The Panel

• Honorable Ronald L. Buch, United States Tax Court
• Thomas J. Kane, KPMG LLP
• Joseph A. Rillotta, Faegre Drinker Biddle & Reath LLP
• Amanda D. Smith, Morgan, Lewis, & Bockius LLP
Objectives

• After this presentation, participants can be expected to –
  • Identify key health and well-being issues generally affecting their communities and specifically affecting the legal profession
  • Understand the relationship between well-being and legal ethics
  • Understand key considerations in designing and implementing well-being programs
  • Understand the well-being and ethical implications related to COVID-19
Health and Lawyer Well-Being

- “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”
  - Preamble to the Constitution, World Health Organization
- “We define lawyer well-being as a continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others. Lawyer well-being is part of a lawyer’s ethical duty of competence…. This definition highlights that complete health is not defined solely by the absence of illness; it includes a positive state of wellness.”
  - Report, p. 9
Illicit Drug Use Statistics

• Percent of persons aged 12 years and over with any illicit drug use in the past month: 11.2% (2017)
• Percent of persons aged 12 years and over with any nonmedical use of a psychotherapeutic drug in the past month: 2.2% (2017)
• Number of drug overdose deaths: 67,367 (2018)
  • Centers for Disease Control and Prevention, National Center for Health Statistics, FastStats Homepage
Alcohol Use Statistics

- Percent of adults aged 18 and over who had at least one heavy drinking day (five or more drinks for men and four or more drinks for women) in the past year: 25.1% (2017)
- Number of alcoholic liver disease deaths: 22,246 (2017)
- Number of alcohol-induced deaths, excluding accidents and homicides: 35,823 (2017)
  - Centers for Disease Control and Prevention, National Center for Health Statistics, FastStats Homepage
Suicide and Self-Inflicted Injury Statistics

• Number of emergency department visits for self-inflicted injury: 273,000 (2016)
• All suicides (2017)
  • Number of deaths: 47,173
  • Deaths per 100,000 population: 14.5
  • Cause of death rank: 10
    • Centers for Disease Control and Prevention, National Center for Health Statistics, FastStats Homepage
Health and Wellness – Physical Health Statistics

- Percent of adults aged 20 and over with obesity: 39.8% (2015-2016)
- Percent of adults aged 20 and over with overweight, including obesity: 71.6% (2015-2016)
- Percent with diabetes (physician-diagnosed or undiagnosed): 15% (2013-2016)
- Percent with physician-diagnosed diabetes: 10.5% (2013-2016)
- Percent with undiagnosed diabetes: 4.5% (2013-2016)
- Percent of visits to physician offices with diabetes indicated on the medical record: 11.5% (2016)
- Percent of visits to emergency departments with diabetes indicated on the medical record: 12.1% (2017)
  - Centers for Disease Control and Prevention, National Center for Health Statistics, FastStats Homepage
Health and Wellness – Mental Health Statistics

• Percent of adults aged 18 and over with serious psychological distress in the past 30 days: 3.9% (2018 (early release data))
• Number of visits to physician offices with mental, behavioral and neurodevelopmental disorders as the primary diagnosis: 56.8 million (2016)
• Number of visits to emergency departments with mental disorders, behavioral, and neurodevelopmental as the primary diagnosis: 4.8 million (2017)
• Percent of persons aged 12 years and over with depression in any 2-week period: 7.6% (2009-2012)
• Percent of physician office visits with depression indicated on the medical record: 9.3% (2016)
• Percent of emergency department visits with depression indicated on the medical record: 9.4% (2017)
  • Centers for Disease Control and Prevention, National Center for Health Statistics, FastStats Homepage
Selected Legal Profession-Specific Statistics

- More than 45% of attorneys experience depression during their career in the legal field
- Nearly 12% in this group have reported having suicidal thoughts at least once
- Nearly 21% of lawyers and others in the legal professions screened positive for hazardous, harmful, and potentially alcohol-dependent drinking
- Attorneys in the first 10 years of their practice now experience the highest rates of problematic drinking, followed by attorneys practicing for 11 to 20 years
- 9% of attorneys have been found to struggle with prescription drug abuse
- Up to 70% of legal malpractice issues are associated with substance abuse
  - American Addiction Centers, Addiction and Substance Abuse in Lawyers: Stats You Should Know
Key Factors Associated with the Legal Profession’s Higher Levels of Substance Abuse

