

**CHALLENGES TO SUSTAINABLE PRACTICE: A PROFESSION AT RISK**

**UTAH STATE BAR SPRING CONVENTION**

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## I. Introduction

It has become a lament so familiar that even the Wall Street Journal finally has taken note:

That lawyers are among the most miserable of men – and women – is well known. . . . Escalating billable-hours quotas fuel chronic overload, and the ceaseless deadlines and adversarial nature of the work feed anxiety. . . . For decades, the legal profession’s responses to these work-life problems has been a little like watching paint dry.<sup>1</sup>

Despite some cynical and superficial scoffing in the blogosphere,<sup>2</sup> the problem of attorney dissatisfaction and psychological symptoms are all too real.

The purpose of this paper is mainly descriptive, to provide an overview of the problem and the profession’s various responses, to note several tensions inherent in both institutional and individual efforts to address it, and to echo Oregon Supreme Court Justice Peterson’s observation that “[l]awyers must be alert to the emotions involved in practicing law.”<sup>3</sup> Increased awareness of these problems is the first step toward conservation of the profession’s human resources and thus establishment of sustainable practice. The message of this paper – that the problem is quite real and that institutional responses, while both necessary and important, are nevertheless subject to identifiable constraints – ultimately is directed at individual attorneys. In both the first and final analysis, we simply must learn take care of ourselves and to behave humanely toward each other. A scorched-earth approach to practice and profitability will produce just that – an uninhabitable professional environment.

In summary, there is good reason to believe that attorneys have become increasingly dissatisfied with, and sometimes even harmed by, their profession. The pressure to bill hours and to overwork, a perceived decline in the work’s inherent satisfactions, and a perceived increase in incivility are by now well-recognized complaints. Rates of psychological distress, depression, and alcohol abuse are significantly higher among lawyers than among the general population.<sup>4</sup> And these developments come at a time when the legal profession finds itself “among the least

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<sup>1</sup> Sue Shellenbarger, *Even Lawyers Get the Blues*, WALL ST. J., Dec, 12, 2007, at D1.

<sup>2</sup> *Law and More: Deconstructing What Happens in Law*, at [http://lawandmore.typepad.com/law\\_and\\_more/2007/12/lawyers-are-amo.html](http://lawandmore.typepad.com/law_and_more/2007/12/lawyers-are-amo.html), visited February 27, 2010.

<sup>3</sup> *Conduct of Loew*, 292 Or. 806, 814, 642 P.2d 1171, 1174 (Peterson, J., concurring).

<sup>4</sup> For a collection of sources, see Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 532-33 (2008).

reputed institutions in American society,” ranking below even Congress.<sup>5</sup>

It would be nothing less than folly to ignore the public and private consequences of these trends. For individuals in professions involving a large degree of stress, fiduciary responsibility, and discretionary judgment, the likelihood and consequences of psychological impairment are substantial.<sup>6</sup>

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?*<sup>7</sup>

Moreover, with over a million lawyers in the United States, elevated rates of impairment present a substantial public health concern. But to focus exclusively and reactively on the impact of attorney impairment on the public interest, as vital a concern as that is, would perhaps be to concentrate only on the iceberg's tip. As one expert in the field of attorney and physician impairment has noted, “[t]he importance of a proactive approach to this issue is demonstrated by the finding that ‘for healthcare professionals, deterioration in clinical performance is one of the *last signs of a substance abuse disorder.*’”<sup>8</sup> By the same token, attorney impairment so noticeable that it comes to the attention of disciplinary authorities is likely to be a relatively advanced milestone in the course of a disorder.

The profession has been expressing concern about these problems for decades and has begun to deploy responses of several kinds. Evidence of that concern can be found at the local and national level. For example, the Journal of the American Bar Association noted programs to

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<sup>5</sup> THE AMERICAN BAR ASS'N SECTION OF LITIGATION, PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 6 (2002). Only the media ranked lower. *Id.*

<sup>6</sup> 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)).

<sup>7</sup> G. Andrew H. Benjamin, et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOLOGY REV. 113, 113 (1992) (emphasis added).

