorney may become socially withdrawn, procrastinate, have unpredictable and frequent mood swings, demonstrate unwarranted anger or hostility, and seek to point the finger at others for personal failings.

Any of these behaviors may be the product of depression, anxiety, neurological dysfunction, gambling addiction and/or substance use disorder.

As indicated above, anxiety and depression are the two most common mental health problems affecting attorneys.

A depressed attorney may demonstrate low motivation, an absence of energy, fatigue, and difficulty concentrating. The attorney may take a long time to learn something new or to respond to client calls or answer mail. The attorney may not respond to important emails, mail, or phone calls out of panic or fear.

The lawyer may procrastinate and leave a job unfinished for someone else to complete, come into work late, leave early, or not come into the office at all for several days. They may file motions or briefs that omit important details because the attorney could not concentrate and could not remember specific information.

Work could be completed late, or not completed, and would likely contain major mistakes. If the lawyer's supervisor gave negative feedback, the depressed attorney may respond with anger and irritability. To this attorney, everything would sound like criticism, resulting in angry responses or blaming others for mistakes.

If the supervisor asked the lawyer to redo something or to correct a problem, the lawyer might feel overwhelmed and too stressed to manage. This attorney's ability to tolerate stress and cope with the everyday demands of clients, partners, opposing counsel, or judges becomes severely compromised to the point where the lawyer is unable to practice competently.

## THE MODEL RULES OF PROFESSIONAL CONDUCT

As you might imagine, impaired lawyers may end up violating a number of ethical rules.

Overwhelmingly, as we did our research for this article, experts pointed to the violation of Rule 1.1 (Competence) because the impairment often leaves an attorney without the competence to practice law.

Though Rule 1.1 is often implicated, ethical violations by impaired lawyers can involve violating many rules, including, but not limited to:

- Rule 1.15 (Safeguarding Property)
- Rule 1.3 (Diligence)
- Rule 1.4 (Communications)
- Rule 1.6 (Confidentiality)
- Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- Rule 5.2 (Subordinate Lawyers)
- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- Rule 8.3 (Maintaining the Integrity of the Profession)
- Rule 8.4 (Misconduct)

## WHEN MUST A LAWYER WITHDRAW OR BE REMOVED FROM CLIENT REPRESENTATION?

Rule 1.16 (a)(2) prohibits a lawyer representing or continuing to represent a client where "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."

In Formal Opinion 03-429 ([Obligations with Respect to Mentally Impaired Lawyer in the Firm](#)), the ABA Standing Committee on Ethics and Professional Responsibility writes, "Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation." The opinion does provide some direction: "[W]hen considering what must be done when confronted with evidence of a lawyer's apparent mental disorder or substance abuse, it may be helpful for partners or supervising lawyers to consult with an experienced psychiatrist, psychologist, or other appropriately trained mental health professional."

An initial referral generally includes consultation with a state Lawyer Assistance Program (LAP), which most states now have. Many programs are run by volunteers or other attorneys who are in recovery. LAP programs differ widely in what services they can provide, so check to see what your state's organization is able to offer. Some LAPs merely provide referrals to mental health professionals in the community, while others may have mental health professionals on staff. Most LAPs are not able to provide a fitness to practice evaluation. In those cases, a referral to a forensics psychologist will be needed.

It is very common for impaired attorneys to need a month undergoing treatment with subsequent treatment thereafter.

These treatments often have good outcomes, with a combination of therapy and medications. This protects clients, the firm reputation and may save the lives of impaired lawyers. As we well know, the financial burden on a small firm may be significant – no hours billed and continuing to pay salary, benefits, etc. And of course, there is never a guarantee that the underlying impairment will be cured.

Sadly, sometimes a law firm must act. As the opinion says,

“If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation to the appropriate professional authority. If the firm removes the impaired lawyer in a matter, it may have an obligation to discuss with the client the circumstances surrounding the change of responsibility. If the impaired lawyer resigns or is removed from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer.”

#### THE ABA’S WORKING GROUP TO ADVANCE WELL-BEING IN THE LEGAL PROFESSION

[The Working Group to Advance Well-Being in the Legal Profession](#) was created to examine and make recommendations regarding the current state of attorney mental health and substance use issues with an emphasis on helping legal employers support healthy work environments.

The Working Group launched a Campaign to improve the substance use and mental health landscape of the legal profession. The primary vehicle for the Campaign is a Pledge calling upon legal employers (including law firms, corporate entities, government agencies and legal aid organizations) to first: (a) recognize that substance use and mental health problems represent a significant challenge for the legal profession and acknowledge that more can and should be done to improve the health and well-being of lawyers; and, (b) pledge to support the Campaign and work to adopt and prioritize its seven-point framework for building a better future.

#### **The Pledge:**

“Recognizing that high levels of problematic substance use and mental health distress present a significant challenge for the legal profession, and acknowledging that more can and should be done to improve the health and well-being of lawyers, we the attorneys of \_\_\_\_\_ hereby pledge our support for this innovative campaign and will work to adopt and prioritize its seven-point framework for building a better future.”

