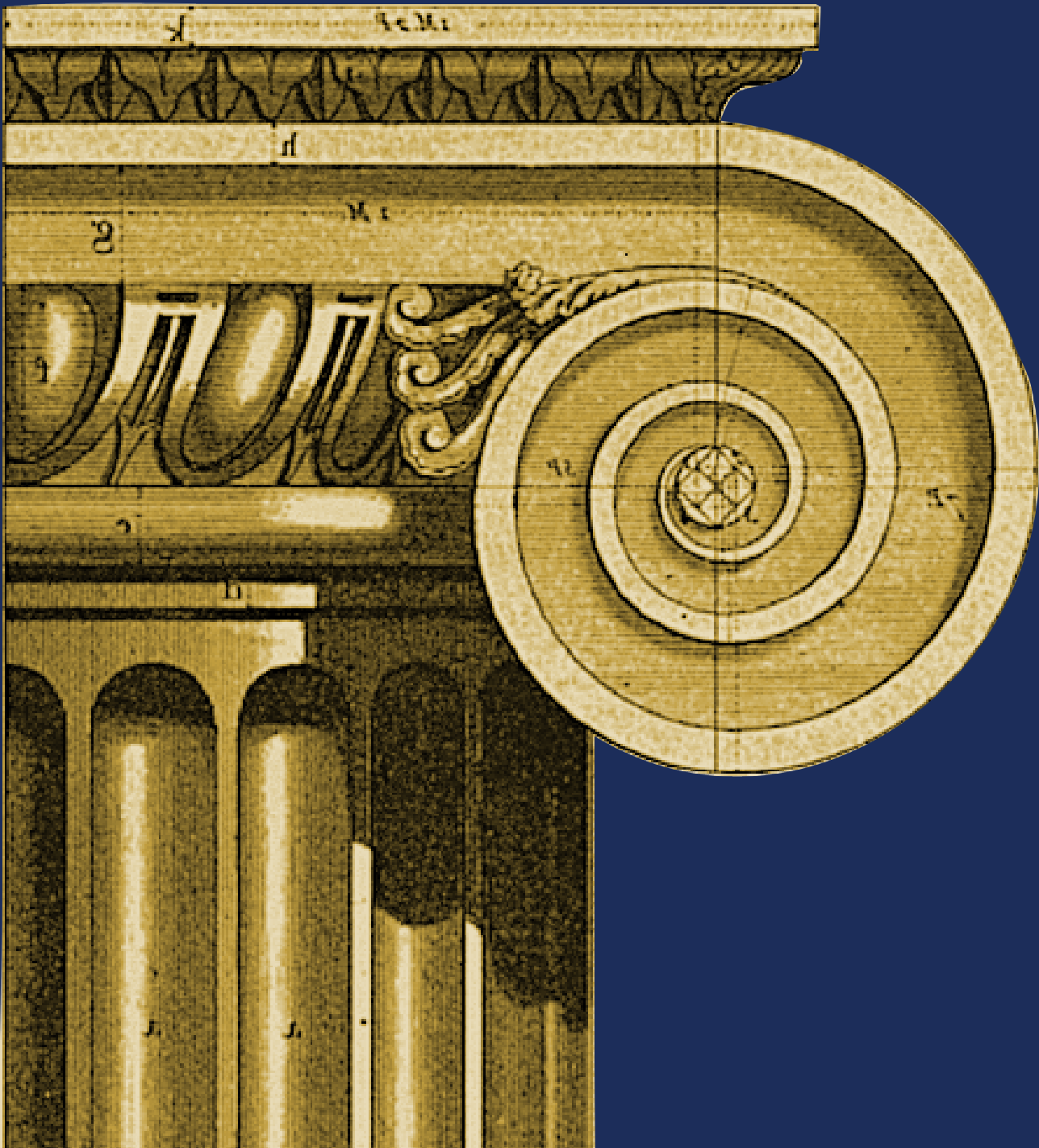


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Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions To Promote Lawyer Well-Being

By David Jaffe and Janet Stearns

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The Character and Fitness Screening Process: Solutions and Problems

Admission to the practice of law involves an evaluation of substantive knowledge, tested through the administration of the bar examination, and a separate evaluation of character and fitness. The character and fitness process is intended to identify issues that could affect the responsible and competent practice of law. So, for example, bar examiners will ask about an applicant's history relating to honor code and academic integrity, criminal history, civil litigation history, and financial dealings, as each piece of information could bear a relationship to the applicant's ability to practice law in a competent manner.

Deans of Students work daily with law students and counsel them on the professionalism required in law school, as well as the candor required to complete the character and fitness application process. Our role is also to work hand-in-hand with bar regulators to educate the next generation of lawyers and transition them into the legal profession. We have counseled hundreds of law students who have struggled with mental health and substance use issues during law school. Some of these problems are first experienced in law school in the face of academic, financial, and career pressures. In other instances, our law schools have admitted students who have a history of mental health or substance use, but who have overcome these challenges to complete the rigors of law school and prepare themselves for the demands of the bar examination and the profession.

It is deeply troubling that our law students and our profession struggle with substance use and mental health issues. The Survey of Law Student Well-Being¹ updated and confirmed the belief among those in the legal profession, particularly at law schools, that law students are continuing to struggle with substance use disorder and other mental health disorders. The survey of 3,300 law school students across fifteen law schools found that more than one in six screened positive for depression and nearly one in four screened for anxiety.

Forty-two percent of the survey respondents indicated they felt they needed mental health intervention,

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but 45% would not seek help, believing it would threaten their ability to be admitted to the bar. At the same time, 63% of respondents reported that the potential threat to bar admissions was a factor discouraging them from seeking services for substance use. Almost half of the respondents reported their belief that they had a better chance of getting admitted to the bar if a substance use problem were hidden, and 44% of respondents reported their belief that they had a better chance of getting admitted to the bar if a mental health problem were hidden.

These numbers are overwhelming evidence of student concerns about the risks to bar admission if they disclose substance use or mental health issues after seeking treatment and support. The source of these concerns must be addressed by clarifying what should, and what should not, need to be disclosed as part of the character and fitness evaluation process.

Provided that bar applicants can perform the essential elements and duties of a lawyer with competence and diligence, overbroad or outdated character and fitness questions should not stand in the way of their admission. The character and fitness process is appropriate when it identifies conduct that could adversely affect the applicant's ability to practice law. Examples of conduct might include an arrest for driving under the influence of alcohol; attendance problems in class, clinics or externships; mismanaging personal funds; or the inability to meet deadlines. All of these are relevant and fair issues for evaluation.

The character and fitness process, however, is not serving its purpose when the focus is on a particular mental health diagnosis or condition. The current perception among law students is that an applicant who receives treatment for a mental health issue and then discloses this treatment on the bar application will create a delay or denial of admission. As a result, the law student who perceives needing help will not seek it when it is most needed. Further, a history of mental health or substance use issues has not been shown to reflect in a lawyer's ability to practice law.² Consequently, the character and fitness process should allow for an individual with mental health or substance use issues prior to law school, who spends three successful years in school without incident, to seek treatment or otherwise be admitted without being subject to questions of condition or diagnosis. Again, the focus should remain on recent conduct and behavior, rather than an over-inclusive, inappropriate (and illegal) application of a stigma.

Further, a focus on certain health conditions, without asking about all health conditions, is underinclusive. If bar examiners wish to know about any medical situation that could potentially affect one's ability to practice law, the questions should focus on a wide range of medical issues (brain injury, Tourette's Syndrome, obesity, cancer, concussions, epilepsy, diabetes, to name a few.). But questions that focus solely on mental health continue to stigmatize future members of the profession, and this stigma is preventing exactly the type of treatment and appropriate help-seeking behavior that we should be encouraging.

This paper summarizes the relevant national legal history over the past five years and describes significant state law developments during this time period. We also articulate a national agenda for reform, and where the American Bar Association, the National Conference of Bar Examiners, and State Bars can each play a significant role.

Recent History in the Debate on Substance Use and Mental Health Questions in the Character and Fitness Process

A. Louisiana Consent Decree

In 2014, the U.S. Department of Justice ("DOJ") announced strong opposition to broad-based mental health questions on bar applications, thus sending a significant message across the nation. DOJ launched a

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substantial investigation of the Louisiana attorney licensure system in 2011 when applicants with mental health disabilities alleged that they were subject to “additional inquiries and/or conditions on admission on account of mental health disability.”³ While not the first legal attack to the bar admission process under the Americans with Disabilities Act (ADA), this investigation directly challenged the reliance upon improper questions by the Louisiana Supreme Court Committee on Bar Admissions and the process by which these questions were evaluated.⁴ Specifically, candidates for admission had to respond to questions developed by the National Conference of Bar Examiners (“NCBE”) as part of its character report process. The questions at issue were:

“25. Within the past five years, have you been **diagnosed with or have you been treated** for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

26A. Do you currently have any **condition or impairment** (including but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way affects, or if left untreated, could affect your ability to practice law in a competent and professional manner?