<sup>8</sup> Rothstein, *supra* note 4, at 551, quoting Marie R. Baldisseri, *Impaired Healthcare Professional*, 35 CRITICAL CARE MED. S106 (2007) (emphasis added).

assist lawyers in adapting to personal crises.<sup>9</sup> The Arkansas Lawyer 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*.<sup>10</sup> And the Utah State Bar Journal devoted its August-September 2003 issue to the problem.<sup>11</sup> Every state now has a Lawyer Assistance Program or similar institution, which programs provide a variety of services, including peer counseling and referral to mental health professionals; and the American Bar Association has established a Commission on Lawyer Assistance Programs.<sup>12</sup> Publications such as *A Lawyer's Guide to Healing: Solutions for Addiction and Depression and Substance Abuse in Law Schools: A Tool Kit for Law School Administrators* are available.<sup>13</sup> Disciplinary authorities sometimes take a more rehabilitative than punitive approach.<sup>14</sup> These problems, especially those related to substance abuse, also have received increased attention from the academy. Indeed, it was a 1994 report of a Special Committee of the Association of American Law Schools<sup>15</sup> that contributed to the establishment of the CoLAP, the creation of a CoLAP Law School Outreach Committee, and publication of the "tool kit" mentioned above.<sup>16</sup> Some jurisdictions have extended LAP services to law students.<sup>17</sup> The emergence of elevated rates of psychological distress in law school and the possible contributing factors in legal education have received

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<sup>9</sup> 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).

<sup>10</sup> 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).

<sup>11</sup> The Utah State Bar Journal volume is available on-line at [http://www.utahbar.org/barjournal2000/html/august\\_september\\_2003.html](http://www.utahbar.org/barjournal2000/html/august_september_2003.html).

<sup>12</sup> For a state-by-state directory, see the ABA's Commission on Lawyer Assistance Programs (CoLAP) website at <http://www.abanet.org/legalservices/colap/lapdirectory.html>. The Commission "is available to conduct a review of lawyer assistance programs (LAPs) already in operation." *Id.*

<sup>13</sup> These may be ordered from CoLAP. *See id.* (listing CoLAP publications and products).

<sup>14</sup> *See infra* Part II.D.

<sup>15</sup> *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35 (1994).

<sup>16</sup> Rothstein, *supra* note 4, at 554.

<sup>17</sup> In Arkansas, for example, services of the Judges and Lawyers Assistance Program ("JLAP") have recently become available to law students. For an overview of Arkansas JLAP services, see <http://www.arjlap.org/>.

increased attention from some scholars.<sup>18</sup> The adverse effects of hourly billing, which did not become prevalent in the profession until the latter half of the twentieth century, have come under increased scrutiny.<sup>19</sup>

Despite increased awareness of the scope and severity of these problems, the profession faces challenges in addressing them. One is that such recognition threatens traditional norms of mental toughness, stoicism, and self-sacrifice.<sup>20</sup> There is also a potential tension between disciplinary approaches that emphasize rehabilitation and those that emphasize protection of the public. And there is a tension – in part because of bias against mental disability, limitations on confidentiality, and the limited protections offered by antidiscrimination laws – between the need of at-risk and impaired attorneys and law students to seek treatment and their willingness to do so. Also, like the population at large, attorneys and especially law students may have trouble gaining access to affordable treatment even if willing to seek it. To the extent that law firms have contributed to these problems by emphasizing financial goals over other values, the pressures of a deep and pernicious recession make a reordering of priorities more difficult even if firm leadership were so inclined. Finally, both institutional and informal mechanisms for enforcing professionalism and civility standards have limited reach and encounter opposing incentives for the use of hardball tactics.

## **II. Contours of the problem**

### **A. The risk of attorney impairment**

Evidence is growing that attorneys face elevated risk of affective and substance abuse disorders and consequent impairment. At the least, they evince significantly elevated levels of psychological distress. A leading study is Connie Beck, et al., *Lawyer Distress: Alcohol-Related*

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<sup>18</sup> E.g., Larry S. Krieger, *What We're Not Telling Law Students and Lawyers – That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from its Roots*, 13 *J. L. & HEALTH* 1 (1999).

<sup>19</sup> E.g., Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hours Requirements*, 69 *UMKC L. REV.* 239 (2000). See also *infra* Part II.B.

<sup>20</sup> 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.").

*Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers.*<sup>21</sup> Their data

manifest an alarming fact: *a significant percentage of practicing lawyers are experiencing a variety of significant psychological distress symptoms well beyond that expected of the general population.* These symptoms are directly traceable to law study and practice. They are not exhibited when the lawyers enter law school, but emerge shortly thereafter and remain, without significant abatement, well after graduation from law school. The dangers of psychological distress among members of the legal profession arise, at least in part, from two of the very elements that are traditionally associated with effective litigation strategy – directed anger and hostility. Both of these factors may often be counter-productive to one’s overall well-being. Posed differently, the environment surrounding lawyers is conducive to the creation of substantial psychological distress.<sup>22</sup>

