LAWYER WELL-BEING: Enhancing Resilience While Maintaining an Ethical Practice

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INTRODUCTION

We are in an unprecedented time for our modern practice of law. Sheltering at home; closed schools; courthouses shut down; Zoom-everything. It's like nothing this generation has faced before. As we (hopefully) move through this pandemic, and as businesses re-open and we all re-enter the workplace, new stressors confront us. For nearly two years we have been working predominantly from home. We may have developed some bad habits. Habits that might impact our practice in negative (i.e., unethical) ways. Perhaps we've gained a few pounds. We've spent a lot more time worrying about our financial situation. All of this is normal, given our circumstances. But what happens now – as we return to the "new normal" as we're hearing it called? How do we manage these new stressors in what was already a profoundly stressful profession? What must we consider and what must we change in order to stay mentally well and improve our resilience during this transition and thereafter?

BACKGROUND

Over the past few years, significant media attention has been given to the high levels of distress and increasing rates of mental health concerns occurring within the legal profession. Stories of lawyer addiction and suicide have been addressed on

CNN's *Legal View with Ashleigh Banfield* [i], written about in USA Today[ii], in The Huffington Post,[iii] and published in ABA publications[iv].

The most recent data was collected from a ground-breaking statistical survey of attorneys circulated nationally by the American Bar Association Commission on Lawyer Assistance Programs (COLAP) in conjunction with HazeldenBettyFord Foundation. The results, published in the Journal of Addiction Medicine in January/February 2016,[v] shocked our entire profession. For years it had been reported that lawyers had higher rates of depression and addiction than the general population. That supposition was based primarily on data from 1992 (in a survey of 1200 Washington state lawyers – not exactly a cross-section), and a 1990 John Hopkins study on the mental health of professionals.[vi] Some of the data previously relied on was even older than that. The Hazelden/BettyFord study provided accurate and current statistical data on rates of addiction and impairment extracted from the responses of 13,000 lawyers from across the country.

In a nutshell, the results of the study provided the following statistics:

- Lawyer rates of addiction are between three (3) to five (5) times higher than the general population;
- Lawyer rates of depression are over four (4) times higher than the general population.

THE COVID-19 PANDEMIC AND LAWYER IMPAIRMENT

The COVID-19 pandemic has negatively impacted mental health worldwide in the general population. Elevated levels of adverse mental health conditions, substance use, and suicidal ideation have been reported by US adults throughout the pandemic. From March 2020 through June of 2020, the prevalence of symptoms of anxiety disorder was three times higher than those reported in 2019 (25.5% versus 8.1%), and

prevalence of depressive disorder was four times higher than reported a year previously (24.3% versus 6.5%). Between August 19, 2020 to February 1, 2021, the percentage of adults with symptoms of an anxiety or depressive disorder increased significantly from 36.4% to 41.5%. (so pre-pandemic the general population went from 6.5% to 41.5% in March 2021). In about the same time frame, significant increases were observed in the percentages of adults who reported experiencing symptoms of an anxiety disorder (from 31.4% to 36.9%) which means since before the pandemic, the anxiety rates rose from 8.1% to 36.9% in the general population.

A majority of adults (61%) reported experiencing undesired weight changes since the start of the pandemic with more than 42% reporting gaining more weight than they intended. The average weight gain was 29 pounds. Two in three (67%) of Americans are sleeping more or less than they wanted.

Lawyers – who already have anxiety and depression levels 3-4 times greater than the general population and consistently have "short sleep" -- are suffering extraordinarily with this added stress and anxiety.

THE STRESS OF PRACTICING LAW

First of all, what is this thing "stress"? *Stress* may be defined as anything in our environment that knocks our bodies out of their homeostatic balance. The stress response is the physiological adaptations that ultimately reestablish balance. It's a bigger deal than we thought. Recently, scientists have been focusing in on the connection between stress and anxiety and the role they play in producing and maintaining depression. For a high-stress profession like practicing law, this link is alarming and should cause great concern.

What's the long-term effect? "If stress is chronic, repeated challenges may demand repeated bursts of vigilance. At some point the vigilance becomes overgeneralized leading us to conclude that we must always be on guard – even in the absence of stress. And thus the realm of anxiety is entered." Dr. Robert Sapolsky, *Lawyers with Depression, The Stress Depression Connection,* May 11, 2008, www.lawyerswithdepression.com.

