

Paper Title: Attorney Well-Being and the Duty of Competence to the Client

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I. Introduction

Is a practicing attorney's well-being, and in particular an attorney's mental health, an ethics issue? Does an entrepreneurial attorney building a book of business have an ethical obligation to insist on client boundaries so that the attorney is not always "on call"? If so, what does this mean for solo practitioners versus practicing attorneys at law firms who are striving to develop and strengthen their client base? And what are the ethical implications of the decisions made by a law firm's management team regarding how a firm self-organizes and how its profits are invested in technology and human capital, and otherwise distributed among its owners?

There are no bright-line answers to these questions, and this article does not take a normative position on how lawyers *should* set up their practices, nor *how* law firms should organize or reorganize and manage themselves in an effort to respond to attorneys who may be overworked and stressed and at risk for mental distress or substance abuse. Nor does this article advance certain value positions over others, if only because we all know lawyers who literally enjoy the practice of law more than any other activity they do in their lives. After all, what right does any of us have over our colleagues with respect to how they *should* live their lives and balance their personal and professional obligations? Legislating leisure in an effort to create a minimum level of well-being directly conflicts with an individual's self-determination and undermines the individual rights of those who live in societies that value autonomy, not to mention appears insensitive to the subjective nature of the concept of well-being.

Notwithstanding, there does appear to be a crisis in the legal profession today, as discussed in the study sponsored by the American Bar Association ("ABA") and Hazelden Betty Ford Foundation in February 2016 on mental health and substance use disorders, which surveyed 13,000 currently-practicing lawyers (the "Study"). At the time of the Study in 2016, the ABA Commission on Lawyer Assistance Programs, in collaboration with the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers, created the National Task Force on Lawyer Well-Being (the "Task Force"). In response to the Study, the Task Force published a report a year later in August 2017 titled, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (the "Report"). This article briefly summarizes the Report and identifies ethical implications relating to certain of the Report's recommendations.

II. The Report and Recommendations

The Report is a 73-page document that proposes general recommendations for all stakeholders in the legal profession, as well as specific recommendations for certain stakeholders, including judges, regulators, legal employers, bar associations, law schools, professional liability carriers, and lawyer assistance programs. A copy of the Report can be accessed at

www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf. (Aug. 14, 2017).

The Report’s recommendations are intended to address a legal industry in the United States that the Task Force characterizes as “at a crossroads” and subjected to a “level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues” Bree Buchanan & James Coyle, Cover Letter to Report. The basis for these characterizations is the Study, which found that of the 13,000 lawyers surveyed, between 20.6 and 36.4 percent were “problem drinkers” and that 28 percent suffered from depression and 19 percent had anxiety. Moreover, in a contemporaneous study of law student well-being, 43 percent reported binge drinking at least once in the prior two weeks. *See Report*, at 1.

The recommendations proposed by the Task Force in its Report are designed, in part, to eliminate the stigma associated with help-seeking behaviors by individual lawyers, to change how law is practiced and how lawyers are regulated, and to emphasize that well-being is an indispensable part of a lawyer’s duty of competence. *Id.* Until mental illness¹ is destigmatized in the legal profession – and seeking help is no longer viewed as a weakness or handicap – attorneys with mental illness or substance use disorders may unnecessarily continue to suffer in silence and remain at heightened risk of professional misconduct.

For legal employers including law firms, the Report recommends that law firms create a well-being committee or appoint a well-being advocate whose responsibilities should include “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.” *See id.*, at 31. A gating item for law firms should be whether their attorneys believe their firms will reasonably accommodate health conditions, including recovery from mental illness and addiction. *Id.* Likewise, the Task Force finds it important for each law firm to have a confidential reporting procedure for lawyers and staff to report concerns about attorney mental health or substance abuse. *Id.*, at 32.

In addition, law firms should endeavor to avoid rewarding work addiction, and should expressly encourage lawyers to take time off from work. *Id.* (noting that approximately 25 percent of all lawyers are workaholics). And finally, law firms’ incentive and compensation systems should reward leaders who enhance the well-being of the associates and partners with whom they work. *Id.*, at 34. All of these recommendations are intended to create a firm culture that encourages help-

¹ Mental illness is used broadly here, and includes all mood disorders (i.e., bipolar, depression, anxiety, obsessive-compulsive, and substance abuse, among others).

seeking behaviors, educates attorneys and staff on identifying impairment in themselves or their colleagues, and ensures that each lawyer understands his or her ethical obligations relating to their own well-being.