This study surveyed a random sample of 10% of actively practicing lawyers in Washington state. The response rate was 68%. Measures included the Brief Symptom Inventory (an abbreviated form of the Hopkins Symptom Checklist-90), a modified Michigan Alcoholism Screening Test-Revised, the Positive Feelings Questionnaire, the Perceived Stress Scale, the Brief Anger-Aggression Questionnaire, and the Sarason Social Support Questionnaire.<sup>23</sup>

The results from the Brief Symptom Inventory are especially striking. The following table lists the percentage of respondents scoring above the clinical cut-off (two standard deviations above the mean) on each of the following measures of psychological distress (using gender-adjusted norms).<sup>24</sup> Keep in mind that the percentage of the general population scoring above the cut-off is only 2.27%.

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<sup>21</sup> 10 J. L. & HEALTH 1 (1995-96). The Beck, et al., paper is a detailed reanalysis of data originally presented in 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)

<sup>22</sup> *Id.* at 2 (emphasis added, footnotes omitted)

<sup>23</sup> *Id.* at 13-18.

<sup>24</sup> *Id.* at 23.

<b>Brief Symptom Inventory Subscales and GDSI</b>	<b>Male lawyers</b>	<b>Female lawyers</b>
Feelings of inferiority/inadequacy	30%	27%
Anxiety	28%	20%*
Social alienation/isolation	25%	19%
Depression	21%	16%**
Obsessive-compulsiveness	20%	15%
Paranoid ideation	13%	9%
Hostility	7%	11%
Global Distress Severity Index	18%	11%*

\* Gender difference significant at  $p \leq .05$ .

\*\* Gender differences significant at  $p \leq .001$ .

Another way to look at these data is to compare the lawyer mean scores to those of the general population (again, using gender-adjusted norms)<sup>25</sup>:

<b>Brief Symptom Inventory Subscales and GDSI</b>	<b>Male lawyers</b>	<b>Male general population</b>	<b>Female lawyers</b>	<b>Female general population</b>
Feelings of inferiority/inadequacy	.62	.25	.84	.35
Anxiety	.59	.22	.83	.37
Social alienation/isolation	.34	.13	.41	.15
Depression	.58	.28	.74	.46
Obsessive-compulsiveness	.75	.34	.87	.44
Paranoid ideation	.50	.34	.49	.34
Hostility	.42	.29	.52	.33
Global Distress Severity Index	.46	.25	.57	.36

$p \leq .0001$  for both male and female lawyers for all comparisons to general population.

Many of the depressed subjects also reported suicidal ideation and tended to isolate themselves from potential support systems.<sup>26</sup> Multivariate analysis found that the strongest association was

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<sup>25</sup> Beck, et al., *supra* note 21, at 24-25.

<sup>26</sup> Benjamin, et al., *supra* note 21, at 241.

between anger and global psychological distress. Anger, of course, has both adaptive and counterproductive consequences. "Sadly, high levels of anger exhibited within the current sample of lawyers, when combined with the high rate of developing alcohol-related problems over their lifetimes, may prove disastrous in regard to both their work and their private lives."<sup>27</sup>

The Washington study also found a disturbingly high risk for alcohol-related problems. More than 20% of the lawyers in the sample scored above the clinical cut-off for probable alcohol-related problems in the current year.<sup>28</sup> The one-year prevalence rates in the general population are approximately 4.7% for alcohol abuse and 3.8% for alcohol dependence. The Washington study found an astounding 70% incidence of lawyers likely to develop alcohol-related problems over their lifetimes. Lifetime prevalence rates among the general population are 17.8% for alcohol abuse and 12.5% for alcohol dependence. 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."<sup>29</sup> 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%).<sup>30</sup> This finding suggests downstream consequences for the profession in view of the relatively young age of those occasional users.<sup>31</sup>

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."<sup>32</sup> The insidious onset of alcoholism and the greater

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<sup>27</sup> Beck, et al., *supra* note 21, at 52-53.

<sup>28</sup> *Id.* at 28-29.

<sup>29</sup> Benjamin, et al., *supra* note 21 at 241, 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).

<sup>30</sup> Benjamin, et al., *supra* note 21, at 241.

<sup>31</sup> *Id.* at 243.

<sup>32</sup> *Id.* at 242.

prevalence of depression among women in the general population may largely account for those differences.<sup>33</sup> 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%).<sup>34</sup>

Awareness that something is amiss in the profession did not begin with the Washington study but instead 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.<sup>35</sup> 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."<sup>36</sup> 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 respondents and a sample of lawyers who had entered practice since the first wave.<sup>37</sup> 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.

