

THE ELEPHANT IN THE ROOM: A PROFESSION AT RISK

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I. Introduction

For individuals in professions involving a large degree of stress, fiduciary responsibility, and discretionary judgment, the likelihood and consequences of psychological impairment may be substantial.¹ For example, it has been noted that

Lawyers hold a unique position of public trust in our society. They are called upon to resolve the most delicate of problems, and in the course of acquitting their responsibilities are provided access to the most private of information about their clients' personal and professional lives. From a consumer's point of view, it is reasonable to ask whether all, or at least most, lawyers can be entrusted with this charge. *For example, what if a significant percentage of lawyers suffered from psychological distress that affected or might affect their practice?*²

The risks and potential consequences of impairment among lawyers are indeed substantial. First, it appears that several clinically relevant factors – particularly those associated with stress and burn-out – are common to many distressed attorneys. Second, the relationship between the attorney's role and the consequences of impairment raises the clinical stakes and adds a measure of public concern to the problem. Third, with over a million lawyers in the United States, elevated rates of impairment present a substantial public health concern.

II. Contours of the problem

A. The risk of attorney impairment

There is ample reason to believe that attorneys as a group are particularly at risk for stress-related disorders. One indicator of the magnitude of the problem is that the profession itself, whose members as a group may actually be somewhat more reluctant than most people to acknowledge psychological problems,³ has been expressing concern for years now. Evidence of that concern can be found at the local and national level. For example, the Journal of the

¹ Some of the issues discussed in this paper are addressed in Donald P. Judges, *Voyages on H.M.S. Beagle*, 49 S.M.U. L. REV. 611 (1995) (reviewing MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE (1994)).

² G. Andrew H. Benjamin, et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOLOGY REV. 113, 113 (1992) (emphasis added).

³ See Suzanne C. Kobasa, *Commitment and Coping in Stress Resistance Among Lawyers*, 42 J. PERSONALITY & SOCIAL PSYCHOLOGY 707, 715 (1982) ("Lawyers may be more psychologically reluctant than others are to interpret their strain symptoms as deserving the attention of medical specialists and necessitating the cutback of normal activities that goes with being sick.").

American Bar Association has noted programs that assist lawyers in adapting to personal crises.⁴ The Arkansas Lawyer more than a decade ago published two pieces evidencing such concern, a brief description of symptoms of and treatments for depression and a review of a book titled *Stress Management for Lawyers*; and the Utah State Bar Journal devoted its August-September 2003 issue to the problem.⁵

A more recent indicator of growing pressure on the legal profession to address these concerns is the nascent attack on what has become the mainstay of law firm economics over the last half century: the billable hour. Billing expectations in the larger firms have risen steadily from 1,200 to 1,660 per annum in the 1960s to 2,000 to 2,200 or more hours. Critics, who include the late Chief Justice Rehnquist and former American Bar Association President Robert E. Hirshon, point out that such requirements impose considerable pressure on the profession. As the New York Times put it, “[t]here is certainly widespread consensus among practitioners, judges, recruiters and academics that hourly billing leads to punishing work schedules, unhappy lawyers, ill-served clients, over-lawyered cases, perverse incentives and outright fraud.”⁶ Some critics, including Scott Turow in a recent cover story in the ABA Journal, have called for the demise of the billable hour.⁷ Some firms have begun exploring alternative approaches, such as exempting first-year associates from billable-hour requirements, implementing a staged billable-hour requirement, and elimination of hourly billing altogether.⁸ The current economic crisis is likely to aggravate these stressors, although some have suggested that it will force potentially positive restructuring of fees and costs in the long term.⁹

Lawyers have increasingly found the profession to be stressful, dissatisfying, and

⁴ David Berringer, *The Way Back: Personal Crises Can Be Especially Tough for Busy Lawyers, But Help in Coping Is Out There*, 82 A.B.A. J. 56 (1996).

⁵ Elizabeth Emmett, *Depression: Research Sheds Light on a Dark Illness*, 31 ARKANSAS LAWYER 4 (1996); William Martin, *An Increasingly Difficult Occupation*, 31 ARKANSAS LAWYER 26 (1996). The Utah State Bar Journal volume is available on-line at http://www.utahbar.org/barjournal2000/html/august_september_2003.html.

⁶ Adam Liptak, *Stop the Clock? Critics Call the Billable Hour a Legal Fiction*, New York Times, Oct. 29, 2002 (On the Job section), available at <http://newyorktimes.com/gst/fullpage.html>.

⁷ Scott Turow, *The Billable Hour Must Die*, 93 A.B.A. J. 32 (Aug. 2007).

⁸ David Gialanella, *Taming the Billable Beast*, 94 A.B.A. J. 30-31 (Feb. 2008).