> Stress went on too long in my own life as a litigator. I had, indeed, entered the realm of anxiety. For me, this anxiety felt like I had a coffee pot brewing twenty-four/seven in my stomach. I became hypervigilant, each of the files on my desk felt like ticking time-bombs about to go off. Over time, the litigation mountain became harder to climb as the anxiety persisted over a period of years.
>
> Dan Lukasik, *Lawyers with Depression*

Unfortunately, if the chronic stress begins to seem insurmountable, it gives rise to helplessness. This helplessness may be so generalized that the person is unable to accomplish tasks they could actually master. Tasks such as preparing a simple motion; returning phone calls; and moving their cases forward can begin to feel like they require a monumental amount of effort. Moreover, helplessness is a pillar of a depressive disorder. It becomes a major issue for lawyers because we ARE the helpers; it's quite foreign and unnatural for us to experience periods of helplessness. In fact, it's frightening, and we are resistant to ask for help.

Studies are showing that the presence of co-morbid anxiety disorders and major depression is very common and according to some studies, as high as 60 percent. This may shed light on why the depression rates for lawyers are so much higher than everyone else's. We work in a chronically anxious and stressful state. *Lawyers with*

Depression, The Stress Depression Connection, May 11, 2008, www.lawyerswithdepression.com.

Over time, this type of chronic anxiety causes the release of too much of the fight-or-flight hormones, cortisol and adrenaline. Research shows clearly that prolonged release of cortisol damages areas of the brain that have been implicated in depression, the hippocampus (involved in learning and memory), and the amygdala (involved in how we perceive fear). *Id.*

Scientists believe that depression may originate in the hippocampus and the amygdala. As such, the chronic stress and strain on the hippocampus and the amygdala caused by the over-saturation of cortisol and adrenaline during periods of prolonged stress may be what causes the development of depression in an otherwise healthy brain.

Depressive disorders are among the most common mental health disorders in the United States. They are characterized by a sad, hopeless, empty, or irritable mood, and somatic and cognitive changes that significantly interfere with daily life. Major depressive disorder (MDD) is defined as having a depressed mood for most of the day and a marked loss of interest or pleasure, among other symptoms present nearly every day for at least a two-week period.[vii] Just like with substance use disorders, the rates of mental health disorders (including but not limited to depression, chronic stress and anxiety) are much higher within the legal profession, than the general population.

According to SAMHSA, 6.6% of adult Americans experienced a major depressive episode (MDE).[viii] Lawyers' higher stress levels (which scientists are now identifying as one of the roots of higher rates of depression and substance abuse) may have their

genesis in the adversarial nature of the practice of law. There are very few professions whose core of work is completely adversarial.

The 2015 Hazelden study reveals that the percentages of lawyers with mental health concerns are even higher than previously thought. The statistical information previously relied upon was a 1990 Johns Hopkins University study which identified lawyers as having depression at a rate 3.6 times higher than non-lawyers, who shared the same socio-demographic traits.[ix] The Hazelden study quantifies lawyers as actually suffering from depression at a rate of 28%, or almost 4-1/2 times that of the general population.[x] Approximately 61% of the study acknowledged concerns with high levels of anxiety during the course of their career; and 46% - *almost half* – reported having experienced depression during the course of their career.[xi] Finally, and perhaps most chilling is the fact that almost 12% admitted suicidal thoughts at some point over the course of their career.[xii]

One still-reliable finding of the 1990 Johns Hopkins study is that in all graduate-school programs in all professional fields, the optimists outperformed the pessimists – except in one profession. The *only* exception was among law students, where pessimists outperformed optimists.[xiii] This is logical when you consider that pessimism is an asset for attorneys. Pessimism creates skepticism about what our clients, our witnesses, opposing counsel, and judges tell us, as well as assisting us in effectively questioning interpretations of the law. Pessimism inspires lawyers to anticipate the worst, and thus prepare for it. Benjamin Disraeli, former Prime Minister of the United Kingdom said that “I am prepared for the worst, but hope for the best”. He probably learned this while training as a solicitor (he ultimately abandoned the law). But

pessimism is bad for your health: it leads to stress and disillusionment, which makes us vulnerable to depression.[xiv]