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<sup>33</sup> *Id.* at 243.

<sup>34</sup> *Id.* 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." 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).

<sup>35</sup> OLAVI MARU, *RESEARCH ON THE LEGAL PROFESSION: A REVIEW OF WORK DONE* (1972).

<sup>36</sup> *Id.* at 43.

<sup>37</sup> *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*).

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."<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

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."<sup>42</sup> Those findings include increased rates of excess fatigue, marital problems, and alcohol consumption.<sup>43</sup>

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."<sup>44</sup> And they also report that sexual harassment remains a serious problem: "*Every* female junior associate who responded to the survey said she

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<sup>38</sup> *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.*

<sup>39</sup> *Id.* at 8.

<sup>40</sup> *Id.* at 9-11.

<sup>41</sup> *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.*

<sup>42</sup> *Id.* at 16.

<sup>43</sup> *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 abuse are elevated among lawyers.

<sup>44</sup> *Id.* at 14-15.

experienced or witnessed an incident of sexual harassment during her career."<sup>45</sup> Only women in solo practice, who do not have to deal with male supervisors, report dissatisfaction levels commensurate with men.<sup>46</sup>

The findings of the YLD Surveys, and other evidence of professional stress, caught the attention of observers within the profession.<sup>47</sup> Some noted the impact of staggering workloads and ethical problems associated with the billable hour discussed below<sup>48</sup> Others pointed out that competitive pressures have rendered work environments ever more impersonal and dehumanizing,<sup>49</sup> and have produced a noticeably increased level of interpersonally hostile and aggressive behavior between adversaries.<sup>50</sup> 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

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<sup>45</sup> Bruce Rutledge, *Women Lawyers: A Status Report: A Demographic Look at How Women Are Faring in Their Careers*, 15 BARRISTER 30, 32 (1991).

<sup>46</sup> 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)

<sup>47</sup> See, e.g., Ronald L. Hirsch, *Are You on Target?*, 12 BARRISTER 17 (1990) (commenting on YLD SURVEYS); Rutledge, *supra* note 45 (same); Hirsch, *supra* note 46 (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.

<sup>48</sup> 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) .

<sup>49</sup> Maute, *supra* note 48, at 801.

<sup>50</sup> 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).

number of jobs.<sup>51</sup> And several commentators have expressed special concern for the disadvantages that women face, particularly the problems of sexism and unequal relational demands.<sup>52</sup> In addition to sexism, reports of racism and homophobia within the profession also have been noted.

There is good reason to believe that rather than bringing elevated risk to the profession, lawyers find it already there when they arrive at law school. 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%).<sup>53</sup> 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%.<sup>54</sup> 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.<sup>55</sup> The data from the Washington study discussed above show that symptoms continue in practice at rates alarmingly above the general population. 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.<sup>56</sup>

Other research sheds light generally on the relationship between occupational stress, burnout, and the changing workplace environment that confronts lawyers today. As suggested

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<sup>51</sup> See generally MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* (1994).

<sup>52</sup> See, e.g., Hirsch, *supra* note 24; Rutledge, *supra* note 45; 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 48.

<sup>53</sup> 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).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Matthew Dammeyer & Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 L. & HUMAN BEHAV. 55, 63, 67 (1999).

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).<sup>57</sup> 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."<sup>58</sup> 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).<sup>59</sup> Observers have noted the impact of "burnout" on lawyers' mental and physical health.<sup>60</sup>

There thus is ample evidence that lawyers as a group face a risk of psychological problems above, and in some instances far above, the general population. There is also reason to believe that these elevated risks do not result primarily from self-selection into the profession but instead from circumstances within the profession itself, many of which result directly from behavioral choices made by members of the profession. It turns out Walt Kelly's Pogo was right:

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<sup>57</sup> 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).

<sup>58</sup> Kahill, *supra* note 57, at 285.

<sup>59</sup> *Id.* at 285-91.

<sup>60</sup> See Fortney, *supra* note 19 at 269-71 (discussing "burnout" and studies of its impact on lawyers. )

“We have met the enemy, and the enemy is us.”

## **B. What Counts?**

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. More broadly, some have begun to question what they perceive as an excessive and ultimately unhealthy focus in the profession on external measures of success.