⁹ Adam Cohen, *With the Downturn, It's Time to Rethink the Legal Profession*, New York Times, April 1, 2009 (Opinion section), available at <http://www.nytimes.com/2009/04/02/opinion/02thu4.html/>.

unhealthy; and more are leaving practice altogether.¹⁰ Some law firms, more slowly than their business counterparts, have begun to consider adopting more flexible and family-friendly work policies.¹¹ An especially interesting development has been the emergence at some elite law schools of a grassroots movement to try to influence the profession in that direction. A group established in 2006 at Stanford Law School and now with chapters at other top schools, “Law Students Building a Better Legal Profession,” which is “deeply concerned about the future of the legal profession.” The group decries what it sees as the “increasing billable hour requirements, decreasing professionalism, and a more dominant focus on the bottom line.” The group ranks firms in New York City and Washington, D.C., based on issues such as diversity, work-life programs, and billable-hour requirements, and its members have announced that they will not seek employment at low-ranked firms: “We are committed to educating and encouraging our classmates to join us in conducting well-informed job search that reward firms who embrace balanced expectations and flexibility and avoid firms that only contribute to the growing problems confronting our profession.”¹²

According to some observers, the problem is not only long hours but also excessive focus on external measure of success (money, social status) at the expense of more intrinsic goals (satisfaction from meaningful work well done) and an increasing disconnection between one’s values and one’s occupation. These patterns are said to begin in law school. A number of commentators have suggested that legal education not only is failing adequately to prepare graduates for professional life but actually may be undermining positive attributes with which many students begin law school that otherwise would provide a stronger basis for professional development. The findings of a longitudinal study of law students

provide[] empirical support for the concern that our legal training has precisely the opposite impact on students from that suggested by our rhetoric – it appears to undermine the values and motivation that promote professionalism as it markedly diminishes life satisfaction. All indications are that when students graduate and enter the profession, they are significantly different people from those who arrived to begin law school: they are more depressed, less service-oriented, and more inclined toward undesirable,

¹⁰ Alex Williams, *The Falling-Down Professions*, New York Times, Jan. 6, 2008, available at <http://www.nytimes.com/2008/01/06/fashion/06professions.html/>.

¹¹ Lisa Belkin, *Who’s Cuddly Now? Law Firms*, New York Times, Jan. 24, 2008 (Life’s Work Section), available at www.nytimes.com/2008/01/24/fashion/24WORK.html/.

¹² Quotes are taken from their website, Law Students Building a Better Profession, available at <http://www.law.stanford.edu/experience/studentlife/organizations/lbbpl/>, last visited October 29, 2009.

superficial goals and values.¹³

The foregoing study further found that in the final two years of law school “students experienced a further and troubling diminution of all their valuing processes (both intrinsic and extrinsic), . . . suggesting a sense of disinterest, disengagement, and loss of enthusiasm” *Id.*

Rather than discouraging the basis for professionalism,

[t]he culture and environment of the law school should foster professional conduct. *A law school must have a culture of respect, civility, responsibility, and honor. A culture of professionalism is promoted when the faculty, staff, and administrators model professional values and attitudes.* Students will do as we do more frequently than they will do as we say. For most students law school professors are their first and most important role models of lawyers. Professionalism ideals can either be enhanced or undermined by the behavior of faculty in and out of the classroom.¹⁴

Awareness that something is amiss in the profession has surfaced gradually over the past two decades. Early signs of this shift can be seen, for example, in a comparison of the 1990 American Bar Association self-study research with that reflected in an ABA-sponsored 1972 review of the literature. The 1972 review, which purports to be a "bibliographic review essay [which] provides an overview of research done on the legal profession in the United States," is virtually silent on the issues of stress, burn-out, and impairment.¹⁵ Indeed, the review observes that "[g]enerally speaking, the works that have been reviewed above examine various aspects and characteristics of the legal profession and not the personal traits of its members."¹⁶ The review goes on to mention the few works that do address such "personal traits," which tend to consist merely of speculation concerning vaguely defined personality traits allegedly predominant among attorneys.

In stark contrast to the 1972 review, the Young Lawyers Division of the American Bar Association undertook a detailed two-wave study of career dissatisfaction among lawyers (the "YLD Surveys"). The first wave (consisting of a random probability sample of 3,000 lawyers) was completed in 1984. The second wave included both a longitudinal study of the 1984

¹³ Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 *Clinical L. Rev.* 425, 433-34 (2005).

¹⁴ ROY STUCKEY, *ET AL.*, BEST PRACTICES FOR LEGAL EDUCATION 101 (2007)

¹⁵ OLAVI MARU, RESEARCH ON THE LEGAL PROFESSION: A REVIEW OF WORK DONE (1972).

¹⁶ *Id.* at 43.

respondents and a sample of lawyers who had entered practice since the first wave.¹⁷ The simple fact that the profession undertook the study at all is evidence of concern, and several of the study's findings indicate that such concern is well-founded.