In addition to the character traits and other stressors which may decrease the good mental health of lawyers (perfectionism, pessimism, financial insecurity, etc. . . .), Britain's Medical Research Council established a clear link between longer work hours and depression.[xv] In the study, the white collar workers who put in eleven hour workdays had a 2.5 times higher likelihood of developing a major depressive episode (MDE) than the employees who worked only seven to eight hour days.[xvi] There was a link between long work days even after the researchers took things into account such as level of support in the workplace, job strain, alcohol use, smoking and chronic physical disease.[xvii] The study indicated that the overworked junior and mid-level employees appear to be more prone to depression than the people at higher levels, which finding supports the Hazelden study's results that junior associates and entry-level attorneys have the highest rates of depression (employees under 30 showed depression rates of 32%).[xviii] The takeaway is that regardless of age, and ignoring every other contributing factor (i.e., increased rates of addiction, poor health habits and increased rates of depression), many lawyers are *still* 2.5 times more likely to develop depression than those who work less than eleven hours a day as a result of the long hours. And lawyers work longer hours than most any other profession.

IS THERE A SOLUTION?

As we move back into our pre-COVID-19 routines, the best news for lawyers is that there are some fairly simple changes we can make in our lifestyles at any age, which can be transformative for us, and can result in tremendous improvements in our

mental, physical, and brain health. They'll also help us deal with the added stress of returning to a workplace that may still feel unsafe and uncertain and improve our resilience. This is the opportunity to take steps to do something different. We don't have to accept the status quo that generations of lawyers before us have accepted. We have been given a do-over as we begin again. This isn't just for younger lawyers. Middle-aged lawyers, those "baby boomers" who are quickly aging into the "silver tsunami" are following suit – not just to improve physical health, but to maintain mental acuity -- and the conversation of how to improve our lives as lawyers and return to the place of actually enjoying the practice of law is growing.

This new normal will be significantly improved for us if we make the decision to change our course, and not only demand a better quality of life, but actually take the action to make it happen. Improving our lifestyle habits and incorporating healthy practices as we return to work have everything to do with the quality of services we perform for our clients. All of the research and scientific studies indicate that we will perform better when we incorporate the 3M's into our lifestyle: Movement, Mindfulness, and Meditation.

MOVEMENT

Exercise makes you smarter. The Harvard Health Blog reports that regular exercise changes the brain to improve memory and thinking skills. In a study done at the University of British Columbia, researchers found that regular aerobic exercise, the kind that gets your heart and sweat glands pumping; appear to boost the size of the hippocampus, the brain area involved in verbal memory and learning. Remember that the hippocampus and the amygdala are the areas of the brain damaged by chronic

stress. It's been proven that exercise helps reverse that damage and helps maintain better brain health. Exercise lowers stress, decreases anxiety and depression, reduces negative mood, enhances positive mood, and decreases the likelihood of developing depression and diabetes. It can decrease high blood pressure and even helps people quit smoking.

Physical exercise, in and of itself, is stress relief. Exercise increases the brain's concentrations of norepinephrine, a chemical that can moderate the brain's response to stress. Biologically, exercise seems to give the body a chance to practice dealing with stress. It forces the body's physiological systems – all of which are involved in the stress response – to communicate much more closely than usual: The cardiovascular system communicates with the renal system, which communicates with the muscular system. And all of these are controlled by the central and sympathetic nervous systems, which also must communicate with each other. This workout of the body's communication system may be the true value of exercise; the more sedentary we get, the less efficient our bodies in responding to stress.

It's not true that the only way to benefit from exercise is to perform at 90% of our heart rate. As perfectionists, we think that we start everything somewhere near everyone else's finish line. In truth, any movement at all can help save your life. Just stick with it, no matter how slow the start. The key is to start. Now is the time. Scottsdale real estate and tax attorney Stanley Bronstein, who described himself as "a heart attack waiting to happen," has written about his own journey of life-threatening habits while practicing law which resulted in his weighing 367 pounds. At age 50, Bronstein decided to reinvent himself. It all started by taking a walk. Now, 6 years later

and at half of his original weight, Bronstein promotes walking, (not running) for lawyers. Slow walking. Bronstein says, “I’m as steady as a snail”. The movement itself is the key, says Bronstein.

In addition, exercise also results in a mentally stronger you now, and it may also stave off diseases like Alzheimer’s and dementia. In 2014, Finnish scientists published their data showing that being physically active during middle-age can prevent the onset of dementia later on. The scientists involved in this study suggest that leisure-time physical activity (LTPA) performed at least twice a week yielded maximum neuroprotective effects for people across ages, sex, and varying degrees of genetic susceptibility. It is interesting to note that the cognitive benefits of LTPA in mid-life subjects have lower risk of developing dementia and Alzheimer’s disease in their old age than those who do not exercise. Oddly, the cognitive benefits of LTPA in mid-life were most prominent in overweight and obese persons. It can be assumed that most of these individuals led sedentary lives up until then.