• Burnout – physical and emotional exhaustion that workers can experience when they have low job satisfaction, perceived demands are greater than perceived responses, or gaps between expectations and outcomes
  • Can be more readily addressed by a job change, support, and/or increased resources
• Compassion Fatigue – the cumulative physical, emotional, and psychological effect of exposure to traumatic stories when working in a helping capacity
• Vicarious Trauma – profound shift in a world view that occurs in helping professionals when they work with clients who have experienced trauma
  • Compassion Fatigue and Vicarious Trauma tend to develop slowly and can be harder to address
  • ABA/ABACLE Presentation – Lawyer Impairment: Substance Abuse and Recovery in the Legal Profession (February 10, 2020)
National Task Force on Lawyer Well-Being

• To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being. … [T]oo many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers’ basic competence. This research suggests that the current state of lawyers’ health cannot support a profession dedicated to client service and dependent on the public trust.

• National Task Force Cover letter, August 14, 2017
National Task Force on Lawyer Well-Being

• ... To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members’ state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.
  • National Task Force Cover Letter, August 14, 2017
• Reasons to take action
First, lawyer well-being contributes to organizational success – in law firms, corporations, and government entities. If cognitive functioning is impaired as explained above, legal professionals will be unable to do their best work. For law firms and corporations, lawyer health is an important form of human capital that can provide a competitive advantage. If cognitive functioning is impaired as explained above, legal professionals will be unable to do their best work. For law firms and corporations, lawyer health is an important form of human capital that can provide a competitive advantage.
• Reasons to Take Action:

Second, lawyer well-being influences ethics and professionalism. Rule 1.1 of the ABA’s Model Rules of Professional Conduct requires lawyers to “provide competent representation.” Rule 1.3 requires diligence in client representation, and Rules 4.1 through 4.4 regulate working with people other than clients. Minimum competence is critical to protecting clients and allows lawyers to avoid discipline. But it will not enable them to live up to the aspirational goal articulated in the Preamble to the ABA’s Model Rules of Professional Conduct, which calls lawyers to “strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.”
• Reasons to Take Action (2d cont’d):
Troubled lawyers can struggle with even minimum competence. At least one author suggests that 40 to 70 percent of disciplinary proceedings and malpractice claims against lawyers involve substance use or depression, and often both. This can be explained, in part, by declining mental capacity due to these conditions. For example, major depression is associated with impaired executive functioning, including diminished memory, attention, and problem-solving. Well-functioning executive capacities are needed to make good decisions and evaluate risks, plan for the future, prioritize and sequence actions, and cope with new situations.
• Reasons to Take Action (2d cont’d):
Further, some types of cognitive impairment persist in up to 60 percent of individuals with depression even after mood symptoms have diminished, making prevention strategies essential. For alcohol abuse, the majority of abusers (up to 80 percent) experience mild to severe cognitive impairment. Deficits are particularly severe in executive functions, especially in problem-solving, abstraction, planning, organizing, and working memory – core features of competent lawyering.
• Reasons to take action

Third, from a humanitarian perspective, promoting wellbeing is the right thing to do. Untreated mental health and substance use disorders ruin lives and careers. They affect too many of our colleagues. Though our profession prioritizes individualism and self-sufficiency, we all contribute to, and are affected by, the collective legal culture.

Report, pps. 8-9, footnotes omitted
The Path to Lawyer Well-Being: The Report of the National Task Force on Lawyer Well-Being

• Selected Recommendations for All Stakeholders
  • Acknowledge the Problems and Take Responsibility (#1)
  • Leaders Should Demonstrate a Personal Commitment to Well-Being (#3)
  • Facilitate, Destigmatize, and Encourage Help-Seeking Behaviors (#4)
  • Provide High-Quality Educational Programs About Lawyer Distress and Well-Being (#8)
  • De-Emphasize Alcohol at Social Events (#10)
  • Begin a Dialogue About Suicide Prevention (#12)
The Path to Lawyer Well-Being: The Report of the National Task Force on Lawyer Well-Being