First, the study found "that across the board, regardless of job setting, there has been a dramatic 20% reduction in the number of lawyers indicating that they are very satisfied, accompanied by an increase in dissatisfaction."¹⁸ The YLD Surveys concluded that many attorneys encounter significant work-related problems, which have become worse and have spread across a broader spectrum of the population between the two waves of the study.¹⁹ Dissatisfaction has increased throughout the range of practice environments (including private, government, and in-house corporate practice) and levels of seniority. Both the number of negative work factors and the percentage of attorneys experiencing them have increased. Those factors include political intrigue, back-biting, impersonal atmosphere, and excessive workloads that leave insufficient time and energy for self and family.²⁰ The data are especially clear with respect to a real increase in the number of hours worked, and provide concrete support for the inference of increased strain on lawyers' family lives. For example, the number of lawyers working 240 hours per month or more increased threefold from 1984 to 1990.²¹

Second, the study found adverse impacts of potentially more direct clinical significance: "These lie in the area of increasing social dysfunction or destructive behavior by lawyers and the impact of this behavior on themselves, their families, and their quality of work and productivity, their firms, and their clients."²² Those findings include increased rates of excess fatigue, marital problems, and alcohol consumption.²³

¹⁷ See ABA YOUNG LAWYERS DIVISION, THE STATE OF THE LEGAL PROFESSION: REPORT #1, A DISCUSSION OF THE EXTENT, CAUSES, AND IMPACT OF LAWYER CAREER DISSATISFACTION 1990 v. 1984 (1990) (hereafter YLD SURVEYS).

¹⁸ *Id.* at 7. The increase in dissatisfaction among corporate counsel, who in 1984 expressed higher job satisfaction than their private-practice counterparts, was especially marked at 77%. *Id.*

¹⁹ *Id.* at 8.

²⁰ *Id.* at 9-11.

²¹ *Id.* at 12. Interestingly, while more lawyers are working longer hours, lawyers' median inflation-adjusted incomes (which are much lower than commonly believed) have increased little over the same period. *Id.*

²² *Id.* at 16.

²³ *Id.* at 17. The report's data on alcohol consumption – which showed an alarming rate of 13% for the consumption of six or more drinks daily – actually were in error, as a subsequent addendum explained. Nevertheless, as set forth below, other data confirm that rates of alcohol

Third, the report found that most of the foregoing problems are even worse for women attorneys: "across the board, regardless of position, women continue to experience a far more negative work environment than men."²⁴ And they also report that sexual harassment remains a serious problem: "Every female junior associate who responded to the survey said she experienced or witnessed an incident of sexual harassment during her career."²⁵ Only women in solo practice, who do not have to deal with male supervisors, report dissatisfaction levels commensurate with men.²⁶

The findings of the YLD Surveys, and other evidence of professional stress, caught the attention of observers within the profession.²⁷ Some noted the impact of staggering workloads and ethical problems associated with the billable hour mentioned above.²⁸ Others pointed out that competitive pressures have rendered work environments ever more impersonal and dehumanizing,²⁹ and have produced a noticeably increased level of interpersonally hostile and

abuse are elevated among lawyers.

²⁴ *Id.* at 14-15.

²⁵ Bruce Rutledge, *Women Lawyers: A Status Report: A Demographic Look at How Women Are Faring in Their Careers*, 15 BARRISTER 30, 32 (1991).

²⁶ Ronald L. Hirsch, *Will Women Leave the Law?*, 16 BARRISTER 22, 25 (1989). A much more recent survey, with a large but self-selected sample, reflects generational changes among women in the legal profession. A majority of women lawyers under 40 years old, for example, reported having better working relationships with their male supervisors, who the women reported gave better direction, gave better constructive criticism, and were better at keeping information confidential than their female supervisors. Stephanie Francis Ward, *What Women Lawyers Really Think of Each Other*, 94 A.B.A. J. 46, 49 (Feb. 2008)

²⁷ See, e.g., Ronald L. Hirsch, *Are You on Target?*, 12 BARRISTER 17 (1990) (commenting on YLD SURVEYS); Rutledge, *supra* note 24 (same); Hirsch, *supra* note 25 (same); Karen E. Klages, *Career Dissatisfaction Increases: Survey Says Lawyers Are Stretched to the Breaking Point*, BAR LEADER 8 (November-December 1990) (same); Phil Brinkman, *Why Lawyers Are Crashing, Burning: Stress Leads Many to Leave the Profession*, MADISON STATE JOURNAL, p. 1A, Oct. 16, 1994.

²⁸ See, e.g., MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 309 (1994) (noting that one must consistently work at an inhuman pace to bill such prodigious numbers of hours); Judith L. Maute, *Balanced Lives in a Stressful Profession: An Impossible Dream?*, 21 CAP. U. L. REV. 797 (1992) (noting that one may also have to resort to unethical billing practices as well) .

²⁹ Maute, *supra* note 28, at 801.

aggressive behavior between adversaries.³⁰ Contributing to those pressures is the large increase in the attorney labor pool, which has produced an excess supply of lawyers competing for a finite number of jobs.³¹ And several commentators have expressed special concern for the disadvantages that women face, particularly the problems of sexism and unequal relational demands.³² In addition to sexism, reports of racism and homophobia within the profession also have been noted.³³

Available research suggests that these problems do indeed manifest in elevated rates of clinically significant impairment, particularly in the form of depression and substance abuse. While the prevailing, diathesis-stress model of psychopathology is reluctant to attribute etiology entirely to environmental factors, the data for this particular occupational group strongly suggest an elevated risk for reactive depression and substance abuse. As noted above, a growing body of research suggests that such problems begin as early as law school, when prospective lawyers are first confronted with the environmental stressors that eventually will characterize their professional lives.