26B. If your answer to 26A is yes, are the limitations caused by your mental health condition... reduced or ameliorated because you receiving ongoing treatment (with or without medication) or because you participate in a mentoring program?

27. Within the past five years have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation, any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority?”

The DOJ investigation resulted in a consent decree on August 15, 2014 with the Louisiana Supreme Court that prohibited the court from asking bar applicants questions about diagnosis and treatment “which did not effectively predict future misconduct as an attorney.”⁵ The decree mandated that the Court: “Refrain from inquiring into mental health diagnosis or treatment, unless (1) an applicant voluntarily discloses this information to explain conduct or behavior that may otherwise warrant denial of admission, . . . or (2) the Committee learns from a third-party source that the applicant raised a mental health diagnosis or treatment as an explanation for conduct or behavior that may otherwise warrant denial of admission. Any such inquiry shall be narrowly, reasonably, and individually tailored.”⁶

The consent decree sent a powerful signal to state supreme courts nationally and established standards for compliance with the ADA. The updated standard was that screening questions should focus on “conduct or behavior”, with reference to condition or impairment only when there is an effect on the ability of the applicant to competently and ethically practice law. The announcement of this consent decree delivered a significant signal to bar regulators to re-evaluate the existing approach to character and fitness questions addressing substance use and mental health.

In August 2015, one year after the Louisiana consent decree, the American Bar Association (ABA) Commission on Disability Rights submitted Resolution 102 to the House of Delegates. This resolution, building upon the language of the consent decree, urged further action by licensing entities around the country:

RESOLVED, That the American Bar Association **urges state and territorial bar licensing entities to eliminate from applications required for admission to the bar any questions that ask about mental health history, diagnoses, or treatment and instead use questions that focus on conduct or behavior that impairs an applicant’s ability to practice law in a competent, ethical, and professional manner.**

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[emphasis added]

FURTHER RESOLVED, That state and territorial bar licensing entities are not precluded from making reasonable and narrowly-tailored follow-up inquiries concerning an applicant's mental health history if the applicant has engaged in conduct or behavior that may otherwise warrant a denial of admission and a mental health condition either has been raised by the applicant as, or is shown by other information to be, an explanation for such conduct or behavior.⁷

The 2015 Resolution placed on the ABA on the record as to the importance of eliminating questions that focus on diagnosis and replacing them with conduct-focused questions. Although approved and adopted by the ABA, a larger movement was required before states started to take action.

B. National Task Force Report

A coalition of national legal associations⁸ came together to form the National Task Force on Lawyer Well-Being, largely in response to the results of the Survey of Law Student Well-Being and a parallel survey on the legal profession.⁹ The latter survey found, *inter alia*, that attorneys are struggling with substance use disorder during the first ten years in their practice, reversing a belief that these problems arose with greater frequency as attorneys aged.¹⁰

In 2017, the National Task Force on Lawyer Well-Being released "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change."¹¹ The report presents a wide array of significant recommendations for stakeholders across the legal profession. A number of these recommendations transcend the scope of this paper. Central to this paper is that the report asked regulators¹² to adjust the bar admissions process to support law student well-being. The report called upon regulators to:

- Re-evaluate bar application inquiries about mental health history.
- Adopt essential eligibility admission requirements.
- Adopt a rule for conditional admissions to practice law with specific requirements and conditions.
- Publish data reflecting the low rate of denied admissions due to mental health disorders and substance use.

A broad coalition of entities¹³ endorsed the structural reform proposed in the National Task Force Report, including a close evaluation of any character and fitness process which asks applicants questions which do not effectively predict future misconduct. Many states have since created their own Task Forces to focus on lawyer well-being.¹⁴

Following the release of the Report, a coalition of groups - including the ABA Working Group to Advance Lawyer Well-Being, the ABA Commission on Lawyer Assistance Programs, the ABA Standing Committee on Professionalism, and the National Association of Bar Counsel - joined forces at the ABA's Midyear Meeting in 2018 to go one step further.

In February 2018, these groups asked the ABA House of Delegates to adopt Resolution 105, which supported the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, judges, and law students. Resolution 105 reads:

RESOLVED, That the American Bar Association supports the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, judges and law students; and FURTHER RESOLVED, That the American Bar Association **urges all federal, state, local, territorial, and tribal courts, bar associations, lawyer regulatory entities, institutions of legal education, lawyer**

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assistance programs, professional liability carriers, law firms, and other entities employing lawyers to consider the recommendations set out in the report, The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, by the National Task Force on Lawyer Well-Being. [emphasis added]¹⁵

The strength of this coalition, and the ongoing national press focus on issues relating to lawyer well-being, has brought a renewed campaign to ensure that the character and fitness questions in all U.S. jurisdictions are in compliance with the standards set forth in the Louisiana consent decree.

C. Conference of Chief Justices Resolutions

The Conference of Chief Justices (CCJ) was established in 1949 and is composed of the highest judicial officer of each of the 50 United States as well as the District of Columbia, Puerto Rico, and the American territories. The CCJ passes resolutions on various issues of policy affecting the judicial system.

In August 2017, the CCJ voted in favor of a general endorsement of the National Task Force Report with Resolution 6, which states in pertinent part:

WHEREAS, the National Task Force on Lawyer Well-Being issued a report, ‘The Path to Lawyer Well-Being: Practical Recommendations for Positive Change,’ which contains 44 recommendations, including recommendations for judges, regulators, legal employers, law schools, bar associations, and lawyer professional liability carriers; and

WHEREAS, the Report makes the following recommendations for judges:

- Communicate that well-being is a priority
- Develop policies for impaired judges
- Reduce stigma of mental health and substance use disorders
- Conduct judicial well-being surveys
- Provide well-being programming for judges and staff
- Provide monitoring for impaired lawyers and partner with Lawyer Assistance Programs; and

WHEREAS, the Conference of Chief Justices fully supports the concept of lawyer well-being as a critical component of lawyer competence, and reinforces the critical role of the highest court in each jurisdiction in overseeing the legal profession; and

WHEREAS, the Conference of Chief Justices recognizes that the highest court in each jurisdiction should take an active role in the development of effective mechanisms for the regulation of the legal profession, including convening the relevant stakeholders in each jurisdiction to improve lawyer well-being;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports the goals of reducing impairment and addictive behavior, and improving the well-being of lawyers, and recommends that each jurisdiction considers the recommendations of the Report of the National Task Force on Lawyer Well-Being.¹⁶

Following this general endorsement of the National Task Force, a year later Massachusetts Supreme Court Chief Justice Ralph Gants proposed another resolution to specifically address the breadth of the character and fitness questions.¹⁷ On February 13, 2019, the CCJ adopted the following Resolution as a significant

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demonstration of support for the goal of ensuring that all the member jurisdictions revise their bar application questions with respect to mental health and substance use issues:

Resolution 5

“In Regard to the Determination of Fitness to Practice Law

WHEREAS, the courts of last resort in the respective states and territories exercise responsibility over the process for the admission of the attorneys to the practice of law; and

WHEREAS, as part of the admissions process, state bar admission authorities evaluate the character and fitness of applicants for admission to practice law; and

WHEREAS, in addition to conduct and behavior-related questions, some states inquire about applicants’ mental health diagnoses and treatment unrelated to conduct and behavior; and

WHEREAS, the U.S. Department of Justice has made findings in an Americans with Disabilities Act (ADA) investigation of bar licensure that questions about medical conditions as part of a fitness inquiry inappropriately focus on an applicant’s status as a person with a disability, rather than on the applicant’s conduct; and

WHEREAS, questions about mental health history, diagnoses, or treatment are unduly intrusive, may tend to screen out individuals with disabilities, may violate the Americans with Disabilities Act, and are likely to deter individuals from seeking mental health counseling and treatment; and

WHEREAS, applicants with disabilities should be assessed, like all other applicants, solely based on their current fitness to practice law; and

WHEREAS, the Department of Justice also has made findings in an ADA investigation of bar licensure that to comply with the ADA, “attorney licensing entities must base their admissions decisions on an applicant’s record of conduct, not the applicant’s mental health history,” and

WHEREAS, public entities cannot impose or apply eligibility criteria that tend to screen out an individual with a disability from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices urges its members and state and territorial bar admission authorities to eliminate from applications required for admission to the bar any questions that ask about mental health history, diagnoses, or treatment and instead use questions that focus solely on conduct or behavior that impairs an applicant’s current ability to practice law in a competent, ethical, and professional manner;

BE IT FURTHER RESOLVED that reasonable inquiries concerning an applicant’s mental health history are only appropriate if the applicant has engaged in conduct or behavior and a mental health condition has been offered or shown to be an explanation for such conduct or behavior.” [emphasis added]¹⁸

With the support of the immediate past President of the Conference of Chief Justices, Vermont Chief Justice Paul Reiber, the adoption of this Resolution provides the strongest endorsement for ongoing reform. The recommendations herein build upon the momentum created by the CCJ Resolution.