The seven-point framework follows:

1. “Provide enhanced and robust education to attorneys and staff on topics related to well-being, mental health, and substance use disorders.
2. Disrupt the status quo of drinking-based events: Challenge the expectation that all events include alcohol and seek creative alternatives. Ensure there are always appealing nonalcoholic alternatives when alcohol is served.
3. Develop visible partnerships with outside resources committed to reducing substance use disorders and mental health distress in the profession: healthcare insurers, lawyer assistance programs, EAPs, and experts in the field.
4. Provide confidential access to addiction and mental health experts and resources, including free, inhouse, self-assessment tools.
5. Develop proactive policies and protocols to support assessment and treatment of substance use and mental health problems, including a defined back-to-work policy following treatment.
6. Actively and consistently demonstrate that help-seeking and self-care are core cultural values, by regularly supporting programs to improve physical, mental and emotional well-being.
7. Highlight the adoption of this well-being framework to attract and retain the best lawyers and staff.”

As of December 29, 2019, there were 164 signatories to the pledge.

#### PROMOTING LAWYER WELLNESS – BEGINNING TO ADDRESS THE PROBLEM

How do firms nurture lawyers and help them stay well? The answer to that is complicated, but it is refreshing to see that more and more firms are committed to finding a path that encourages lawyer wellness. Here is some of what we’ve seen:

- Law firm physical fitness centers (greatly loved by lawyers)
- Space for yoga or meditation
- Non-alcohol events – or at least events where there is a choice of beverages
- Training/education sessions/retreats about wellness, including stress reduction, meditation, self-care, team building, etc.
- Policies which encourage employees to come forward for treatment without being afraid of losing their jobs
- Setting a maximum for billable hours and lowering the minimum required
- Special training for partners in creating a culture of wellness and how they can help
- For larger firms, hiring a Director of Wellness has become common
- To make sure lawyers are ready to come back to work and to perform competently, firms are requiring verification of participation in a treatment program, requiring that the lawyer commit to sticking with the program, and agree to alcohol and drug screens where appropriate

#### PROMOTING LAWYER WELLNESS – EVOLVING STEPS TO ADDRESS THE PROBLEM

We did a little research on 2019 steps taken by law firms to address lawyer wellness. While some steps echo the beginning steps above, some are innovative.

Law firms, particularly large firms, are offering CLE wellness courses, bringing in speakers and also offering online resources to help with stress or substance abuse. The resources are often available via firm intranet or through custom apps.

Firms have offered clubs ranging from knitting to running and events like “bike to work week.” Reed Smith highlighted the connection between art and wellness and established a program encouraging its employee to create and exhibit art – as well as viewing art in the firm’s offices around the world.

Firms are creating mocktails for retreats and functions – and they sound pretty appealing! New terminology and imagery are being employed. For Cooley, “cocktails and conversation” is no longer used – ditto for images of martini glasses and champagne flutes promoting events.

Unsurprisingly, there has been an emphasis on mindfulness and meditation, with firms offering training, guided meditation sessions, and subscriptions to meditation apps.

Employee assistance programs have bloomed, offering help for those with addiction problems, financial stress, relationship difficulties and other crises. Most programs are provided by a third-party vendor with interactions taking place via phone, video counseling, online chats or even face-to-face.

Some firms are bringing in counselors on a regular basis – and the sessions are confidential. This seems to be successful as appointments fill up quickly.

Knowing how helpful it can be to have symptoms of a colleague’s struggle recognized, some firms are providing mental health first aid training, making sure that staff, attorneys and managing partners know the symptoms of depression, anxiety and substance abuse.

There has been a sudden rash of hiring to fill a new position: Director of Well-Being. As you might imagine, this is more likely to happen at larger firms. As of June 2019, 11 of 40 large firms had someone exclusively working on a firm wellness program.

## FINAL THOUGHTS

The National Task Force on Lawyer Well-Being concluded, in part: “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.”

As of August, 2019, Bloomberg Law reported that 29 states have established working groups or task forces, and revised regulations related to continuing legal education (CLE) programming and to bar admissions. Virginia modified Rule 1.1 to add a comment specifically addressing lawyer well-being:

“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.”

Systemic progress is happening. Still, it is legitimate to ask whether the efforts by law firms outlined above are “enough” or whether there is a real commitment to them. Let’s face it, billable hours have been the holy grail for a very long time. While skepticism is fair, we think firms recognize (maybe for the first time) the true extent and cost of impaired lawyers. That recognition, coupled with a commitment to



provide effective and confidential help to lawyers in need of assistance, is a good sign of what we hope will be a long-term effort to make sure that lawyer wellness is a core concern of every law firm and legal entity.

*The authors are the President and Vice President of Sensei Enterprises, Inc., a legal technology, cybersecurity and digital forensics firm based in Fairfax, VA. 703-359-0700 (phone) <https://senseient.com>*