An excellent book outlining how exercise makes us smarter, staves off degenerative brain disorders, and causes us to live longer, is *Younger Next Year*, and *Younger Next Year for Women*, both written by a New York City trial lawyer in his 70s and his cardiologist. They will inspire you to look at your body, your longevity, and your quality of life in a whole different way and will make you want to move.

MINDFULNESS

There has never been a better time to begin the practice of mindfulness than in the middle of a pandemic where we have little or no control over the outcome of events at any given moment. Nowadays, mindfulness and meditation are often used to mean

the same thing, which can be confusing, but not everyone is clear about what "mindfulness meditation" is and how it differs from either of the above. Both are pathways to well-being and peace of mind. What is the difference between mindfulness and meditation?

Mindfulness is being aware. It's noticing and paying attention to thoughts, feelings, behavior, and everything else. Mindfulness can be practiced at any time, wherever we are, whoever we are with, and whatever we are doing, by showing up and being fully engaged in the here and now. That means being free of both the past and future—the what if's and what maybe's—and free of judgment of right or wrong—the I'm-the-best or I'm-no-good scenarios—so that we can be totally present without distraction. Mindful meditation means "paying attention in a particular way: on purpose, in the present moment, and non-judgmentally." It was first introduced into the legal profession in 1989 when Jon Kabat-Zinn, Ph.D., Director of the Center for Mindfulness in Medicine, Health Care and Society in Boston conducted a program for judges. Since judges must pay attention to everything going on in the courtroom, they wanted to learn meditation to reduce stress and have a "systematic way of handling one's own intrusive thoughts and feelings."

Mindfulness is the awareness that arises when we non-judgmentally pay attention in the present moment. It cultivates access to core aspects of our own minds and bodies that our very sanity depends on, says Jon Kabat-Zinn, from The Unexpected Power of Mindfulness Meditation. Mindfulness, which includes tenderness and kindness toward ourselves, restores dimensions of our being. These have never actually been

missing, [it's] just that we have been missing them, we have been absorbed elsewhere. When your mind clarifies and opens, your heart also clarifies and opens.

According to Dr. Kabat-Zinn, who has studied mindfulness for more than 35 years, practicing mindfulness is actually a form of meditation. The "non-judgmental" part of mindfulness allows us to simply be a part of. One of this author's favorite quotes is that "things are neither good nor bad, they simply are." William Shakespeare wrote it in Hamlet, Act II, Scene 2, as "for there is nothing either good or bad, but thinking makes it so." Flash forward a few hundred years, and in the TV show Mad Men, Don Draper reminded a client that "change is neither good nor bad, it simply is."
When we allow ourselves to look at our lives, our circumstances, our clients, our families, and COVID-19 NOT in the realm of judgment, but just as they are, we eliminate all of the noise our head makes trying to classify, affirm negative thinking, and pigeon-hole the information into categories and nice neat boxes. In truth, things simply are. Our perspective defines the circumstance, and we get to choose what that is . . . good or bad, or nothing at all.

You've heard about the "glass half full" versus the "glass half empty" personalities. That's the difference between an optimist (half full) and a pessimist (half empty). Since lawyers are trained to think pessimistically, and indeed we excel as lawyers using pessimistic thinking, we are typically "glass half empty" folks. But what if you looked at the glass and it just was? It was neither good (half full) nor bad (half empty); it was simply a glass with liquid in it. That doesn't change one single thing about the glass or what's in it or how much. What it does do is free your mind to simply accept that there's a glass with some liquid in it and you don't have to judge whether

that's good or bad. Period. It completely removes the business of evaluating, labeling and then trying to extrapolate what's next or what the labels ("good" and "bad") actually mean in the situation.

This mode of non-judgmental thinking provides tremendous freedom for your busy lawyer brain and allows you to simply observe and accept. It's so very useful right now as you begin to plan your return to work but have to maneuver through so many different obstacles that you never encountered before and go down roads for which there is no roadmap. This is vastly different from the critical thinking we learned in law school, and that we carry into every moment of our daily law practice and even after we end our workday. It allows our brain a "breather," if you will, from all of the critical thinking and judgment we necessarily exhaust our brains with on a daily basis. It is a peaceful moment for our mind.