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D. Role of the National Conference of Bar Examiners and the Uniform Bar Exam

The National Conference of Bar Examiners (NCBE), is a not-for-profit corporation founded in 1931 whose mission includes working with other institutions to “develop, maintain, and apply reasonable and uniform standards of education and character for eligibility for admission to the practice of law; and assist bar admission authorities by providing standardized examinations of uniform and high quality for the testing of applicants for admission to the practice of law; . . . and provide other services such as character and fitness investigations and research.”¹⁹

NCBE does not make rules regarding the admission of candidates, nor does it make a final determination on admission. The NCBE does however host a character and fitness screening application used by 22 jurisdictions for attorneys seeking: 1) first time admission, 2) attorney admission on motion (licensed in another U.S. jurisdiction or territory); 3) foreign-educated/foreign-licensed, and 4) admission by transferred Uniform Bar Exam (UBE) score.²⁰ Three additional jurisdictions use the character and fitness questions only for admission review of foreign educated attorneys and one jurisdiction only for admission by motion. Thus, 26 jurisdictions are directly affected by the character and fitness screening questions as drafted by the NCBE.

Of the jurisdictions NCBE works with to provide character and fitness services, 20 use the standard language from the NCBE application, five use nonstandard language for some or all of the mental health questions, and three do not use any of the mental health questions (the questions are suppressed and do not appear).

The NCBE questions were revised in 2014 in response to the State of Louisiana consent decree. But given the ongoing attention on these issues, and the fact that these questions are being used in the majority of jurisdictions, we should again take a critical look at whether they represent the appropriate balance of interests. Because the questions are widely used, they are provided here:²¹

29. Conduct or Behavior

Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?

30. Condition or Impairment

Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?

If Yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or participate in a monitoring or support program?”

While Question 29 is consistent with the framework set forth in the Louisiana Consent Decree, for the reasons set forth above NCBE should delete Question 30.

Until 2018, the NCBE application included a Preamble to the mental health and substance use questions.²² The since-removed Preamble stated:

Through this application, the National Conference of Bar Examiners makes inquiry about

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circumstances that may affect an applicant's ability to meet the professional responsibilities of a lawyer. This information is treated confidentially by the National Conference and will be disclosed only to the jurisdiction(s) to which a report is submitted. The purpose of such inquiries is to allow jurisdictions to determine the current fitness of an applicant to practice law. The mere fact of treatment, monitoring, or participation in a support group is not, in itself, a basis on which admission is denied; boards of bar examiners routinely certify for admission individuals who demonstrate personal responsibility and maturity in dealing with fitness issues. The National Conference encourages applicants who may benefit from assistance to seek it.

Boards do, on occasion, deny certification to applicants whose ability to function is impaired in a manner relevant to the practice of law at the time that the licensing decision is made, or to applicants who demonstrate a lack of candor by their responses. This is consistent with the public purpose that underlies the licensing responsibilities assigned to bar admission agencies; further, the responsibility for demonstrating qualification to practice law is ordinarily assigned to the applicant in most jurisdictions.

The National Conference does not seek information that is fairly characterized as situational counseling. Examples of situational counseling include stress counseling, domestic counseling, grief counseling, and counseling for eating or sleeping disorders. The National Conference does not seek medical records.

Preambles are helpful to applicants' understanding the goals and intentions of the licensing authority in evaluating their responses. Thus, the removal of the NCBE Preamble may be problematic for all applicants, including applicants with a history of substance use or other mental health conditions. This Preamble provided critically important guidance to applicants as they approached the process of responding to character and fitness questions and perhaps sought guidance on help-seeking behavior during law school.

Inasmuch as the public statement of policy as provided in this Preamble was very helpful to bar applicants and their counselors and advisors, the decision to remove this statement was a step backward.

E. Bazelon's Fifty State Analysis

The Bazelon Center for Mental Health Law is a non-profit organization that since 1972 has advocated for the civil rights, full inclusion, and equality of adults and children with mental disabilities.

In spring 2019, Bazelon conducted a review of and subsequently published the Bar Exam Character and Fitness Questions for all fifty States and the District of Columbia.²³ While Bazelon opted not to specify or flag those states for which character and fitness questions appear invasive, contrary to the Louisiana decree, and/or likely to cause an applicant to reconsider applying, by providing every state's questions in one table Bazelon's research demonstrates the following:

- **Breadth of Questions:** A number of states ask questions that are not limited in time or scope or seek applicant responses that appear overbroad with respect to the period of time sought and are not directed at an applicant's ability to practice law.
- **Questions Calling for Diagnosis:** A number of states continue to ask questions related to an applicant's diagnosis, rather than to the applicant's conduct or behavior, despite the Louisiana decree and the resolutions adopted by bar and bench entities.
- **Speculative Questions:** A number of states ask questions that call for speculation on the part of the

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applicant (i.e., “...that could affect your ability to practice law”). Said questions not only seek information potentially unanswerable by an applicant but are no more appropriate than asking a bar applicant if a physical (non-hidden) condition could affect his or her ability to practice law.

- **Questions Requiring Excessive Medical Disclosure:** A number of states ask questions that can result in requiring disclosure of significant personal health care information, medications, and diagnostic notes, which are not only invasive but may come at a burdensome cost to the applicant.

The Bazelon survey offers readers an important snapshot of the relevant questions asked in all United States jurisdictions and allows for an ease of comparison of the questions addressing mental health and/or substance use disorders.

States Adopting Significant Recent Changes

While many states have not changed their practices after the 2014 Louisiana Consent Decree and subsequent bench and bar urgings, several states have recognized the need for change. Below is information from those states:

California—On July 30, 2019, Governor Gavin Newsom signed Senate Bill 544 into law. This bill amended the California Business and Professions Code Section 6060, and generally prohibits the State Bar of California, or members of its Examining Committee, from reviewing or considering a person’s medical records relating to mental health, except as specified, during the moral character determination process for attorney licensure. The limited exceptions to this prohibition are if the records are being used to show good moral character or to demonstrate a mitigating factor to a specific act of misconduct. This statutory change will go into effect January 1, 2020.

Connecticut—In January 2018, the Connecticut Bar Examining Committee voted to remove mental health questions from the character and fitness analysis entirely, as reported by the Connecticut Bar Tribune.²⁴ The website for the Connecticut Bar Examining Committee has a “protocol” for applicants with health diagnosis or drug or alcohol dependence, and clarifies that they are looking to instances where conduct is involved and that these issues were disclosed to explain the conduct.²⁵

Florida—In October 2018, the Florida Board of Bar Examiners (“FBBE”) announced significant changes in its approach to substance use and mental health questions. This followed a year of substantial attention to mental health issues through the leadership of the 2017-2018 Bar President Michael Higer and past Chair of the Florida Board of Bar Examiners Scott Baena. Significantly, Florida has implemented four important reforms:

- 1) Reform of the mental health questions on the character and fitness portion.²⁶
- 2) The addition of a broad frequently asked questions section (“FAQ”) that addresses and states the FBBE’s position on substance use and mental health disclosures. (<https://www.floridabarexam.org/web/website.nsf/faq.xsp>);
- 3) Substantial training of hearing panels on appropriate and inappropriate questions so that bar hearings are constructive rather than traumatizing to applicants.²⁷
- 4) An agreement to assume expenses for any additional testing or evaluation required of bar applicants.²⁸

Michigan—The Michigan State Bar Board of Commissioners wrote in March 2019 to the Michigan Supreme Court requesting reform of the character and fitness process. Michigan Lawyers & Judges

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Assistance Program (LJAP) Director Tish Vincent, on behalf of the Bar, has requested reform of the character and fitness questions in accordance with the Louisiana consent decree. Further, the Michigan LJAP has requested that a psychologist or experienced mental health professional be available at all bar hearings involving applicants with substance use or mental health history to ensure that the hearing reflects appropriate sensitivity to the applicants and ADA issues.²⁹

New York—The current President of the New York Bar Association, Henry Greenberg, announced in June 2019 that he was launching a blue-ribbon committee to determine if the state should remove questions about mental health disorders from applications for the bar. On August 13, 2019, the Working Group on Attorney Mental Health of the New York State Bar Association issued its report *The Impact, Legality, Use and Utility of Mental Disability Questions on the New York State Bar Application*. This report calls for the complete removal of Question 34 on the New York Bar Application given its negative impact upon law students.³⁰ The report also raises “serious doubt” as to the legality of asking Question 34 in light of the ADA.³¹ The report concludes: “It is the conclusion of the Working Group on Attorney Mental Health that mental health inquiries should be eliminated from the application for admission to the Bar of New York State.”³²

The New York State Bar Association voted November 2 to adopt the recommendations of the report.³³ As of the publication of this article, a final determination on whether the question will be eliminated is pending before the New York Administrative Board of the Courts.³⁴

Virginia—Effective January 1, 2019, the Virginia bar no longer asks applicants to disclose the applicant’s mental health conditions and treatment. In this instance the change resulted when University of Richmond School of Law student organizations requested, and a Virginia Supreme Court committee recommended, that the Virginia Board of Bar Examiners make the change. The law students and the court committee argued that such questions discourage law students from seeking help for fear they will be denied admission to the bar.