One influential study, conducted at a state law school in Arizona, found that the incidence of depression (according to DSM-III-R criteria) among the sample entering class was not different from that of the general population (slightly less than 10%).³⁴ By the end of the students' first year, however, the rate had more than trebled to 32%; by the end of the third year the rate had jumped to 40%.³⁵ Although the rate dropped somewhat once the subjects had moved beyond the concentrated stressors of law school (and also perhaps once the more vulnerable individuals had dropped out), it nevertheless remained significantly elevated above that of the general population at 17% two years after law school.³⁶

³⁰ James E. Brill, *Save the Whales: Among the Many Worthy Causes, Let's Also Save the Profession*, 79 A.B.A. J. 110 (1993); Stephanie Goldberg, *ABA Journal Roundtable: Identity Crisis*, 80 A.B.A. J. 74 (1994).

³¹ See generally MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* (1994).

³² See, e.g., Hirsch, *supra* note 26; Rutledge, *supra* note 25; Elizabeth Johns Clark & Patricia Perri Reiker, *Gender Differences in Relationships and Stress of Medical and Law Students*, 61 J. MED. EDUC. 32 (1986); Maute, *supra* note 28.

³³ Maute, *supra* note 28, at 797.

³⁴ G. Andrew H. Benjamin, et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, AMERICAN BAR ASS'N RESEARCH J. 225 (1986).

³⁵ *Id.*

³⁶ *Id.*

A second study, published in 1990, expanded those findings to a larger sample of practicing attorneys.³⁷ The 1990 study examined the rates of depression, alcohol abuse, and cocaine abuse among a random sample (stratified by years of practice) of ten percent of the attorneys in Washington state. For reasons detailed in the report of the second study, both the Arizona and Washington data appear to be both reliable and generalizable.³⁸ The study found clinically significant indications of depression and alcohol abuse among lawyers at rates almost twice that of the general population. Thus, 19% of the Washington lawyers scored two standard deviations above the non-patient normative sample for depression on the Brief Symptom Inventory (an abbreviated form of the Hopkins Symptom Checklist-90).³⁹ Many of the depressed subjects also reported suicidal ideation and tended to isolate themselves from potential support systems.⁴⁰

Alcohol abuse, measured by the Michigan Alcoholism Screening Test (Revised), was found in 18% of the sample – again a rate almost twice that of the general population.⁴¹ What is more, alcoholism/depression co-morbidity was found among 5% of the sample: "This result is of particular concern because depression that follows the onset of alcoholism is associated with poor social consequences and undesirable life events, such as marital breakdown, and has been shown to be highly predictive of suicide attempts and relapses."⁴² And, although the rate of cocaine abuse was lower for lawyers in the sample (less than 1%) than the general adult population (3%), the rate of occasional cocaine use among the sample (26%) was more than double that of the general population (12%).⁴³ This finding suggests downstream consequences

³⁷ G. Andrew H. Benjamin, et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. LAW & PSYCHIATRY 233 (1990). For a detailed reanalysis of the Washington data, see Connie J.A. Beck, et al., *Lawyer Distress: Alcohol-Related Problems and other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1 (1995-96).

³⁸ Benjamin, et al., *supra* note 37 at 239.

³⁹ *Id.* at 237, 240-41.

⁴⁰ *Id.* at 241.

⁴¹ *Id.*

⁴² *Id.*, citing K. Merikangas, et al., *Familial Transmission of Depression and Alcoholism*, 42 ARCHIVES OF GENERAL PSYCHIATRY 368 (1985); J.G. MacDonald, et al., *Predictors of Treatment Outcome of Alcoholic Women*, 22 INT'L J. OF THE ADDICTIONS 235 (1987); J. Wallace, et al., *Six-month Treatment Outcomes in Socially Stable Alcoholics' Abstinence Rates*, 5 J. SUBSTANCE TREATMENT 247 (1988).

⁴³ Benjamin, et al., *supra* note 37.

for the profession in view of the relatively young age of those occasional users.⁴⁴

Length of practice was not associated with rates of depression or cocaine abuse, but it did correlate with alcohol abuse: Attorneys who have been in practice longer are at greater risk (18% for 2 to 20 years of practice compared to 25% for more than 20 years of practice; $p < .05$). Statistically significant differences also appeared when gender was taken into account: "Men were more likely than women to develop into problem drinkers, while women were more likely than men to experience depression."⁴⁵ The authors suggested that the insidious onset of alcoholism and the greater prevalence of depression among women in the general population may largely account for those differences.⁴⁶ The men in the sample tended to be older than the women and also tended to show pathology (i.e., at least one of the three conditions) at a higher rate than the women (35% versus 24%).⁴⁷ No differences in rates of pathology were found between the Arizona graduate cohort and the Washington sample.