• Recommendations for Judges
  • Communicate that Well-Being is a Priority (#14)
  • Develop Policies for Impaired Judges (#15)
  • Reduce Stigma of Mental Health and Substance Use Disorders (#16)
  • Conduct Judicial Well-Being Surveys
  • Provide Well-Being Programming for Judges and Staff (#18)
  • Monitor for Impaired Lawyers and Partner with Lawyer Assistance Programs (#19)
The Path to Lawyer Well-Being: The Report of the National Task Force on Lawyer Well-Being

• Selected Recommendations for Regulators
  • Adopt Regulatory Objectives that Prioritize Lawyer Well-Being (#20.1)
  • Modify the Rules of Professional Conduct to Endorse Well-Being as a Part of a Lawyer’s Duty of Competence (#20.2)
  • Expand Continuing Education Requirements to Include Well-Being Topics (#20.3)
  • Implement Proactive Management-Based Programs (PMBP) That Include Lawyer Well-Being Components (#22.1)
  • Adopt a Centralized Grievance Intake System to Promptly Identify Well-Being Concerns (#22.2)
  • Modify Confidentiality Rules to Allow One-Way Sharing of Lawyer Well-Being Related Information from Regulators to Lawyer Assistance Programs (#22.3)
  • Adopt Diversion Programs and Other Alternatives to Discipline That Are Proven (#22.4)
The Path to Lawyer Well-Being: The Report of the National Task Force on Lawyer Well-Being

• Recommendations for Legal Employers
  • Form a Lawyer Well-Being Committee (#24.1)
  • Assess Lawyers’ Well-Being (#24.2)
  • Monitor for Signs of Work Addiction and Poor Self-Care (#25.1)
  • Actively Combat Social Isolation and Encourage Interconnectivity (#25.2)
  • Emphasize a Service-Centered Mission (#26.1)
  • Create Standards, Align Incentives, and Give Feedback (#26.2)
Other Recommendations

- Recommendations for Law Schools
- Recommendations for Bar Associations
- Recommendations for Lawyers Professional Liability Carriers
- Recommendations for Lawyers Assistance Programs
ABA Efforts on Lawyer Well-Being

• ABA Model Rule for Minimum Continuing Legal Education
  • Current version adopted by the ABA in February 2017
  • Recommends that as part of the required credit hours, lawyers must earn at least one credit hour every three years addressing mental health and substance use disorders programming
  • A number of states have adopted mandatory CLE requirements for mental health and substance abuse education, e.g., Illinois (two hours every two years)

• ABA House of Delegates Resolution 105
  • Adopted February 2018
  • ABA supports the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, judges, and law students
  • ABA urges all law-related institutions to consider the recommendations made by the National Task Force on Lawyer Well-Being
ABA Efforts on Lawyer Well-Being

- ABA Working Group on Lawyer Well-Being
  - Sponsors the Campaign of Innovation to Improve the Substance Use and Mental Health Landscape of the Legal Profession
  - As of May 2020 there were 181 signatories to the pledge supporting the Campaign
8.1 Work Engagement vs. Burnout
8.2 Stress
8.3 Resilience and Optimism
8.4 Mindfulness Meditation
8.5 Rejuvenation Periods to Recover From Stress
8.6 Physical Activity
8.7 Leader Development and Training
8.8 Control and Autonomy
8.9 Conflict Management
8.10 Work-Life Conflict
8.11 Meaning and Purpose
8.12 Substance Use and Mental Health Disorders
8.13 Additional Topics
Physical Activity Benefits

• There is a growing body of evidence demonstrating the association between physical activity and its positive effects on mental health and interventions designed to reduce alcohol and other drug dependence and enhance smoking prevention.
  

• There is abundant scientific evidence that physically active people of all age groups and ethnicities have higher levels of cardiorespiratory fitness, health, and wellness, and a lower risk for developing several chronic medical illnesses, including cardiovascular disease, compared with those who are physically inactive.
  