The billable-hour problem is part of a sea-change in law firms over the past half-century, which has emphasized rapid growth and high profitability. According to a study of billable hours and their consequences,

[o]ver the last thirty years, the billable hours have dramatically increased. In the 1960s the median number of billable hours was approximately 1500 per year for partners and associates. By the 1970s, the target for most firms was between 1600 and 1800 hours. During the 1980s and 1990s the number of hours associates were expected to bill continued to increase. The 1990 study conducted by the A.B.A. Young Lawyers Division revealed that 45% of attorneys in private practice billed at least 1920 hours per year and 16% billed 2400 or more hours per year. Since that time, the number of billable hours has steadily increased.<sup>61</sup>

Given that a portion, indeed as much as one-third, of attorney work time is non-billable “down time,” these numbers mean that a lawyer might spend up to an inhuman 3,200 hours at work to meet the highest billing expectations.<sup>62</sup> A study of Texas firms found, contrary to common assumptions, that respondents from medium-sized firms actually out-billed those from the largest firms.<sup>63</sup>

Critics, who include the late Chief Justice Rehnquist and former American Bar Association President Robert E. Hirshon, point out that such requirements impose considerable adverse 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,

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<sup>61</sup> *Id.* at 247.

<sup>62</sup> *Id.* at 248.

<sup>63</sup> *Id.* at 251.

perverse incentives and outright fraud.”<sup>64</sup> There is evidence that both double-billing and billing for recycled work, in direct violation of ABA Formal Ethics Opinion 93-379,<sup>65</sup> not infrequently occur and actually have increased. The Texas study, for example, found double-billing rates among associates from 10% in the largest firms up to 24% in the smallest firms and billing for recycled work above revision time of 9% to 30%, respectively.<sup>66</sup> Fully two-thirds of respondents in the Texas study “reported that billable hour pressure had ‘taken a toll’ on their personal lives. The percentage reporting that billable hour pressure had taken a toll also increased as billable hour requirements increased [and as firm sized increased].”<sup>67</sup> The Young Lawyers Division study discussed above “identified increases in hours worked and the resulting decrease in personal time as a major cause of attorney dissatisfaction.”<sup>68</sup> The consequences for attorney well-being are clear:

Because of the time commitment and other work pressures, many attorneys find it difficult to achieve a healthy balance between their work and personal lives. As explained by Professor Schiltz, working sixty, seventy, or even eighty hours a week to produce 2000 hours per year “leaves room for little else in the attorney’s life.” As a result, those things that give most people “joy and meaning – family, friends, hobbies, the arts, recreations, exercise – are absent from [the attorney’s] life.”<sup>69</sup>

The Texas study suggested that the “time famine” produced by billable-hour demands contributes to pathogenic stress on lawyers, impaired work performance, a possible Gresham’s Law effect such that “ethical attorneys who do not pad or do not work long hours may be placed at a competitive disadvantage come evaluation time,” degradation of ethical commitment among those who do remain, decreased opportunities for professional training and pro bono work, and increasing rates of associate attrition.<sup>70</sup>

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<sup>64</sup> 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>.

<sup>65</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (1993).

<sup>66</sup> See Fortney, *supra* note 19, at 258-60. Fortney also cites WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* (1996) (reporting on the results of surveys conducted in 1991 and 1994-95).

<sup>67</sup> Fortney, *supra* note 19, at 265.

<sup>68</sup> See *id.* at 267-68 (discussing YLD study).

<sup>69</sup> *Id.* at 264, quoting Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 725-26 (1998).

<sup>70</sup> Fortney, *supra* note 19, at 279-92.

Some critics, including Scott Turow in a recent cover story in the ABA Journal, have called for the outright demise of the billable hour.<sup>71</sup> A few 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.<sup>72</sup> The current economic crisis is likely to aggravate these stressors, although some have optimistically suggested that it will force potentially positive restructuring of fees and costs in the long term.<sup>73</sup>

Lawyers have increasingly found the profession to be stressful, dissatisfying, and unhealthy; and more are leaving practice altogether.<sup>74</sup> Some law firms, more slowly than their business counterparts, have begun to consider adopting more flexible and family-friendly work policies.<sup>75</sup> An 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 a 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.”<sup>76</sup>

According to some observers, the problem is not only long hours but also excessive focus

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<sup>71</sup> Scott Turow, *The Billable Hour Must Die*, 93 A.B.A. J. 32 (Aug. 2007).

<sup>72</sup> David Gialanella, *Taming the Billable Beast*, 94 A.B.A. J. 30-31 (Feb. 2008).

<sup>73</sup> 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/>.

<sup>74</sup> Alex Williams, *The Falling-Down Professions*, New York Times, Jan. 6, 2008, available at <http://www.nytimes.com/2008/01/06/fashion/06professions.html/>.

<sup>75</sup> 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/](http://www.nytimes.com/2008/01/24/fashion/24WORK.html/).

<sup>76</sup> 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.