Mindful of the growing public awareness of tobacco as a substance susceptible of abuse and thus itself an appropriate target of clinical intervention, the Washington researchers also examined tobacco use among the sample and its association with clinically significant levels of distress. Although overall use among the sample was relatively low (15%), the study found that male smokers as a group "are far more likely to report somatization, depression, anxiety, and problems with alcohol."⁴⁸

A 1999 review of the literature to date on anxiety and depression among law students concluded:

Across studies and measurement instruments, law students almost always reported higher levels of anxiety than comparison groups, including medical students. In some cases, they report mean scores on anxiety measures that are comparable to psychiatric populations. . . . The data on depression in law school resemble what was found on anxiety measures.⁴⁹

⁴⁴ *Id.* at 243.

⁴⁵ *Id.* at 242.

⁴⁶ *Id.* at 243.

⁴⁷ *Id.*

⁴⁸ John A. Chiles, et al., *Who Smokes? Why?: Psychiatric Aspects of Continued Cigarette Usage Among Lawyers in Washington State*, 31 *COMPREHENSIVE PSYCHIATRY* 176, 182 (1990).

⁴⁹ Matthew Dammeyer & Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 *L. & HUMAN BEHAV.* 55, 63, 67 (1999).

Other research sheds light on the relationship between occupational stress, burnout, and the changing workplace environment that confronts lawyers today. As suggested above, that environment is characterized by increasing demands and negative experiences on the one hand and decreasing rewards on the other. Research into the phenomenon of "burnout," which may be prodromal to clinical symptomatology, has focused on the role of the work environment in generating the "burnout triad" of: (1) emotional exhaustion (caused by excessive affective demands in interpersonal situations); (2) depersonalization (excessive emotional detachment, such as callousness or cynicism, to protect the professional from continuing emotional demands); and (3) feelings of low personal accomplishment (feelings of inefficacy).⁵⁰ According to one review, the burnout literature tends toward diffuse and imprecise descriptions of the phenomenon; and, while such variability may indicate conceptual confusion, "it may also reflect psychological reality:" "[B]urnout may be a generalized psychological distress reaction that is necessarily experienced somewhat differently by each individual, and may thus have no clearly delineated symptomatology."⁵¹ In general, the literature indicates that burnout manifests in: (1) physical ailments (e.g., fatigue, sleep disturbance, somatic complaints such as headaches and gastro-intestinal problems, and depressed immune functioning); (2) emotional symptoms (e.g., depression, anxiety, guilt, irritability, and feelings of helplessness); (3) dysfunctional behaviors in the workplace (e.g., absenteeism, tardiness, substance abuse, poor performance, pilfering, and high turnover); (4) disruption in interpersonal functioning (e.g., avoidance of or stereotypical response styles to clients and family members, verbally and sometimes physically abusive behaviors, and social isolation); and (5) development of negative attitudes toward self, others, and work (e.g., cynicism, callousness, pessimism, defensiveness, and intolerance).⁵²

B. The public costs of attorney impairment

The consequences of impairment extend beyond the personal lives of lawyers and their families to include the interests of their clients. There is reason to believe that impairment plays a substantial role in attorney misconduct and neglect. According to one review, "[t]he National Bar Council believes it can prove that at least fifty to sixty percent of all client complaints are directly related to alcohol or substance abuse. In fact, they suspect that the true estimate

⁵⁰ See generally CHRISTINE MASLACH, *BURNOUT: THE COST OF CARING* (1982); ROBERT T. GOLEMBIEWSKI & ROBERT F. MUNZENRIDER, *PHASES OF BURNOUT: DEVELOPMENTS IN CONCEPTS AND APPLICATIONS* (1988); Christine Maslach & Susan E. Jackson, *Burnout in Organizational Settings* in 5 *APPLIED SOCIAL PSYCHOLOGY ANNUAL: APPLICATIONS IN ORGANIZATIONAL SETTINGS* 133-54 (S. Oskamp ed., 1984); Susan E. Jackson, et al., *Toward an Understanding of the Burnout Phenomenon*, 71 *J. APPLIED PSYCHOLOGY* 630 (1986); Sophia Kahill, *Symptoms of Professional Burnout: A Review of the Empirical Evidence*, 29 *CANADIAN PSYCHOLOGY* 284 (1988).

⁵¹ Kahill, *supra* note 49, at 285.

⁵² *Id.* at 285-91.

approaches eighty percent."⁵³ According to another source, the American Bar Association found substance abuse implicated in 27% of all attorney discipline cases in the United States during a one-year period.⁵⁴ Further, an Oregon study found that 60% of a consecutive sample of lawyers in the state lawyer assistance program had, while they were engaged in substance abuse, been the subject of malpractice proceedings.⁵⁵

Although the public consequences of lawyer impairment are measured by the extent of client interests at stake – and therefore can range from small claims to great fortunes and life or death – the symptoms are often quietly commonplace. They can go unnoticed until the damage to the attorney's career and the client's interest is done. The case of R.L. is illustrative.