The Virginia question asked if applicants had any “condition or impairment (including, but not limited to, a substance or alcohol use disorder, or a mental, emotional, or nervous disorder or condition)” that might impact their ability to be a lawyer. The updated question asks “[W]ithin the past five (5) years, have you exhibited any conduct or behavior that could call into question your ability to perform any of the obligations and responsibilities of a practicing lawyer in a competent, ethical and professional manner?”

The students’ letter to the Virginia Board of Bar Examiners referenced ABA Resolution 105, *infra*, which urges stakeholders to consider the recommendations in the August 2017 report by the National Task Force on Lawyer Well-Being, including the recommendation to “re-evaluate bar application inquiries about mental health history.”³⁵

An Agenda for Reform

Changes in law, policy, and regulations can proceed slowly, and often involve a number of relevant organizations, stakeholders, and decision-makers. However, in light of the importance of the character and fitness evaluation process to the health and well-being of law students nationally, and the aforementioned support and recommendations of stakeholders, the following actions need to be taken:

First, State Supreme Courts and Bar Examiners must:

- Remove any character and fitness questions that address mental health and other substance use

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issues that do not specifically address actual and recent conduct. NCBE Question #29 is an appropriate framing of the character and fitness question. It reads:

Within the past five (5) years, have you exhibited any conduct or behavior that could call into question your ability to perform any of the obligations and responsibilities of a practicing lawyer in a competent, ethical and professional manner?

States that do not eliminate questions based upon condition or impairment within a reasonable time frame should justify this inaction and provide the rationale or evidence for inaction.

- Ensure that online and print materials about the character and fitness review process include an appropriate preamble or FAQ that clarifies what must and what need not be disclosed, so as not to discourage appropriate help-seeking behaviors by applicants. The preamble or FAQ must clarify with examples the types of conduct that would be disclosable, such as criminal incidents, financial mismanagement, or chronic absenteeism. But it is also essential that the FAQ clarify that there is no requirement of disclosure of medical conditions, treatment, or past history of substance use or mental health.
- Use educational opportunities with law students to clarify the message that appropriate counseling for mental health conditions is encouraged and appropriate.
- Provide training to bar members involved in the character and fitness process and include, where possible, trained mental health professionals in such hearings so that medical information can be appropriately evaluated and hearings are handled with sensitivity.

Second, the NCBE must:

- Lead the way by ensuring that its character and fitness questions are focused on actual and recent conduct. To that end, NCBE should eliminate Question # 30, as stated herein.
- Further, NCBE should reinstate a preamble or develop an appropriate list of FAQs, to ensure that its policy and approach to character and fitness does not discourage critical help-seeking behaviors by applicants while they are in law school. More specific examples of the types of information as to conduct that should be disclosed would be an important addition to the preamble. Inasmuch as nearly half of U.S. jurisdictions are utilizing the NCBE character and fitness questions, the effect of NCBE reforms in this area would be substantial.

Third, the ABA should:

- Dedicate appropriate resources to monitor and report on jurisdictional changes that come about as a result of its previously adopted Resolutions, and should use the platform of CLE education, publications, and other media to continue to bring attention to this critical issue.
- Through the Section on Legal Education, ensure that all accredited law school are dedicating appropriate services to law student well-being and basic education to all law students about essential self-help resources.

Working hand in hand, law school professionals together with bar regulators can make a significant contribution towards the well-being of the next generation by ensuring that the character and fitness process is serving its essential and critical function. Probing into mental health and substance use treatment history or diagnosis is stigmatizing and in the process discouraging exactly the type of self-care that competent professionals should be encouraged to seek. A targeted character and fitness process can serve its essential and critical function and still promote lawyer well-being. Let us work together to do

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better.

Endnotes

1. Published as *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, vol. 66, J. LEGAL EDUCATION, no. 1 (2016).
2. See, e.g., Alyssa Dragnich, *Have You Ever...? How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 718 (2015) (suggesting that a prior diagnosis or mental health issues has “no predictive value of an applicant’s ability to practice law in the future”).
3. SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE LOUISIANA SUPREME COURT UNDER THE AMERICANS WITH DISABILITIES ACT (Aug. 14, 2014), available at https://www.ada.gov/louisiana-supreme-court_sa.htm.
4. See generally Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93 (2001) & Alyssa Dragnich, *Have You Ever...? How State Bar Association Inquiries into Mental Health Law Violate the Americans with Disabilities Act*, 80 BROOK. L. REV., Issue 3 (2015).
5. SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE LOUISIANA SUPREME COURT UNDER THE AMERICANS WITH DISABILITIES ACT (Aug. 14, 2014), available at https://www.ada.gov/louisiana-supreme-court_sa.htm.
6. SETTLEMENT AGREEMENT BETWEEN THE UNITED STATE OF AMERICA AND THE LOUISIANA SUPREME COURT UNDER THE AMERICANS WITH DISABILITIES ACT (Aug. 15, 2014), available at https://www.ada.gov/louisiana-supreme-court_sa.htm.
7. *ABA Strengthens Policies on Mental Health Forms for Bar Admissions, Law School Financing*, (Aug. 4, 2015) https://www.americanbar.org/news/abanews/aba-news-archives/2015/08/aba_strengthens_poli/.
8. Primary stakeholders were the Commission on Lawyer Assistance Programs, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers. See THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE, <https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf> [hereinafter THE PATH TO LAWYER WELL-BEING] (last visited Nov. 26, 2019).
9. Patrick R. Krill, Ryan Johnson, Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, vol. 10, JAMA (2016).
10. *Id.* at 6.
11. See THE PATH TO LAWYER WELL-BEING, *supra* note 8.
12. The National Task Force on Lawyer Well-Being report defines regulators broadly as “all stakeholders who assist the highest court in each state in regulating the practice of law.” See THE PATH TO LAWYER WELL-BEING, *supra* note 8, at 25.
13. Endorsing organizations include: ABA Law Practice Division, ABA Center for Professional Responsibility, Association of Professional Responsibility Lawyers, ABA Commission on Lawyer Assistance Programs, Conference of Chief Justices, National Conference of Bar Examiners, and the National Organization of Bar Counsel.
14. See Monica M. Marquez & Jonathan White, *Call to Action: The Colorado Supreme Court’s Task Force on Lawyer Well-Being*, 96 DENV. U. L. REV. 247 (2019).
15. See ABA COMMISSION ON LAWYER ASSISTANCE PROGRAMS, POLICY, https://www.americanbar.org/groups/lawyer_assistance/policy/ (last visited Nov. 26, 2019).
16. See CONFERENCE OF CHIEF JUSTICES POLICY RESOLUTIONS, LAWYER CONDUCT, <https://ccj.ncsc.org/Policy-Resolutions.aspx> (last visited Nov. 26, 2019).
17. Substantial support for this resolution included Massachusetts Board of Bar Examiners Executive Director Marilyn Wellington.
18. See CONFERENCE OF CHIEF JUSTICES, POLICY RESOLUTIONS, BAR ADMISSION, <https://ccj.ncsc.org/Policy-Resolutions.aspx> (last visited Nov. 26, 2019).
19. NATIONAL CONFERENCE OF BAR EXAMINERS, ABOUT US, <http://www.ncbex.org/about/> (last visited Nov. 26, 2019).