COVID-19 Considerations

• Thus, this period of isolation might lead to a spike in alcohol misuse, relapse, and potentially, development of alcohol use disorder in at-risk individuals, therefore placing further strain on addiction and drug and alcohol services, and the health service in general, during and after the pandemic.
  • Persons who are isolated and stressed—as much of the population is during a pandemic—frequently turn to substances to alleviate their negative feelings. Those in recovery will face stresses and heightened urges to use substances and will be at greatly increased risk for relapse.
COVID-19 Considerations

• The pandemic and the related containment measures—namely quarantine, social distancing, and self-isolation—can have a detrimental impact on mental health. In particular, the increased loneliness and reduced social interactions are well-known risk factors for several mental disorders, including schizophrenia and major depression. Concerns about one’s own health and that of their beloved ones (particularly elderly or suffering from any physical illness), as well as uncertainty about the future, can generate or exacerbate fear, depression, and anxiety.

COVID-19 Considerations

• Home stay is a fundamental safety step that can limit infections from spreading widely. But prolonged home stays can increase behaviors that lead to inactivity and contribute to anxiety and depression, which in turn can lead to a sedentary lifestyle known to result in a range of chronic health conditions. Maintaining regular physical activity and routinely exercising in a safe home environment is an important strategy for healthy living during the coronavirus crisis.

COVID-19 Ethical Considerations

- Competence Model Rule 1.1
- Diligence Model Rule 1.3
- Communications Model Rule 1.4
- Confidentiality Model Rule 1.6
- Conflicts of Interest Model Rules 1.7 and 1.8
- Client with Diminished Capacity Model Rule 1.14
- Declining or Determining Representation Model Rule 1.16
- Dealing with Unrepresented Person Model Rule 4.3
- Supervision Model Rules 5.1 and 5.2
- Unauthorized Practice of Law; Multijurisdictional Practice of Law Model Rule 5.5
- Civility and professionalism
COVID-19 Ethical Considerations

- Boston Bar Association Ethics Committee Pandemic Advisory (April 2020)
- Meeting your Ethical Responsibilities During the COVID-19 Pandemic, James M. McCauley, Ethics Counsel, Virginia State Bar
Bar-Required Attorney Wellness Fees

- May 31, 2019
- Supreme Court of Virginia Approves $30 Attorney Wellness Fund Fee
  - On May 31, 2019, the Supreme Court of Virginia approved an amendment to the Rules of Court governing the Virginia State Bar to allow for a $30 Attorney Wellness Fund fee to be collected on the dues statement of all active VSB lawyers. The fee will be used to fund a judges and lawyers assistance program, CLE courses, and other activities that improve lawyer wellness.
  - The order becomes effective July 1, 2019.
“The formation of the Standing Committee on Lawyer Well-Being will allow a continued and sustained focus on attorney well-being at a time when too many attorneys are struggling with serious health issues that are exacerbated, if not caused, by the way that law is practiced today. The practice of law has always been demanding, but it is especially challenging now, fraught with ever-increasing financial pressures, client demands, and work expectations that are taking a terrible toll on many of our most resilient attorneys.”

- Supreme Judicial Court Chief Justice Ralph D. Gants
"If we are to reduce burnout and enrich the practice of medicine, we must prioritize our basic biological need to belong and to experience positive and rewarding human connections as part of our working environment. When our need to belong is not satisfied, we suffer mentally and physically.... Social connectedness, particularly in the form of teamwork, addresses the psychological needs of friendship and esteem and is not a luxury but rather a basic human necessity that is built into our biology."
“… We recommend that leaders at all levels of health care organizations heed the advice of leadership expert Gen Martin Dempsey, ‘The most important responsibility of leaders, no matter how busy they are and how many priorities demand their attention, is to make their people feel like they belong.’ In health care, this means that leaders devote time every day to create a work environment and culture that fosters a sense of belonging, where every staff member feels safe, valued, and part of a collaborative mission to improve the health and well-being of patients and colleagues.”

Summary

• There is a clear connection between well-being and legal ethics
• Well-being principles and programs can be effectively implemented across the spectrum of organizations associated with the legal profession, regardless of the size of the organization
• Well-being principles and programs can be used to effectively address potential ethical issues associated with COVID-19-related conditions
Additional References


• Centers for Disease Control and Prevention, Workplace Health Promotion. https://www.cdc.gov/workplacehealthpromotion/index.html

Questions

All attendees can submit questions via the Q&A feature in the webinar interface.