Prior to the incident that brought him before the state disciplinary committee, R.L.'s professional life appeared to be exemplary: "His academic performance in law and international relations was impressive. He spent the first 12 years of his practice in governmental employment of high responsibility . . . ," and then entered private practice where, from all outward appearances, he performed successfully.⁵⁶ His misconduct reflected the quintessential silent symptom: He simply failed to pursue his client's appeal. Despite several extensions, numerous delays, and his adversary's willingness to allow the matter to be reopened, R.L. never prepared or filed a brief on his client's behalf. In those communications with his client that he was unable to avoid, he repeatedly assured the client that the matter was in hand and that the brief would be ready soon. He issued similar assurances when the client hired another attorney to pursue the matter, and even after the client filed a complaint with the state disciplinary committee. That dereliction, and the ensuing disciplinary proceedings, eventually brought the attorney to treatment. The treating psychiatrist described the attorney's condition as "burnout syndrome," in which "a professional person feels obliged to help each person who seeks his help, takes on more work than he can handle, including work he finds unpleasant, and evades such work by

⁵³ Maute, *supra* note 27, at 797, citing DONNA L. SPILIS, ABA COMMISSION ON IMPAIRED ATTORNEYS, OVERVIEW OF ASSISTANCE PROGRAMS 2 (1991), and ROSEANNE THEIS, ABA COMMISSION OF IMPAIRED ATTORNEYS: AN OVERVIEW OF LAWYER ASSISTANCE PROGRAMS IN THE UNITED STATES (June 1989).

⁵⁴ Benjamin, et al., *supra* note 37, at 243.

⁵⁵ *Id.* at 244, citing C. Greene, *Half of Lawyer Malpractice and Discipline Stems from Substance Abuse*, ANNUAL MEETING OF THE NATIONAL CONFERENCE OF BAR PRESIDENTS (Aug. 6, 1988), and D. Muchogrosso, *Profile of Legal Malpractice: A Statistical Study of Determinative Characteristics on Lawyers' Professional Liability Fund*, OREGON STATE BAR ASSOCIATION, INTERNAL PROGRAM MEMORANDUM (May 1986).

⁵⁶ *In re Loew*, 642 P.2d 1171 (1982).

procrastination and self-denial."⁵⁷

The Oregon Supreme Court concluded that the attorney's conduct "was an isolated event caused by emotional difficulties with which he is now dealing effectively" and imposed a suspension rather than disbarment.⁵⁸ A concurring justice remarked that "[t]he court's opinion should be required reading for every lawyer, for almost every practicing attorney becomes involved in situations which create pressures and stresses akin to those which are present in this case."⁵⁹ The justice went on to observe that "[o]ver the years I have seen a host of intelligent, capable lawyers get into trouble because of their inability to recognize and resolve problems such as faced [R.L.] in this case."⁶⁰

Thus, stress and poor performance can become interrelated in a vicious cycle. Stress adversely impacts a lawyer's job performance (often in the form of lowered productivity, procrastination, denial, and avoidance). Compromised performance creates isolation, disrupts interpersonal communication, and erodes self-esteem.⁶¹ Those impacts in turn create more stress and further undermine performance. Eventually, the lawyer may find himself or herself before a disciplinary committee, and the client may find that his or her case has been irretrievably neglected. Unfortunately, as in R.L.'s case, the attorney's impairment will not receive clinical attention in time to avoid such tangible losses.

In other cases the signs and symptoms of progressive impairment, particularly those involving substance abuse, are less occult to persons close to the attorney. The case of B.F.K., a

⁵⁷ *Id.* at 1173. Among the symptoms described by the psychiatrist were that:

"They feel fatigue all the time, they have difficulty sleeping, they feel drained, may have an array of physical ailments which occur which are quite real, maybe hospitalized as you were, have memory lapses, impaired concentration, frequently missed deadlines, backlog of work, financial problems, beginning to view patients or clients or whatever people you're working with, or you begin to view your work as the enemy"

Id. at 1174 n.2

⁵⁸ *Id.* at 1174.

⁵⁹ *Id.* at 1174 (Peterson, J., concurring) (emphasis added).

⁶⁰ *Id.* at 1175.

⁶¹ See Jeffery M. Wilson, *Stress and "FUD" Factor Adversely Impact Professional Performance*, 37 *ADVOCATE* 6 (1994) (message from Commissioner of Idaho State Bar and President of the Bar concluding that a significant number of attorney disciplinary cases involve stress-related impairment).

talented trial attorney whose alcoholism destroyed his career, is an example. Despite a drinking problem that dated back to high school, B.F.K. graduated from law school and established a successful practice. The court offered the following description of the eventual impact that his alcoholism had on his practice:

"By the late 1970's [B.F.K.'s] condition had degenerated to the point where he frequently drank more than a fifth of rum in a single day. By 1984, [B.F.K.'s] law practice was in complete disarray. He frequently missed court appearances or arrived late. He was unshaven, ill-dressed, and disheveled. His eyes were bloodshot and his breath smelled of alcohol or peppermint. When he was late for a court date, others would call [him] at home to wake him or cover for his absence. When he did appear in court, often he was confused, unprepared, and could not identify his clients. [He] had no financial record-keeping system, failed to file Criminal Justice Act vouchers, and began to commingle client funds and to use them for his own purposes. . . . By 1984, alcohol completely dominated [his] life. He experienced over 100 blackouts. Family and friends, and colleagues tried to confront [him] with his alcoholism, but their efforts were futile."⁶²