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, superficial goals and values.*<sup>77</sup>

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.<sup>78</sup>

Whether any of these perspectives will gain traction remains to be seen. The billable hour is now an entrenched practice and fundamental changes to existing billing structures and compensation systems, and the underlying disposable-associate-as-profit-center culture that produces them, have been slow in coming. “Although many firms are now offering alternative positions such as part-time and staff attorney positions, attorneys in such positions appear to have

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<sup>77</sup> Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 *Clinical L. Rev.* 425, 433-34 (2005) (emphasis added).

<sup>78</sup> ROY STUCKEY, *ET AL.*, *BEST PRACTICES FOR LEGAL EDUCATION* 101 (2007)

less status and job security than full-time attorneys who are on the partnership track.”<sup>79</sup>

### C. Incivility and unprofessional conduct in litigation

The incivility problem has been noted for decades.<sup>80</sup> It has been blamed for clogging court dockets, decreasing public respect for the profession, increasing litigation costs to clients, and, as noted above, contributing to lawyer dissatisfaction and distress.<sup>81</sup> Rising incivility and declining professionalism have been attributed to the increased commercialization of the profession which, as suggested above, has been said to decrease emphasis on professional values. These developments also have been said to result from the enormous increase in the number of lawyers, who now must compete more strenuously for clients in an increasingly impersonal atmosphere. A correlative factor has been said to be the increase in multijurisdictional practice, which increases the frequency of “one-shot” encounters in which the consequences of discourteous and uncooperative behavior, especially during discovery, are minimized.<sup>82</sup> Formal responses include procedural rules such as Rule 11 and discovery-abuse provisions and adoption in almost every state of codes of conduct.

The effectiveness of formal regulatory mechanisms for enforcing civility norms is in real doubt.

Judges dislike being bogged down in satellite litigation over sanctions motions and are rightly suspicious of the tactical misuse of procedural rules, such as Rule 11 and discovery-abuse provisions, designed to curb excesses of partisan advocacy. State bar investigatory personnel and grievance committees are woefully underfunded and must concentrate their limited resources on egregious wrongdoing such as embezzling client funds.<sup>83</sup>

Skeptics point out that complaints about incivility in the profession are nothing new and that “hardball” tactics, at least those occurring outside the courtroom, often at the behest of large and

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<sup>79</sup> Fortney, *supra* note 19, at 294-95.

<sup>80</sup> For a thorough review, see Comment, Kathleen P. Browe, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994)

<sup>81</sup> *Id.* at 756, citing FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT at 6 (1992); ABA COMM’N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 248 (1986).

<sup>82</sup> For an overview, see W. Bradley Wendel, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 SO. CAR. L. REV. 967 (2003).

<sup>83</sup> *Id.* at 967-68.

sophisticated clients, are giving such clients “the results they want.”<sup>84</sup>

It has also been suggested that informal mechanisms, which might be available in subcommunities of lawyers (such as those in smaller cities and in specialized practice areas), can moderate bad behavior. In such contexts, lawyers accumulate effectiveness-enhancing “social capital” in the form of reputation for credibility, trust, and appropriate reciprocal cooperativeness among each other, which they are reluctant to squander for any particular client. In this way, there is a very real and tangible benefit to civil behavior and lawyers “serve as reputational intermediaries or ‘gatekeepers,’ vouching for the credibility of their clients’ positions so that third parties and courts are not required to take redundant precautions to ensure against being cheated.”<sup>85</sup> This process requires “repeat-player communities,” however, and is much less likely to obtain in diffuse markets comprised largely of “one-shot” encounters.<sup>86</sup>

#### **D. 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 approaches eighty percent.”<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup>

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<sup>84</sup> Browe, *supra* note 80, at 775.

<sup>85</sup> Wendel, *supra* note 82, at 972-73.

<sup>86</sup> *Id.*

<sup>87</sup> Maute, *supra* note 48, 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).

<sup>88</sup> Benjamin, et al., *supra* note 21, at 243.

<sup>89</sup> *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

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. This is the tip-of-the-iceberg problem.

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.<sup>90</sup> 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 procrastination and self-denial."<sup>91</sup>

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.<sup>92</sup> 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

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ASSOCIATION, INTERNAL PROGRAM MEMORANDUM (May 1986).

<sup>90</sup> In re Loew, 642 P.2d 1171 (1982).

<sup>91</sup> *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

<sup>92</sup> *Id.* at 1174.

case."<sup>93</sup> 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."<sup>94</sup>

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.<sup>95</sup> 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.