Mindfulness is simply awareness, something you don't have to practice for 20 minutes at a time. You can be mindful anywhere, anytime and with anyone you like. "You and I sitting here having a conversation, you know, the thought might cross one of our minds, 'Well, when are we going to get down to meditating?'" Jon says. "The fact is, we are." The other gift mindfulness brings to all those who practice it, but which seems an especially important gift for lawyers, is that by its very nature it takes us out of our tomorrows and our yesterdays and demands that we focus on the only thing we truly have, the now. As lawyers, we live by calendars. We ruminate on past losses (more so than past wins). Our past and our future are so jumbled together that the "now" becomes lost.

Eckhart Tolle's words, in his number one best seller "The Power of Now: A Guide to Spiritual Enlightenment", almost seem as if they were written for lawyers:

> All negativity is caused by an accumulation of psychological time and denial of the present. Unease, anxiety, tension, stress, worry - all forms of fear - are caused by too much future, and not enough presence. Guilt, regret, resentment, grievances, sadness, bitterness, and all forms of nonforgiveness are caused by too much past, and not enough presence. [Emphasis added].

Judge Jeremy Fogel, Director of the Federal Judicial Center, has written about the important role of mindfulness in assisting judges in "slowing down one's mental processes enough to allow one to notice as much as possible about a given moment or situation, and then to act thoughtfully based on what one has noticed." In the 1990s, the Ninth Circuit US Court of Appeals mediators attended training on mindfulness. In the time since its inception in the late 1980s and now, many law firms and law schools have started providing mindfulness training for law students and lawyers.

MEDITATION

Mindfulness folds into meditation, which folds back onto mindfulness. Mindfulness and meditation are mirror-like reflections of each other: mindfulness supports and enriches meditation, while meditation nurtures and expands mindfulness. Where mindfulness can be applied to any situation throughout the day, meditation is usually practiced for a specific amount of time. But what is meditation? Merriam-Webster defines meditation as follows:

Intransitive verb

1: to engage in contemplation or reflection.

2: to engage in mental exercise (such as concentration on one's breathing or repetition of a mantra) for the purpose of reaching a heightened level of spiritual awareness. [Emphasis added]

Transitive verb

1: to focus one's thoughts on: reflect on or ponder over.

2: to plan or project in the mind: intend, purpose.

At its very essence, meditation is the process of quieting the mind in order to spend time in thought for relaxation or religious/spiritual purposes. The goal is to attain an inner state of awareness and intensify personal and spiritual growth. In practice, meditation involves concentrated focus on something such as a sound, image or feeling. Meditation is also referred to as dhyana in Sanskrit.

As lawyers, we think, think, and think. We contemplate, we ruminate, and we "focus on." We are trained problem-solvers. What we don't seem to know how to do, and what may not come naturally to us, is the process of contemplating and focusing our thoughts not on problem-solving, but on the present thing, and only one thing (for example our breath), with an actual goal of calming our mind, and making it be still and quiet. Sounds difficult, doesn't it? It is, at first. But meditation is a practice. Just like the practice of law. In law we're always learning and building upon that knowledge. Meditation is the same way. International Shoe v. Washington, 326 U.S. 310 (1945) made absolutely no sense to us on the first day of law school. At this point in your career though, you can dissect any set of facts and apply the law to them in a fairly well-

reasoned and knowledgeable fashion, and International Shoe makes perfect sense. The same is true for the practice of meditation.

The first stage of meditation is to find a focal point or method of focusing in order to free oneself from distractions. Some methods of focusing include:

Sound: Repeating a mantra, phrase or other sound.

Visualizing: Picturing an object with eyes closed, such as a lotus flower or the energy points in the body (chakras).

Gazing: Looking at an actual object with eyes open. Candles, flowers or pictures are common objects used in gazing.

Breathing: Observing the breath and what it feels like – the sensations – as it travels in and out of the body.

The primary methods of meditation are Focused Attention (FA) meditation and Open Monitoring (OM) meditation. Focused Attention is focusing on a chosen object in a sustained fashion. Open Monitoring meditation involves non-reactively monitoring the content of experience from moment-to-moment, primarily as a means to recognize the nature of emotional and cognitive patters. The two types of meditation are often combined either in a single session or over the course of the practitioner's training.