B.F.K.'s case illustrates not only the impact that impairment can have on attorney performance but also the role that recognition of impairment can play as a mitigating factor in disciplinary proceedings. Taking the position that alcoholic behavior was neither completely voluntary nor involuntary, the court required B.F.K. to establish a strong causal connection between his alcoholism and his misconduct (as opposed to merely showing the existence of the alcoholic condition). Moreover, the court noted that "unlike recovery from ordinary disease, the alcoholic's recovery is predicated on a choice to confront his or her problem, coupled with an appropriate supportive program."⁶³ In view of B.F.K.'s alcoholism, the court stayed his disbarment for a five-year probationary period, contingent on his total abstinence from alcohol (as verified by an appointed monitor) and supervision of his practice and financial arrangements by appointed monitors.⁶⁴ Other courts have also taken alcoholism into account in disciplinary cases, and the presence or absence of evidence of rehabilitation has often been an important factor in such cases.⁶⁵

⁶² In re B. Franklin Kersey, 520 A.2d 321 (D.C. App. 1987).

⁶³ *Id.* at 325-26.

⁶⁴ *Id.* at 328.

⁶⁵ *E.g.*, In re: Ewaniszyk on Disbarment, 788 P.2d 690 (Calif. 1991) (evidence of rehabilitation insufficient); Hawes v. State Bar, 797 P.2d 1180 (Calif. 1990) (evidence of successful treatment for alcohol dependency and bipolar disorder; sanctions reduced); Matter of Willis, 552 A.2d 979 (N.J. 1989) (strong evidence of recovery; reduced suspension); Tenner v. State Bar, 617 P.2d 486 (Calif. 1980) (alcoholism and recovery taken into account); Matter of Walker, 254 N.W.2d 452 (S.D. 1977) (suspension stayed subject to compliance with treatment).

III. Interventions

One approach to the problem of attorney impairment, for those lawyers who do not recognize its onset and seek clinical evaluation and treatment on their own, includes the development of comprehensive, formal lawyer assistance programs ("LAPs") by the organized bar. The goals of such programs are preventive and remedial – to offer intervention before the deterioration in an attorney's professional performance becomes problematic. According to one review, jurisdictions in the United States have developed more effective monitoring and support networks for impaired attorneys, especially in cases of substance abuse and addiction, than has the United Kingdom.⁶⁶

The structure, role, and functioning of a model LAP have been described by the research team who conducted the Arizona and Washington studies.⁶⁷ Under the Washington model, the LAP would serve as a resource for education and prevention, evaluation, referral, some treatment, and advocacy. The educational and preventive function would be accomplished through bar association publications and presentations at law schools, conferences, and continuing education programs. The goals of such efforts would be to increase lawyers' awareness of the signs and symptoms of impairment and distress, to begin the process of confronting denial, and to inform attorneys about the availability of assistance. The method would include a combination of biographical vignettes with which practicing attorneys could personally identify, didactic presentation of information, and skills training to assist lawyers in developing a greater variety of alternatives for managing commonly encountered situational stressors.⁶⁸

Another important component of an LAP is a complete psychosocial evaluation. This function should be performed by a trained professional and should include a thorough clinical interview and such testing as the clinician deems appropriate (e.g., MMPI-2, BDI, Alcohol Use Inventory).⁶⁹ The authors of the Washington model also point out that, while substance abuse and depression are the most prevalent presenting problems, it is nevertheless imperative for the

⁶⁶ Jonathan Goodliffe, *Alcohol and Depression in English and American Lawyer Disciplinary Proceedings*, 89 ADDICTION 1237 (1994).

⁶⁷ G. Andrew H. Benjamin, et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOLOGY REVIEW 113 (1992).

⁶⁸ *Id.* at 121-22.

⁶⁹ For an comprehensive source on the clinical interview, see EKKEHARD OTHMER & SIEGLINDE OTHMER, *THE CLINICAL INTERVIEW USING DSM-IV* (1994). For an overview of the particular issue of assessing substance abusing patients, see Arnold M. Washton, *Clinical Assessment of Psychoactive Substance Abuse* in PSYCHOTHERAPY AND SUBSTANCE ABUSE: A PRACTITIONER'S HANDBOOK 23-54 (Arnold M. Washton, ed., 1995).

evaluating clinician to be diagnostically vigilant to the possible presence of other mental and physical conditions. Suicidality, for example, is a problem of rare but obviously disastrous proportions.⁷⁰ As in any other setting, the clinician should also be alert to the possibility, for example, of medical conditions that present psychiatric symptoms (e.g., endocrine problems).⁷¹

The Washington Model offers several suggestions concerning the range of therapeutic services that an LAP might provide. The primary form of direct service should be peer counseling as a form of social support, which has been found to be "a moderating factor in distress reactions and recovery."⁷² The Washington LAP was successful in recruiting volunteer peer counselors, 150 of whom contributed 9000 hours of time during one fiscal year.⁷³ Training and supervision of peer counselors should be conducted by experienced clinicians hired on an as-needed basis. Peer counselors can both provide direct support services and assist their counselees in making use of available self-help groups, such as Alcoholics Anonymous.