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20. See NATIONAL CONFERENCE OF BAR EXAMINERS, CHARACTER AND FITNESS EXAMINATIONS, <http://www.ncbex.org/character-and-fitness> [hereinafter CHARACTER AND FITNESS]. See also Bazelon's Fifty State Analysis, *infra* note 24.
21. See CHARACTER AND FITNESS, *supra* note 20; See Memo of President Erica Moeser to Bar Admission Administrators dated February 4, 2014 (on file with authors).
22. Presentation of Matt Samuelson, National Conference of Bar Examiners, at the COLAP National Conference, Sept. 27, 2018.
23. *Bar Exam Resources for Law Students and Graduates*, BAZELON CENTER, <http://www.bazelon.org/our-work/education/bar-exam-resources-for-law-students-and-graduates/> (last visited Nov. 26, 2019).
24. *Long Overdue Step Taking To Remove Mental Health Stigma in the Law*, LAW.COM, (Apr. 12, 2019, 11:41 AM), <https://www.law.com/ctlawtribune/2019/04/12/long-overdue-step-taken-to-remove-mental-health-stigma-in-law/?slreturn=20191026164131>.
25. *Regulations of the Connecticut Bar Examining Committee*, STATE BAR OF CONNECTICUT JUDICIAL BRANCH, <https://www.jud.ct.gov/cbec/regs.htm#VI> (last visited Nov. 26, 2019).
26. Florida Board of Bar Examiners Questions 25 and 26 now read:
 “Substance Use and Mental Health
 The Board of Bar Examiners, as part of its responsibility to protect the public, must assess whether an applicant manifests any mental health or substance use issue that impaired or could impair the applicant’s ability to meet the essential eligibility requirements for the practice of law.
 The Board supports applicants seeking mental health or substance use treatment, and views effective treatment by a licensed professional as enhancing the applicant’s ability to meet the essential eligibility requirements to practice law.
 Seeking counseling to assist with stress or anxiety will not adversely affect the outcome of a Florida Bar application. The Board does not request that applicants disclose such counseling.
 Within the past 5 years, have you been treated for, or experienced a recurrence of, schizophrenia or any other psychotic disorder, bipolar disorder, or major depressive disorder, that has impaired or could impair your ability to practice law.
 Within the past 5 years, have you been treated for, or had a recurrence of, a substance-related disorder that has impaired or could impair your ability to practice law?”
27. Interview with Scott Baena, Chair, Florida Board of Bar Examiners.
28. See FLORIDA BOARD OF BAR EXAMINERS, BAR EXAMINERS MODIFY DISORDER EVALUATION REQUIREMENTS (2019), <https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/6EEF117694DE6506852583CB00742D8F>
29. Notes on file with authors.
30. THE PATH TO LAWYER WELL-BEING, *supra* note 8, at 33.
31. Question 34 is comprised of three subparts. First, the applicant is asked, “Do you have any condition or impairment ... which in any way impairs or limits your ability to practice law?” Second, the applicant is instructed, “If your answer is Yes, describe the nature of the condition or impairment.” Third, the applicant who answered the first subpart affirmatively is asked if the limitations caused by the condition or impairment are “reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program.” See THE PATH TO LAWYER WELL-BEING, *supra* note 8, at 22.
32. Susan DeSantis, *Momentum Builds for Allowing NY Bar Applicants to Keep Mental Health History Secret*, N.Y. LAW JOURNAL (2019), <https://www.law.com/newyorklawjournal/2019/06/10/momentum-builds-for-allowing-ny-bar-applicants-to-keep-mental-health-history-secret/>.
33. *N.Y. Bar Association Calls for Mental Health Question Ban*, BLOOMBERG NEWS, (Nov. 2, 2019), <https://news.bloomberglaw.com/us-law-week/n-y-bar-association-calls-for-mental-health-question-ban>.
34. *Id.*
35. See Justin Mattingly, *Virginia Panel Scraps Mental Health Question After Law Student Push*, RICHMOND TIMES-DISPATCH (Feb. 8, 2019), https://www.richmond.com/news/local/education/virginia-panel-scraps-mental-health-question-after-law-school-student/article_36ece9b3-078c-5e12-b748-762555b8f081.html.

Brexit Could Bring Massive Change to Legal Profession

By Helen W. Gunnarsson

Helen Gunnarsson is Associate Counsel at the American Bar Association, Chicago.

This is an expanded version of an article that appeared in the ABA/Bloomberg Law Lawyers' Manual on Professional Conduct in October 2019.

CHICAGO—Brexit is “the most complex deal in history,” said panelist Ros Kellaway during a program at the Aon Law Firm Symposium in Chicago on October 18, 2019. The panel, made up of lawyers from both sides of the Atlantic, convened to discuss how doing business and practicing law is about to change in the United Kingdom—unless the U.K. government changes course and decides “never mind,” as panelist Ellen Hayes put it.

The program was moderated by Jane Hunter, executive director and senior vice president of Aon Professional Services in London and took place as U.K. Prime Minister Boris Johnson was attempting to obtain parliamentary approval of a deal between the U.K. and the European Union by the EU-imposed October 31 deadline.

Hunter asked Kellaway to provide the mostly North American audience with some Brexit background. Kellaway is a partner with Eversheds Sutherland in London.

Amid Britain’s Conservative Party’s increasing concerns about rising immigration, a perception that perhaps the U.K. could do better if it could conclude its own trade deals around the world, a general disenchantment with integration into the European Union, and the rise of other political parties with a “Eurosceptic” view, Kellaway said, Britain held a referendum in 2016 asking voters to opine whether the United Kingdom should opt to exit the European Union. A 51.9% majority voted to leave. Since then, the U.K. and the EU have been negotiating the terms of the U.K.’s disengagement in an attempt to avoid a “hard Brexit,” that is, leaving the EU without any sort of agreement to ease the way out.

Disagreements regarding whether and how the U.K. may leave the EU customs union and civil market have since delayed Brexit, Kellaway said.

“If you are in the [EU] customs union, you give up the ability to conclude your own trade deals” because members have delegated that power to the EU, Kellaway explained. But the EU civil market provides member nations with the valuable and significant benefit of free movement of goods, services, capital, and people across member nation borders. While the U.K. might prefer to retain some of those benefits, “the EU says those four are indivisible. You can’t pick and choose and be part of the civil market but not accept the free movement of people,” Kellaway explained.

The border between Ireland, an EU member nation, and Northern Ireland, a part of the U.K., has made resolution of those disagreements especially difficult, Kellaway said.

The Irish border, Kellaway pointed out, “goes through people’s houses” and has been a longstanding

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political flashpoint. A key provision of the Good Friday Agreement reached in the 1990s, she said, was eliminating the “hard border” between Ireland and Northern Ireland. But if the U.K. leaves the EU, she continued, that border will reappear. The admittedly cumbersome solution in the currently proposed agreement, she said, is for the U.K. to staff a border in the Irish Sea, all around Ireland, and collect customs duties for goods flowing in and out, with businesses to apply for rebates as needed.

Hunter asked panelist Angela Pearson to tell the audience what Brexit’s most significant implications are for global law firms. Pearson is a partner and global general counsel of Ashurst LLP.

Each EU member nation, Pearson said, has its own legal regulations, but each also recognizes every other member’s legal regulations. That, she explained, means a U.K. lawyer currently may travel to any other EU country and advise a client on English law, European law, or the law of any other EU jurisdiction, a practice known as “fly in and fly out” [FIFO]. As long as the U.K. remains a member of the EU, U.K. lawyers may have their qualifications recognized “with relative ease” in any other EU member nation, may open offices there and employ local lawyers, and may represent clients in the European Court of Justice. Lawyers may also register trademarks in the U.K. that will be recognized in the EU and have any disputes adjudicated by the European Court of Justice.

Once Brexit occurs, absent an agreement of mutual recognition between the U.K. and the EU, U.K. lawyers will lose these privileges. “We’re not going to be able to move our people as freely as we could [as an EU member nation] in order to meet our clients’ needs, or fly easily in and out to advise our clients on the law, or provide our lawyers with the opportunities that we had,” Pearson said.

“FIFO affects all practices,” commented Hunter, yet “a solution hasn’t been forthcoming.” She asked panelist Ellen Hayes, who is of counsel to Risk Americas, Linklaters LLP in New York, to provide more detail.

In the absence of an agreement with the EU, Hayes said, whether U.K. and other foreign lawyers may enter EU countries to advise their clients without running afoul of statutes prohibiting the unauthorized practice of law will be governed by local law, “which may be complicated and obscure,” difficult to ascertain, and will differ from country to country. “In Belgium it may not be a problem, but in Luxembourg it may be a crime,” she said. And in other countries FIFO may be a “technical violation” but, as a practice, overlooked by the authorities “because the bar knows its citizens need advice from English lawyers.” She also noted “there may be laws requiring a national law firm, or a firm based in an EU state, to handle certain matters.” Spain, for example, prohibits local lawyers from partnering with lawyers outside the EU, she said.