There is unequivocal evidence, through objective testing tools like MRIs and other brain scan tools, that there are structural differences and higher gray matter density in the lower brainstem of patients engaged in the long-term practice of meditation. This evidence has been published in multiple medical and scientific journals and can be found on credible medical websites (e.g., the Mayo Clinic), that mindfulness and meditation can literally change your brain. "Recent research provides strong

evidence that practicing non-judgmental, present-moment awareness (a.k.a. mindfulness) changes the brain." Meditators demonstrate superior performance on tests of self-regulation, resisting distractions and making correct answers more often than non-meditators. They also show more activity in the anterior cingulate cortex (ACC), which is a structure located inside the forehead, behind the frontal lobe.

Extensive practice involving sustained attention can lead to changes in brain structure. Through studying the brains of Tibetan Monks (a study that the Dalai Lama himself encouraged and then recruited the monks for), scientists found that over many hours of meditation (i.e., a sustained practice), the long-term practitioners had altered the structure and function of their brains.

A great starting-point for a lawyer who wants to learn the practices of mindfulness and meditation can be found in lawyer/meditator Jeena Cho's book, "The Anxious Lawyer: an 8-Week Guide to a Joyful and Satisfying Law Practice through Mindfulness and Meditation" (American Bar Association, 2016). It's a step-by-step process of introducing mindfulness and meditation into your daily regimen. There's also a website (listed in the resources section of this article) which allows you to participate in the practices of mindfulness and meditation over the course of eight weeks.

Mindfulness meditation helps us make better complex decisions, which is what we, as lawyers, are paid to do. We extricate our clients from complex problems. Any modality that improves our ability to do so should be immediately incorporated into our daily practice. Einstein said that we can't solve our problems from the level of thinking that we were at when we created them," says Marianne Williamson. "A different level of thinking doesn't mean just a different emphasis in our thinking, or a more loving kind of

thinking. It means what he said, a different level of thinking, and, to me, that is what meditation is. Meditation changes us, as it returns us to our right mind.

Right here, right now, as we navigate these troubled waters, our “right mind” is exactly where we need to be. Returning to a “new normal” may be anything but normal, but with a few changes, we can rise to the occasion and improve our mental and physical health going forward.

THE ETHICAL ASPECT OF IMPAIRMENT ISSUES

There have been a number of studies which link impairment to breaches of ethical duties, and the resultant disciplinary actions. “It has been estimated that between forty (40%) and seventy-five per cent (75%) of the disciplinary actions taken against lawyers involve practitioners who are chemically dependent or mentally ill.” But can chronic anxiety and stress cause you to be “impaired” or “mentally ill”? The answer is “yes,” they can.

Besides leading to hopelessness and depression, which chronic stress and anxiety absolutely do, profound mental stress, chronic anxiety, and repeatedly long workdays can cause our thinking and our responses to become less sharp and even muddled at times. These stressors will actually diminish our ability to make good complex decisions which, of course, is at the very heart of what we do all day, every day.

Studies prepared in Oregon and in Louisiana found that eighty per-cent (80%) of their states' Client Security Fund (Escrow) Cases involved chemical dependency, gambling or mental health issues. In 2005, the Illinois Attorney Registration and Disciplinary Commission reported that (all) impairments accounted for a

disproportionate share of program awards. And finally, in Illinois, between 1998 and 2005, twenty-eight per cent (28%) of all attorneys disciplined were found to be impaired, and thirty-seven per cent (37%) of claims against the Illinois Security Fund stemmed from attorneys with impairment. At least anecdotally, I have observed much higher levels of impairment where unethical conduct is involved. Lawyers are not slackers or thieves by nature.

So how can we recognize where we might be treading into the dangerous waters of impairment and/or unethical behaviors? The rules are pretty clear about what our duties are as lawyers in the realm of decision-making and the practice in general . The areas in which Kentucky and other bar associations see the highest level of complaints are not coincidentally the three areas in which the impaired attorney will have the greatest struggle. Specifically: communication, competency and diligence.

Pursuant to Supreme Court Rule 3.130(1.4) **Communication**:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Pursuant to Supreme Court Rule 3.130(1.1) **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.

Comments: Thoroughness and Preparation

(5) 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. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

(6) To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

And, pursuant to Supreme Court Rule 3.130(1.3) **Diligence**:

A lawyer shall act with reasonable diligence and promptness in representing a client.