Another case of insidious onset is Grotewold's.<sup>96</sup> He had no prior disciplinary complaints, but the court found that his depression led him increasingly to neglect client matters. His unraveling came on slowly but steadily until ethical complaints were brought against him, which he also neglected.

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

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<sup>93</sup> *Id.* at 1174 (Peterson, J., concurring) (emphasis added).

<sup>94</sup> *Id.* at 1175.

<sup>95</sup> 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).

<sup>96</sup> Iowa Supreme Court Bd. Of Prof'l Ethics And Conduct v. Grotewold, 642 N.W.2d 288 (Iowa 2002)

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.<sup>97</sup>

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."<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup>

These and other cases suggest that courts have struggled to balance the need to protect the public from attorney misconduct against recognition that affective and substance abuse and dependency disorders require treatment. The ABA's Standards for Imposing Lawyer Discipline contemplate that sanctions serve multiple purposes: protection of the public, preservation of the bar's integrity, deterrence of similar misconduct, and rehabilitation of lawyers. B.F.K.'s case, as mentioned, reflects a relatively strong rehabilitative approach. Other cases combine punishment and rehabilitation. In Grotewold's case, for example, the court imposed a sixty-day suspension. The court's opinion includes an extensive review of the literature on attorney impairment. The court concluded that Grotewold's neglect was attributable to his depression, but that his misrepresentation of the status of client matters to the court was not, hence the need for

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<sup>97</sup> In re B. Franklin Kersey, 520 A.2d 321 (D.C. App. 1987).

<sup>98</sup> *Id.* at 325-26.

<sup>99</sup> *Id.* at 328.

<sup>100</sup> *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).

punishment. The court's approach in R.L.'s case also reflects an effort at balance, imposing a thirty-day suspension while finding substantial mitigation in the psychiatric testimony. A common requirement, imposed in R.L. and B.F.K.'s cases, is successful participation in treatment. Other courts have taken more punitive approaches. *In re Hoare* involved a very successful attorney with no prior history of discipline who drove the wrong way up an interstate highway while intoxicated and collided with another car, killing its occupants. Both the Missouri court and the United States Court of Appeals for the Eighth Circuit disbarred him.<sup>101</sup> In another case, the court disbarred a lawyer for embezzlement of client funds, while acknowledging his claim of addiction, because his condition did not mitigate the egregiousness of his misconduct.<sup>102</sup>

*Florida Bar v. Heptner* illustrates the problem of lawyers who seek to excuse serious and serial misconduct with claims of impairment. Heptner failed to pursue client matters, continued to practice law while under suspension for failure to comply with CLE requirements (and misrepresented his status to clients), and while under suspension was recorded in an undercover investigation soliciting the delivery of cocaine from a client and repeatedly purchasing cocaine from a client (including in exchange for legal services). He had a number of prior disciplinary offenses and sanctions, including two suspensions. After his arrest, he entered drug rehabilitation treatment. He attempted to excuse his conduct on the basis of addiction. The court would have none of it. The court found no evidence that substance abuse or dependence was a "specific cause" of Heptner's misconduct and was patently skeptical of his "addiction defense." The court disbarred him.

### III. Interventions

At-risk and impaired lawyers require effective treatment but encounter several barriers. One is the profession's reluctance at the firm and individual level to acknowledge the existence and scope of the problem. As one expert on law and psychology recently observed,

The legal profession has notoriously ignored the reality that a significant number of its members exhibit signs of serious mental illness (and become addicted or habituated to drugs or alcohol at levels that are statistically significantly elevated above the public at large). This is no longer news. What has not been explored is why so much of the bar has remained willfully ignorant of these realities, and why it refuses to confront the depths of this problem – one which appears to be exacerbated in the cases of lawyers in large, high-powered firms.<sup>103</sup>

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<sup>101</sup> 155 F.3d 937 (8<sup>th</sup> Cir. 1997) (imposing reciprocal discipline).

<sup>102</sup> *State ex rel. Counsel for Discipline, Nebraska Supreme Court v. Reilly*, 712 N.W.2d 278 (Nebraska 2006).

<sup>103</sup> Michael L. Perlin, "*Baby, Look Inside Your Mirror*": *The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589 (2008).