A serious obstacle to obtaining a free trade agreement with an agreement of mutual recognition for lawyers with the EU, Pearson said, is that other countries’ free trade agreements contain “most favored nation” clauses, so that the EU would have to give the lawyers of all of those countries the same recognition and privileges. Pearson suggested an agreement with the World Trade Organization might provide a “partial possible solution.”

Pearson noted predictions that the U.K., now the second largest market for legal services (behind the U.S.), will lose several billion dollars in annual legal services revenue and thousands of jobs. But on the bright side, she added, “clients are going to reach for their lawyers” to help them navigate Brexit’s tricky turns.

Until recently, Hayes said, “we all thought that admission to the [Law Society of Ireland] solved the problem” and many English solicitors did, accordingly, obtain admission. But Ireland recently “doused”

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those hopes, she said, by imposing strict additional limitations on non-EU lawyers who wish to apply to practice in Ireland. For example, she said, a law firm's presence in Ireland must be in an unincorporated structure under Irish law and may not be a branch of a U.K. LLP. Post-Brexit, she said, without an Irish office or an Irish certificate of admission, "probably the best way for English lawyers to practice is to associate with an Irish lawyer in EU matters."

Hunter asked Pearson to tell the audience how aspects of civil justice may be expected to change post-Brexit.

"Because we have a strong independent judiciary in the U.K.," Pearson responded, many clients choose to have U.K. courts adjudicate disputes under U.K. law. But whether EU states or courts will respect a party's choice of U.K. law and the jurisdiction of U.K. courts with respect to contracts executed, and whether European law will be incorporated into English law after Brexit, are not clear, she said. A withdrawal agreement would provide some additional time in which to negotiate those points, she said, "but they're going to have to work quite hard, because about a thousand statutory instruments," including those impacting environment and consumer health and safety, will have to be amended before the U.K. leaves the EU "in order to keep the lights on." Pearson suggested an agreement with the EU similar to the Lugano Convention, which applies to Norway, Switzerland, and Iceland, might be one attractive option and that including arbitration clauses in contracts should also be discussed with clients.

Hayes expects a decline in clients preferring English law in their contracts and thinks clients may begin expressing preferences for their own law. Some Israeli clients, she said, have introduced contracts that are to be interpreted using French law. "If only five or ten percent of clients use clauses like that, it will have an enormous impact on our firm's practice," she said.

Kellaway noted that Brexit poses additional "critical business risks," including its uncertain effect on laws respecting data. Up-to-date contractual clauses regarding the treatment of personal data, she said, are essential, but, "although we [in the U.K.] recognize the EU rules on the protection of data, they do not reciprocate in recognizing ours."

Pearson said businesses have been preparing for Brexit in a number of ways. Banks, for example, have been "building up their presence in Frankfurt and Paris, but the key decisionmakers are still based in London." She said, "Anglo-American clients still want their financial advisers in London to advise them" and the financial advisers, in turn, want to continue receiving legal services in London. But she predicted that in the long term, global law firms that have hedged their positions by cultivating business and opening offices in other regions, including the U.S., Asia, and Australia, will be better positioned to weather Brexit. "The best people are being snapped up and will be much more expensive."

Law Firm General Counsel Tell How They Handle Outside Counsel Guidelines, Mistakes, and COIs

By Helen W. Gunnarsson

Helen Gunnarsson is Associate Counsel at the American Bar Association, Chicago.

This is an expanded version of “Mistakes Are Everywhere—You Just Need to Recognize Them,” which appeared in the ABA/Bloomberg Law Lawyers’ Manual on Professional Conduct in October 2019.

Outside counsel guidelines, conflicts of interest, joint representations, and mistakes are all weekly, if not daily concerns for lawyers acting as their firms’ general counsel, moderator Henry S. Bryans told an audience at the Law Firm General Counsel Forum at the Aon Law Firm Symposium on October 17 in Chicago. Bryans is a senior consultant at Aon Professional Services in New York.

The Bane of GCs’ Existence

“Outside counsel guidelines are the bane of our existence,” said panelist Stacy L. Brainin, who is a partner and general counsel at Hanes and Boone, LLP in Dallas. “We send a terrific engagement letter that covers everything” to our client, she said, and “if we’re lucky, by return mail we get a set of outside counsel guidelines containing a number of provisions that are inconsistent with our engagement letter.”

Common problems found in outside counsel guidelines, Brainin said, are provisions regarding conflicts of interest. Many guidelines, she said, contain provisions that say “if you represent one company, you represent the entire corporate family.”

Is the responsibility with the law firm to determine who the affiliates are, Bryans asked? “We ask” the client for a list, Brainin responded, but even if the client provides one, “it’s typically out of date.” She noted that some guidelines also require the firm not to represent any competitors without the client’s consent—but neither list nor provide the firm with any easy way to identify them.

Brainin encouraged lawyers to “push back” and try to negotiate those provisions with the client, but if that proves unavailing and “if you decide the business is worth it,” to take care to put all of the affiliates into the firm’s conflicts database.

Panelist Douglas S. Laird, who is a partner and general counsel of Polsinelli PC in Kansas City, warned that clients frequently include provisions that were originally drafted for business partners in other industries in their outside counsel guidelines. Provisions regarding security and data privacy are common examples, Brainin agreed.

Panelist Stuart N. Senator, a partner and general counsel of Munger, Tolles & Olson LLP in Los Angeles, said his firm has successfully dealt with difficult data security guidelines by having his firm’s IT personnel deal directly with the client’s counterparts on those issues. “Find out what they want and why they want

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it.” He also said those provisions often include “good ideas” that can help a law firm make sure it’s “on the cutting edge” of data security.

Watch out for security agreements from clients with security breach notification requirements that are “very short, like 24 hours,” Brainin warned. Key provisions, Senator said, are “what is the triggering event and how short is the notification period.” He advised thinking through in advance what’s reasonable and what’s not.

Audit access provisions should also be scrutinized, Brainin said. Although client audits, like client data security requirements, may sometimes be helpful to a law firm because they test how easy it is for an outsider to penetrate the firm’s electronic defenses, “sometimes they want to come in and audit in a way that would let them access other clients’ data.” In such cases, she said, her firm will ask the client “how would they feel about another firm accessing their data.”

The panelists agreed that provisions requiring outside counsel to indemnify their clients under various circumstances must also be examined and, whenever possible, negotiated. Critical questions include what’s covered by the indemnification requirement and when it becomes effective, Senator said. Although many guidelines provide for indemnification upon a final determination of liability, others state that the triggering event will be a claim or even, Bryans said, a mere threat of litigation over something that may be the result of someone else’s work.

“We have successfully pushed back against indemnification clauses that would make us responsible for anything,” panelist Maura L. Hughes, who is partner and general counsel of Calfee, Halter & Griswold LLP in Cleveland, said. Brainin commented that her firm has often successfully objected to those provisions by pointing out that indemnification is unlikely to be covered by the firm’s LPL policy. Senator suggested asking for parallel indemnification clauses so that the client also agrees to indemnify the law firm if the client is at fault, or a rider providing that the firm’s liability will not exceed its insurance coverage. He also recommended probing to find out the client’s real concerns before drawing a line in the sand on indemnification.

The District of Columbia Bar, Brainin told the audience, is considering whether to amend its rules of professional conduct to address some common concerns with outside counsel guidelines. More information is on the bar’s website at <https://www.dcbar.org/about-the-bar/news/Rules-Review-Committee-Requests-Comment-on-Client-Generated-Engagement-Letters-and-Outside-Counsel-Guidelines.cfm>.

Conflict Waivers

Laird said successful navigation of the ethics rules to obtain valid waivers of conflicts of interest—or, sometimes, a determination that a conflict may not be waived—is an “art” that benefits both clients and law firms. He pointed the audience to Rule 1.8 for examples of nonwaivable conflicts, including a representation that would provide a lawyer with a substantial gift, acquiring a proprietary interest in the subject of the litigation, or the advent of a sexual relationship that did not predate the representation. He emphasized that a firm may not request a waiver unless it reasonably believes it can provide competent and diligent representation for all affected parties. “If the answer is no, that’s it, and you have to reject the representation.”

Brainin said once she starts discussing a conflict with a lawyer she finds “they are actually looking for a ‘no,’ because there is something in their gut that they are not comfortable with. I tell my partners they can

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always use me for a ‘no,’ but they have to talk with me to get a ‘yes.’” Laird advised firm GCs to “arm [your partners] with the information they need to explain to the client why the answer is ‘no.’”

If the firm does determine that the conflict is waivable, Laird said, general counsel should discuss with the partner “who should contact the client, which client representative should be approached, and which client should be contacted first.” He noted “if you can say the other side has already agreed to the waiver, this can be very helpful.”