The top three client complaints, across all states, are communication (lack thereof); competence (being unprepared); and diligence (not moving the case). All three of these are impacted by an overly stressed or depressed brain. It can feel impossible to pick up the phone to call a client when you're in the middle of a major depressive episode. The same is true about being prepared, when all you really want to do is to escape the chaos of your practice. And finally, it's all but impossible to remain diligent when you can't even decide how to solve the problems of the case, don't have your trial strategy, or just can't concentrate long enough to figure out how to move forward. All of these issues arise as a result of an overly anxious and stressed brain and it can be all but impossible to recognize it in yourself.

Supreme Court Rule 3.130(8.3) relates to "Maintaining the Integrity of the Profession." Rule 8.3 is entitled: **Reporting Professional Misconduct**.

(a) A lawyer who **knows** that another lawyer **has committed a violation** of the Rules of Professional Conduct **that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness** as a lawyer in other respects, shall inform the Association's Bar Counsel.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such violation to the Judicial Conduct Commission.

(c) A lawyer is not required to report information that is protected by Rule 1.6 or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received in the course of participating in the Kentucky Lawyer Assistance Program or Ethics Hotline.

(d) A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).

(e) As provided in SCR 3.435, a lawyer who is disciplined as a result of a lawyer disciplinary action brought before any authority other than the Association shall report that fact to Bar Counsel.

(f) As provided in SCR 3.320, a lawyer prosecuting any member of the Association who has been arrested for or who has been charged by way of indictment, information, or complaint with a felony or Class A misdemeanor shall immediately notify Bar Counsel of such event.

(g) As provided in SCR 3.166(2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, shall immediately notify Bar Counsel of such event.

The duty to report unethical behavior, as set forth in Supreme Court Rule 8.3, frequently called the “snitch rule,” requires a lawyer to inform the office of disciplinary counsel when they know of ethical violations. The same rule requires attorneys to report judges to the Judicial Conduct Commission for misconduct.

The rule is very specific about what is required to trigger the reporting requirement. First, the lawyer must **know** that unethical conduct has been committed. It doesn't say that you think, you heard, or you guess unethical conduct was committed. You must **know.** Second, not only must you know that unethical conduct was committed; but it must be unethical conduct that **that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness.** If you leap these two hurdles, then the reporting requirement is triggered.

If you are uncertain as to whether your information triggers the reporting requirement, before you report an attorney for unethical conduct, it may be prudent for you to first call the Ethics Hotline, and run the scenario, in hypothetical format, through the Ethics Hotline. The information discussed with the Ethics Hotline not subject to disclosure nor does it fall under the reporting requirement. Further, under (c) there is no requirement for a KYLAP volunteer or employee (in Kentucky it is prohibited from being reported) to report unethical conduct learned through the course of assisting a lawyer or judge while participating in an approved lawyer assistance program.

Here's the critical reminder to you that is not set forth in the rule. If you have knowledge that requires reporting the matter to disciplinary counsel due to an attorney's impairment, that is not the same thing as calling KYLAP and reporting the information. The two entities (Office of Bar Counsel and the Kentucky Lawyer Assistance Program) are two wholly separate entities that do **not** share information. If you call KYLAP about a colleague who has committed unethical conduct because of an impairment, you have done a wonderful thing for that attorney. But you have not satisfied the reporting requirement (to your disciplinary committee) of 8.3. KYLAP is prohibited from reporting

the misconduct to discipline. What you can do by notifying KYLAP, however, may save your friend's life and/or career. That's the greatest gift you can give to your colleague.

CONCLUSION

It's true that the way we look at our lives and our practices will never be the same after a global pandemic. But we can begin practices that will help us adapt to the changes that we will inevitably face each day for the foreseeable future. Physical exercise and mindfulness meditation improve your physical and mental health and improve resilience. Both help to decrease the impact of stress on your body, allow you to manage anxiety better, lower blood pressure, and improves a number of other stress-related psychosomatic symptoms. We need that now more than ever.

Eckhart Tolle said, "It is not uncommon for people to spend their whole life waiting to start living." At this point in all of our lives, everything around us has been halted, modified, or completely changed. You have decisions to make about your career that perhaps you would not have considered two years ago. Yes, you're going to be working hard, but you can also work hard at being well. Don't wait to take care of physical and mental health "when things lighten up" or when "it gets easier." It has been proven to us that it doesn't get easier. But it certainly gets different. Most of our work stressors moving forward will be familiar to us but there will absolutely be new challenges, too. We've already experienced many of them. We must begin living in the now and take better care of these amazing vessels (our bodies and brains) that have served us so well thus far. In doing so, we will be better lawyers, better family members, and better community members. If we take better care of ourselves, both physically and mentally, we will feel better; we will practice better; and we will BE better. Every day we

have a new opportunity to choose to improve ourselves and our lives. We don't have to go back to exactly how things used to be. We need not accept the status quo of the way things were. We can reduce or even eliminate the high rates of alcoholism, depression, suicide, and overall discontent with our law practices and our lives.