Peer counselors can also offer concrete problem-solving assistance. For example, an important step in lawyer recovery is an honest appraisal of the specific situational stressors facing the impaired attorney – which, as discussed above, often stem from excessive workloads and financial pressures. The establishment of more realistic and sustainable professional goals – "the creation of a functional niche" – has been shown to result in less stress and higher job satisfaction among elderly attorneys, and presumably would yield the same benefits for their younger colleagues as well.⁷⁴

With respect to professional psychotherapeutic services, the Washington model recommends that the LAP serve mostly a referral rather than direct treatment function. The obvious reason is that bar associations lack the expertise and financial resources to establish comprehensive mental health care facilities and therefore must refer to therapists in the community. The Washington model mentions two exceptions: (1) lawyers who are unwilling to see outside therapists because of confidentiality concerns (the issue of confidentiality is

⁷⁰ For an overview of the issues involved in assessing suicide risk, see Zigfrids T. Stelmachers, *Assessing Suicidal Clients* in CLINICAL PERSONALITY ASSESSMENT: PRACTICAL APPROACHES 367-79 (James N. Butcher, ed., 1995).

⁷¹ See, e.g., Maurice J. Martin, *A Brief Review of Organic Diseases Masquerading as Functional Illness*, 34 HOSPITAL & COMMUNITY PSYCHIATRY 328 (1983).

⁷² Benjamin, et al., *supra* note 67, at 128, citing James M. LaRocco, et al., *Social Support, Occupational Stress, and Health*, 21 J. HEALTH & SOCIAL BEHAVIOR 202 (1980).

⁷³ *Id.* at 130.

⁷⁴ Michael Meltzer, *The Reduction of Occupational Stress Among Elderly Lawyers: The Creation of a Functional Niche*, 13 INT'L J. AGING & HUMAN DEVELOPMENT 209 (1981).

addressed below) and (2) the surprising number of lawyers who are indigent and lack health insurance.⁷⁵

The Washington model team also recommends that LAP staff be allowed to testify, but only with client consent, before professional disciplinary authorities. Other observers have noted the importance of reliable and complete information if the attorney disciplinary process is to take impairment into account.⁷⁶ As the Washington group pointed out, "[w]ithout the possibility of such a communication, the disciplinary authorities will be quite reluctant to permit a stipulation that would leave the public at risk."⁷⁷

The Washington model specifies two other elements that its authors regard as essential: noncoercive referral and confidentiality. Recognizing that trust forms the foundation of all therapeutic relationships, the team concludes that "[d]istressed lawyers will self refer if the LAP provides confidentiality protections [and] independence from the disciplinary authority."⁷⁸ The team also acknowledges the potency of denial, especially in substance abuse cases, but opts for an approach that enlists the persuasive force of peer counselors and the impaired attorney's friends and family as the access means of first resort. The team devotes considerable attention to the issue of confidentiality and independence; indeed, it is listed as "the first requirement."⁷⁹ The Washington model recommends implementation of two-way protections: measures that shield LAP staff from official information requests and that prevent staff from initiating contact with disciplinary authorities (subject to the usual exceptions for exigent cases, such as those involving child abuse or threat of imminent physical harm to self or others).⁸⁰

IV. Conclusion

Attorney impairment is a significant personal, public, and clinical problem. Lawyers face real situational stressors that can contribute to or aggravate psychological disorders. And, regardless of etiology, psychological impairment among attorneys is a serious concern in view of the singular position of trust and confidence with which lawyers are charged in our society. Impairment may manifest in subtle or obvious forms. Often, treatment is not sought until

⁷⁵ Benjamin, et al., *supra* note 67, at 132. The authors report that "15% of Washington's LAP clients" are indigent. *Id.* at 132-33 n.56.

⁷⁶ Goodliffe, *supra* note 57, at 1239.

⁷⁷ Benjamin, et al., *supra* note 67, at 133-34.

⁷⁸ *Id.* at 123.

⁷⁹ *Id.* at 119.

⁸⁰ *Id.* at 119-20 & n.30.

substantial damage had been done.

Ideally, an at-risk lawyer would seek and obtain the necessary clinical services before coming to the attention of disciplinary authorities. Further, law firms and corporate legal departments would provide the means to assist lawyers in recognizing the need for, and gaining access to, appropriate mental health services.

The establishment of a proactive, preventive, confidential, independent, and peer-organized and -managed Lawyer Assistance Program also offers a positive response to this problem. The Utah program is captioned “Lawyers Helping Lawyers.” According to its website:

Utah Lawyers Helping Lawyers (LHL) is committed to rendering confidential assistance to any member of the Utah State Bar whose professional performance is or may be impaired because of mental illness, emotional distress, substance abuse or any other disabling condition or circumstance.

For an overview of the program, and a series of articles recognizing the problem of attorney impairment, see the August/September volume of the Utah State Bar Journal.⁸¹ Lawyers Helping Lawyers may be contacted by telephone at 801-579-0404 or in-state toll free at 800-530-3743 and by email at admin@lawyershelpinglawyers.org. The website can be found at <http://www.lawyershelpinglawyers.org/homepage.html>.

⁸¹ The entire volume is available on-line at http://www.utahbar.org/barjournal2000/html/august_september_2003.html.