But determining which client to approach first without breaching confidentiality can be “very tricky,” Senator commented. He said the determination involves a “multistep process” beginning with very general communications to the affected clients and, little by little, disclosing more and more information. “You can’t make full disclosure to either at first.” Laird agreed. “The client may say ‘I’m not comfortable’” with disclosure of the existence or nature of the matter.

The panelists agreed that the style and presentation of the waiver request is crucial. Brainin said “don’t *ask*” for the waiver if the firm isn’t going to take no for an answer: *tell* the client that a waiver is essential for the firm to accept or continue the representation. Laird said that when a firm lawyer expresses reluctance to ask for a waiver, or when he’s concerned that the lawyer might suggest to the client that a waiver is an option and not a necessity, he wants to be on the call or in the lawyer’s office when the call is placed.

Inadvertent Joint Representations

Hughes reviewed how not to end up with an unwanted joint representation and its attendant problems. Long-time representations of family-owned and operated businesses in which disagreements arise among the owners and officers, she said, are ripe for inadvertent joint representations to occur because individuals may believe the company lawyer represents them in addition to the company.

Lawyers must be very clear in their communications, she said, on who is and isn’t a client. “There’s nothing wrong with that separate ‘I’m not your lawyer’ letter, say, after a phone conversation where you answer some questions” from a corporate officer or shareholder, she said. And if the lawyer does accept a joint representation, make sure the engagement letter documents and informs the clients what information will be shared and what will happen if a conflict arises. “Lay out the consequences ahead of time,” she said. Then, if an issue is raised during the representation, “you can lay out your engagement letter and say ‘as you know, this is how it is.’”

Hughes recommended lawyers considering accepting a joint representation ask themselves whether it’s a good idea. Are there any signs of antagonism between the potential clients or possible claims they might file against each other, perhaps in an unrelated matter that might “bleed into” this one? Instead of representing both clients, lawyers should consider finding a “friendly counsel” for one, she said.

Probe the clients’ respective goals and attitudes toward the representation as well as toward each other, Hughes advised. “One client may want the bare minimum of protecting their interests” while the other may want the lawyer “to file every motion possible,” for example. Attitudes toward settlement may also differ, she noted. If the potential clients disagree, “that’s a pretty clear warning sign of conflicts that may develop later,” she said.

Bryans remarked that signs of future tension at the outset of a joint representation may suggest that the lawyer will be placed in an impossible situation, in which case the best course of action is to tell the

potential clients “thanks, but no thanks.”

Mistakes, Mistakes

Showing a slide listing common causes of mistakes made by lawyers and their firms, Senator told the audience “If you have not seen these mistakes, or people coming close to making them, it does not mean you don’t have a problem: it means you do not have a system for recognizing them.”

Principal causes of lawyer error include:

- Improper calendaring. Failing to calculate a deadline correctly or failing to calendar an event. “Then it’s missed or recognized at the very last minute.”
- Last minute work. “Scrambling to get something done and either it doesn’t get done at all or it gets done poorly. I guarantee you have had close calls at your firm.”
- Dabbling outside of your specialty. This, Senator said, frequently occurs with respect to matters in litigation that are settled at the last minute. “Any settlement that involves more than just a release of claims may need a transactional attorney with experience in that area,” he said. Common transactions that must be addressed in litigation settlement agreements include ERISA, real estate, and tax matters, the panelists said. “Your colleagues are dying to help out,” Senator said. And enlisting their assistance will not increase the client’s bill “because it takes them less time to find the solution than it would the litigator.”
- Giving off-the-cuff advice. A client who calls and says “I don’t want you to spend any time on this, I just want your gut reaction” is asking for bad advice.
- Overreliance on prior documents. Using forms from prior matters in the firm’s files without thinking about whether they are appropriate for the client’s situation. Senator said he’s even seen lawyers paste conflicting clauses from two similar prior forms into one for a current client because they couldn’t decide which they liked better.
- Multitasking and distractions. It will surprise no one that email and social media can interfere with the practice of law. The lawyer trying to think about multiple issues and do multiple tasks simultaneously is likely to make mistakes.
- Failure to document discussions and decisions with the client. Verifying that no misunderstandings exist requires documentation.

In addition to avoiding these traps, Senator emphasized that lawyers should include limitations on the scope of their representation in their engagement letters, send letters at the conclusion of every matter informing the client that the engagement is closed, and having a second lawyer review any last-minute document revisions for correctness and a determination of whether other documents require conforming changes. He also recommended timely disclosure of mistakes to clients. But, he warned, “Don’t be overly apologetic and confess error on something that wasn’t.”

Most mistakes, Senator said, “can be fixed, or at least minimized.” He told the audience to remember how their reactions to learning of their lawyers’ mistakes will affect how future errors are handled or disclosed. “Lawyers need to know a mistake will not end their career.”

2019 Michael Franck Award Acceptance Speech

By Peter Jarvis

Peter Jarvis, partner in Holland & Knight's Portland office, is the recipient of the 2019 Michael Franck Professional Responsibility Award from the American Bar Association Center for Professional Responsibility. Mr. Jarvis practices primarily in the area of attorney professional responsibility and risk management, advising lawyers, law firms, corporate legal departments and government legal departments about all aspects of the law governing lawyers. Mr. Jarvis also serves as an expert witness and is an avid lecturer for public and private in-house continuing legal education seminars.

I began reading legal ethics cases as a law student in 1973—one year before the first ABA National Conference, ten years before the Model Rules, 21 years before the Michael Franck award and 37 years before the Rosner award. I love this field of practice because it allows me to help people solve real world problems in real time in ways that are good for them and for others. In my time today, I would like to speak about two current issues and about two people who helped me early on.

My first issue stems from the explosive growth of “do it yourself” computer programs and sales of legal or law-related services by non-lawyers directly to customers. Like Isaac Asimov’s laws of robotics, I wish to propose three rules to help guide these developments:

1. **Don’t define the unauthorized practice of law, or UPL, as the application of law to fact.** Historically speaking, this has never been “the” or “a” universally applied test even though we sometimes speak of it that way. It is at most a rhetorical flourish that we trot out when we want to say “no” to something and that we ignore when we want to say “yes.” When, for example, my wife and I remodeled our kitchen, I asked our contractor whether certain changes would require a building permit. If the contractor had replied that he couldn’t answer my question because he was not a lawyer and therefore couldn’t apply legal principles to our particular factual situation, we would have found another contractor. Or consider a retail salesperson who sees a shoplifter leaving a store with unpaid merchandise and yells, “Stop, thief.” We wouldn’t expect the police to arrest the salesperson for UPL. In these and thousands of other situations, we balance benefits against risks, which is all that a fair reading of the substantive law actually requires. There is neither reason nor need for UPL to include the application of law to fact when the principles of law at issue are easily understood, are generally known¹ or are ancillary to an otherwise lawful business.
2. **Absent clear risk of harm to third parties or the legal system, services of equal or better quality that can be provided by computers or non-lawyers should be lawful.** Lawyers exist to serve clients, not vice versa.
3. **Consider regulation.** Many health care products are sold over the counter, but when we walk into urgent care centers, we expect licensed health care professionals. The evolving legal services marketplaces will require thought to figure out what, if any, regulation is needed for which activities. If, for example, non-lawyers will be allowed to help people prepare estate plans, we will want these non-lawyers to have training and won’t want them to have multiple fraud convictions. We might also want to think about whether these non-lawyers should be subject to the same standard of care as

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lawyers.² And we might want to consider whether these non-lawyers' communications with their customers or clients should be subject to privilege protection.

My second issue concerns a special kind of effort in aid of diversity and inclusion. Most of us know the history of discrimination against our own personal group, but few of us take time to learn the histories of others. Anyone can stand up for the right thing when times are relatively easy. My concern is that without sufficient meaningful and empathic learning to be able to know enough about each other's histories, we may be unable to stay the course if, as presently seems possible, times get much tougher than they are now. It is good for the soul and the bonds of citizenship to know more about each other, but I also mean something else. Standing up in really tough times takes courage and a willingness to sacrifice. I see professional responsibility lawyers as being among the guardians of the rule of law system and therefore as among those who must stand up for the rule of law system in the toughest of times. Attributes such as courage and a willingness to sacrifice can gain strength through shared understandings founded on individual personal commitments.

I began practice as a civil litigator at a firm at which I had two mentors, George Fraser and Karen Creason. George graduated from law school in time to serve in World War II before practicing in Portland, Oregon. Before I arrived, he had mentored Geoff Hazard, who started his career at that firm and encouraged me to go there.³ Karen was a nurse before she was a lawyer, was about half way between George's age and mine, and was the first woman there to proceed from first year associate to partner.