III. Ethical Implications of the Report

The Report defines attorney 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.***

See Report, at 9 (emphasis added). Emotional health includes managing emotions to inform decision-making, and perhaps most importantly, to realize when seeking help for mental health is necessary.

The Task Force emphasizes that mental health issues may affect an attorney's ability to comply with Rule 1.1 and Rule 1.3 of the ABA Model Rules of Professional Conduct ("Model Rules Prof. Conduct"). Rule 1.1 defines "competent" representation to require "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Model Rules Prof. Conduct R. 1.1*. Rule 1.3 requires an attorney to act with reasonable diligence and promptness in representing a client. *Id.*, *R. 1.3*.

The Task Force recommends that Rule 1.1 be modified "to more clearly include lawyers' well-being in the definition of 'competence.'" *Report*, at 26. One alternative advanced by the Report would be to follow California's lead, which defines "competence" in its rules of professional conduct to include the "mental, emotional, and physical ability reasonably necessary" to do client work. *Cal. Rules Prof. Conduct R. 3-110*. Alternatively, the Task Force notes that the Comments to Rule 1.1 could be amended to clarify that professional competence requires being able to comply with certain "eligibility guidelines" for lawyers with mental or physical impairments. *Report*, at 28 (noting that at least 14 states have eligibility requirements for admission to practice law).

Throughout the Report, the Task Force makes significant effort to emphasize that help-seeking efforts by attorneys with disorders should be both encouraged and rewarded. Along those lines, the Task Force does not suggest that failure to satisfy the well-being requirement or essential eligibility requirements should result in disciplinary action, and that disciplinary action should only be taken in the event of an attorney's actionable misconduct in client representation. *Id.*, at 26.

In addition, the Report notes that the ABA proposed a new Model Continuing Legal Education Rule in 2017 that recommends all 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 disorders. *Id.*

IV. Concluding Comments

The Report certainly suggests that a lawyer's ethical duty to provide competent and diligent representation depends in part on the mental health of that lawyer and on the attorney's overall well-being. What that means, however, in terms of how the legal industry should self-organize in support of its attorneys in complying with this duty is less certain. Most attorneys in private practice, whether in solo or small practices or at large law firms that more closely resemble businesses than professional partnerships, are still governed by the billable hour, where profitability is tied to how many hours an attorney bills his or her clients, and where salaries are determined by individual attorney collections year in and year out. This makes it very hard for attorneys to draw deep lines in the sand between their personal and professional lives, especially for junior lawyers who may be trying to make a good impression within their firm or with new clients, and who are likely have a steep learning curve ahead of them in terms of learning the practice of law and trying to grow a book of business.

There appears to be a greater urgency in addressing this problem in light of three interrelated developments in the legal industry over the past two decades: first, the use of technology in digitizing the practice of law and in particular, the use of email to communicate with clients and opposing counsel at any time and almost anywhere; second, the commoditization of legal advice, cost pressures on the provision of legal service, and resulting increased competition over market share among lawyers and their firms; and third, pressures on junior lawyers, including associates of all ranks, to generate client collections very early on in their careers.

Ultimately, the concept of well-being seems very personal and hard to legislate, insofar as each lawyer may respond to a particular stress or challenge differently, and ultimately it is up to every individual attorney to identify what works for that attorney in terms of balancing client obligations with personal and family obligations. And perhaps therein lies the problem – the burden ultimately is with each attorney to navigate his or her career, and yet when an attorney is suffering from mental illness or responding to stresses by abusing alcohol or drugs, that attorney may be in the worst possible position to navigate particular work stresses and challenges, and may feel unable to reach out for help from his or her colleagues or from mental health professionals.

The Report, in essence, appears designed to address this problem by proposing recommendations that are intended to chip away at the isolation that envelops an attorney experiencing mental illness. Ultimately, the responsibility lies with each

of us to determine how and to what extent these recommendations are implemented.