The new normal is ours to create. By exercising, eating better, moderating our alcohol intake, practicing mindfulness, meditating, staying in the now, and exploring our spirituality, we increase our resilience and can write a new narrative for our lives as lawyers. We can experience joy, peace, and happiness in our practice. We don't often hear lawyers describing those experiences in their practices. Maybe we have never experienced them. But things can change. In the oft-quoted words of Mahatma Gandhi, "be the change you wish to see in the world."

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[i] https://www.cnn.com/2014/01/19/us/lawyer-suicides/index.html, Accessed April 12, 2018.
[ii] https://www.usatoday.com/story/news/nation/2013/06/03/lawyer-suicides-concern-colleagues/2383627/
[iii] https://www.huffingtonpost.com/don-mcnay/the-hall-of-fame-and-dead_b_5560781.html, https://www.huffingtonpost.com/don-mcnay/dead-lawyers-and-dying-yo_b_3598528.html, Accessed April 12, 2018.
[iv] https://www.americanbar.org/groups/lawyer_assistance/task_force_report.html, https://www.forbes.com/sites/pauladavislaack/2017/08/15/lawyer-well-being-creating-a-movement-to-improve-the-legal-profession/#1fbdaf034d1e,
[v]https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx
[vi] "Occupations and the Prevalence of Major Depressive Disorder," 32 Journal of Occupational Medicine 1079 (1990).
[vii] See http://www.samhsa.gov/disorders/mental.
[viii] See http://www.samhsa.gov/disorders/mental.
[ix] Benjamin, GA, Darling E, Sales B. "The prevalence of depression, alcohol abuse, and cocaine abuse among United States lawyers." *International Journal of Law and Psychiatry*, 1990;13:233-246. ISSN 0160-2527.
[x] *Id.*.
[xi] Forward, Joe, "Landmark Study: U.S. Lawyers Face Higher Rates of Problem Drinking and Mental Health Issues", *State Bar of Wisconsin Journal*, Live 2, http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=89&Issue=2&ArticleID=24589.
[xii] Krill, PR, *et al, supra,* 50.
[xiii] Benjamin, GA, *et al*, *supra*.
[xiv] Toshihiko, Maruta, et al., "Optimists vs Pessimists: Survival Rate Among Medical Patients Over a 30-Year Period," *Mayo Clinic Proceedings*, Volume 75, Issue 2, 140 – 143.

[xv] Virtanen M, Stansfeld SA, Fuhrer R, Ferrie JE, Kivimäki M (2012) "Overtime Work as a Predictor of Major Depressive Episode: A 5-Year Follow-Up of the Whitehall II Study." *PLoS ONE* 7(1): e30719. doi:10.1371/journal.pone.0030719.
[xvi] *Id.*.
[xvii] *Id.*
[xviii] Krill, PR, *et al, supra,* Table 3, 49.

OTHER RESOURCES (ARTICLES)

https://www.americanbar.org/groups/lawyer_assistance/well-being-in-the-legal-profession

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lawyer_well_being_report_final.pdf

https://www.abajournal.com/news/article/law-firms-came-dangerously-close-to-losing-a-quarter-of-their-associates-in-2021

https://www.abajournal.com/voice/article/how-i-learned-to-find-work-life-balance-during-the-pandemic

https://www.abajournal.com/news/article/30-of-these-lawyers-would-like-to-work-fewer-hours-those-most-dissatisfied-are-younger-and-female

https://www.abajournal.com/news/article/20-of-surveyed-corporate-lawyers-were-highly-exhausted-and-68-of-that-group-wanted-to-switch-jobs

https://www.abajournal.com/magazine/article/how-to-integrate-well-being-throughout-your-organization

https://www.abajournal.com/news/article/what-does-it-take-to-retain-female-lawyers-in-criminal-justice-aba-task-force-identifies-solutions

https://www.abajournal.com/news/article/survey-finds-decline-in-lawyer-well-being-particularly-for-early-career-respondents