Another is that when members of the profession, such as those in hiring, supervisory, or disciplinary positions, do suspect or learn that a student, applicant, or subordinate may have a mental disability, their reaction may be filtered through bias, ignorance, and fear. Such bias may be “fed by persistent myths and exaggerations about people with mental illness, including the perceptions that they are disproportionately violent, cruel, lazy, and unreliable” and may lead to a “tendency to evaluate person according to categories rather than on an individualized basis.”<sup>104</sup> Other critics have noted that “[d]iscrimination against this group, unlike racism and sexism, is largely invisible, normalized, and unquestioned. As a result, individuals with impairments continue to face significant challenges both to entry into the profession and to achieving success one admitted thereto.”<sup>105</sup> Thus, even while the profession seeks to protect itself and the public from the harm impaired attorneys may cause, to the extent its responses reflect poorly informed biases and perpetuate discriminatory practices (including some overly broad questions regarding mental health history on character and fitness applications), it may deter students and attorneys from seeking help. The limitations of antidiscrimination laws in protecting this class are well-documented.<sup>106</sup> Another barrier is affordability of treatment. This is an especially acute concern for students.<sup>107</sup>

A recent initiative “to balance the interests of the individual and the public” is the ABA’s Model Rule on Conditional Admission to Practice Law.<sup>108</sup> This approach “would encourage an individual to seek early treatment and provide for a confidential conditional admission process with an effective monitoring procedure to act more quickly if there is a relapse.”<sup>109</sup>

One of the most visible institutional 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, has been the development of comprehensive, formal lawyer assistance programs (“LAPs”)

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<sup>104</sup> John V. Jacobi, *Professionalism and Protection: Disabled Lawyers and Ethical Practice*, 69 U. PITT. L. REV. 567, 572 (2008) (discussing vagueness in ABA Formal Opinions 03-429 and 03-421).

<sup>105</sup> Wendy F. Hensel, *The Disability Dilemma: A Skeptical Bench and Bar*, 69 U. PITT. L. REV. 637, 638 (2008).

<sup>106</sup> *E.g.*, Jacobi, *supra* note 104, at 580-583 (describing limits of ADA); Rothstein, *supra* note 4, at 535-41 (same).

<sup>107</sup> Rothstein, *supra* note 4, at 552-53.

<sup>108</sup> *Id.* at 559.

<sup>109</sup> *Id.* at 554-55.

by the organized bar. As mentioned, some jurisdictions have extended these services to law students as well. 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.<sup>110</sup>

The structure, role, and functioning of a model LAP have been described by the research team who conducted the Arizona and Washington studies.<sup>111</sup> 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.<sup>112</sup>

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).<sup>113</sup> 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 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

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<sup>110</sup> Jonathan Goodliffe, *Alcohol and Depression in English and American Lawyer Disciplinary Proceedings*, 89 ADDICTION 1237 (1994).

<sup>111</sup> G. Andrew H. Benjamin, et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOLOGY REVIEW 113 (1992).

<sup>112</sup> *Id.* at 121-22.

<sup>113</sup> 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).

proportions.<sup>114</sup> 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).<sup>115</sup>

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."<sup>116</sup> The Washington LAP was successful in recruiting volunteer peer counselors, 150 of whom contributed 9000 hours of time during one fiscal year.<sup>117</sup> 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.<sup>118</sup>

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

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<sup>114</sup> 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).

<sup>115</sup> See, e.g., Maurice J. Martin, *A Brief Review of Organic Diseases Masquerading as Functional Illness*, 34 HOSPITAL & COMMUNITY PSYCHIATRY 328 (1983).

<sup>116</sup> Benjamin, et al., *supra* note 111, at 128, citing James M. LaRocco, et al., *Social Support, Occupational Stress, and Health*, 21 J. HEALTH & SOCIAL BEHAVIOR 202 (1980).

<sup>117</sup> *Id.* at 130.

<sup>118</sup> 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).

insurance.<sup>119</sup>

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.<sup>120</sup> 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."<sup>121</sup>

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."<sup>122</sup> 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."<sup>123</sup> 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).<sup>124</sup>

#### 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 substantial damage had been done.

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<sup>119</sup> Benjamin, et al., *supra* note 111, at 132. The authors report that "15% of Washington's LAP clients" are indigent. *Id.* at 132-33 n.56.

<sup>120</sup> Goodliffe, *supra* note 57, at 1239.

<sup>121</sup> Benjamin, et al., *supra* note 111, at 133-34.

<sup>122</sup> *Id.* at 123.

<sup>123</sup> *Id.* at 119.

<sup>124</sup> *Id.* at 119-20 & n.30.

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.<sup>125</sup> 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](mailto:admin@lawyershelpinglawyers.org). The website can be found at <http://www.lawyershelpinglawyers.org/homepage.html>.

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<sup>125</sup> The entire volume is available on-line at [http://www.utahbar.org/barjournal2000/html/august\\_september\\_2003.html](http://www.utahbar.org/barjournal2000/html/august_september_2003.html).