Karen taught me about friendship, standing up for your principles and looking out for others. One night before Karen and I had a critical brief due on which I had one last section to complete, I reached a point at which I hit a wall. I was a junior associate and Karen was a partner. But there I was between 1 and 2 a.m., absolutely stuck.

I called Karen at home, woke up Karen and her husband, told Karen I was stuck, and asked her to get out of bed, come down to the office, and help me. Karen showed up, we worked side by side until the brief was done and filed, and we won the case. And Karen never criticized me—not then and not at any later time.

I have not asked another lawyer since then to make a work commitment that I was not prepared to make. I also check in regularly with other lawyers to make sure that they haven't become overburdened. If they have, I take work back and help out—just as Karen did for me. I don't see this as promoting bad habits. I see this as the best way to encourage lawyers to look out for each other, to help them learn to speak up when problems appear on the horizon, to help them build strong mutual bonds, and to get the best work out of all of us in the long run. I also see it as the right thing to do, a message that George also demonstrated through regularly treating Karen and me to lunch and through a practice that I later learned was called management by walking around.

George also taught me that there are many creative ways to look at legal situations and that the search for the right legal argument for a particular case can be as much art as science. But more importantly, George, along with Karen, taught me that for most working lawyers, the practice of law is primarily a practice for and about human beings and their goals, failings, thoughts, and needs. Both of them strongly supported my transition into professional responsibility law.

When George retired, I inherited his desk. Shortly after that, his former secretary came into my office to hand me a memo.

“You know,” she said, “I’m used to seeing a much bigger man behind that desk.”

I answered her honestly: “So am I.”

I was blessed to work with George and Karen; they put me on a road I still travel. I am honored to be recognized by you today. And I am blessed to be married to Anne Seiler Jarvis, the love of my life. Thank you.

Endnotes

1. *See, e.g.*, Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951).
2. *See, e.g.*, Jones v. Allstate Ins. Co., 146 Wash. 2d 291, 45 P.3d 1068 (2002) (applying lawyer standard of care to non-lawyers performing what would otherwise be considered legal work).
3. *See* Peter R. Jarvis, *Geoff Hazard: My Views as a Law Student, Mentee and Coauthor*, 70 HASTINGS L.J. 1085 (2019).

Recruiting and Keeping Diverse Talent Challenges Firms

By Nancy Kisicki

Nancy Kisicki is Associate Counsel at the American Bar Association, Chicago.

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A lack of diversity and inclusion and a significant gender pay gap are persistent problems in the legal profession, but law firms have options for tackling these issues.

In an October 2019 Aon Law Firm Symposium session entitled “Rising to the Challenge: Achieving Gender Pay Equity, Diversity and Inclusion in Law Firms,” panelists offered suggestions for identifying, hiring, and keeping diverse lawyers.

Identifying diverse talent doesn't mean lowering standards, the panel said, but simply requires casting a broader net and rethinking the pipeline typically used to identify new lawyers. Ideas included searching at a broader range of law schools, recruiting at affinity bar associations and asking members of the firm to recommend lawyers they already know.

Panelist Patricia Brown Holmes, a partner at Riley Safer Holmes & Cancila LP, suggested recruiting laterally from firms beyond the “top” law firms, as well as contacting experienced individuals returning after having left the work force. Such lawyers might begin in part-time or of counsel status, and later increase their involvement.

Diversity efforts have measurable effects when it comes to supporting clients. As Giselle Perez de Donado, Global Chief Employment Counsel at Aon, observed, having lawyers with diverse backgrounds ensures you have the best possible fit for any type of matter or claim. Brown Holmes agreed that the more diverse the firm is, “the more likely you are to have a person who fits the bill.”

The panel agreed that clients have been increasingly assertive about their expectations for diversity and inclusion in the firms they hire. Joseph K. West, a partner and the Chief Diversity and Inclusion Officer at Duane Morris LLP, noted that Microsoft awards a 3% annual bonus to firms meeting diversity and inclusion goals.

And each of those goals—diversity and inclusion—must work hand in hand. Perez de Donado said that firms have made progress on diversity, but work remains to be done on inclusion. West emphasized that once a law firm has succeeded in attracting diverse talent, it's “important to hold onto that talent and not to let it wither and die on the vine.”

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Accepting Differences, Countering Bias

The first step toward inclusion, Brown Holmes explained, is accepting that there's something different, and not doing so contributes to individuals' malcontent. "It's okay to call me black," she said; "if you say you don't see color, then you don't see me."

She related an experience in which she and three other minority partners sat together at a dinner. When challenged by another partner who felt this was offensive, she responded, "Why do we have to split up?" and pointed out that he was sitting at a table of all white males.

Brown Holmes indicated that interaction between minority partners helps them feel accepted, included and comfortable, and should be encouraged.

West recommended that firms examine whether implicit bias at various "choke points" impedes the development of talent. The tipping point, he explained, is not getting good work assignments, with reduced client exposure and reduced hours following from that. His firm has addressed this issue by rotating assignments, giving everyone an opportunity to grow, develop and succeed.

West also described a study in which a legal memorandum containing mistakes was reviewed by 60 diverse law firm partners. Half the graders were told that the associate who wrote it was Caucasian, and half were told that he was African American. Those who were told that the associate was African American identified three times as many errors, suggesting the memorandum was reviewed with a more critical eye.

Moreover, the memo was graded a full point lower by those who were told that its author was African American, with corresponding comments: "Are you sure he works here?" vs. "he made a few mistakes."

Addressing the Gender Pay Gap

Moderator Jennifer Finnegan, Senior Vice President and Executive Director at Aon's Loss Prevention Group, cited statistics showing that in 2018, male partners made 53% more than female partners. West said that factors contributing to the gender pay gap include an affinity bias causing decisionmakers to reward people who look like them, and life choices made by women that result in a gap that follows them throughout their careers.

To address the gender pay gap, West recommended both equity and transparency.

Brown Holmes explained that her firm determines compensation according to the lawyer's contribution to the client team. The system recognizes that it takes a team to keep a client happy and ensures that everyone on the team feels valued.

Litigators Face Myriad of Ethical Pitfalls

By Nancy Kisicki

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This article originally appeared in the ABA/Bloomberg Law Lawyers' Manual on Professional Conduct in October 2019.

Claims related to litigation practice make up nearly a third of all of his company's client notifications to their insurers, Douglas R. Richmond, Managing Director of Aon Professional Services said at a recent conference.

Litigation is rife with ethical pitfalls. In an October 2019 Aon Law Firm Symposium session titled "Recurring Professional Responsibility and Liability Traps in Litigation," Richmond offered advice focused on problem areas that get litigators into trouble.

First, he advised, don't communicate with a represented party. Lawyers need to understand that under ABA Model Rule of Professional Conduct 4.2, which forbids communications with a person known to be represented by counsel, only the represented person's counsel can waive the right to invoke the rule. No exception excuses a communication when counsel is unavailable, and under most circumstances, no showing of prejudice is required to prove a violation. Richmond said that any lawyer approached by a represented person should disengage as quickly as possible.

Take precautions when hiring a private investigator, he counseled. Necessary steps include ensuring that the investigator is properly licensed, checking references, and researching the investigator online. Additionally, because the lawyer is charged with supervisory responsibility for the investigator under Model Rule 5.3, the investigator's independent contractor status will not protect the lawyer from sanctions for improper tactics. The lawyer should tell the investigator what to do and what not to do.

Richmond also advised that when an organizational client's employee who has been produced for a deposition asks, "Are you my lawyer?" saying yes, even "for this deposition only," is a "really, really bad idea." Creating an attorney-client relationship, whether implied or express, not only imposes duties and liabilities but risks creating a conflict with the organizational client.

Lawyers should also think carefully before stepping into a case as replacement counsel. Richmond recommended finding out why the prior firm is being replaced and being wary of a client who is not forthcoming or who is planning a malpractice action against prior counsel. The lawyer also should consider whether it will be possible to meet existing deadlines, and despite any urgency, should always check for any conflicts.

"Over the transom deliveries," in which a lawyer is deliberately given purloined documents that appear to be privileged or confidential, pose additional challenges for litigators. Richmond proposed employing an "elegant solution" that follows the guidelines for safekeeping property under Model Rule 1.15: the lawyer should hold the documents separately from other documents, should promptly notify the person to whom

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the documents belong, and, if the lawyer plans to keep the documents, should continue to segregate the documents until any dispute over them is resolved.

Richmond also offered advice to protect lawyers withdrawing from a representation. He explained that “the trouble for lawyers, beyond waiting too long to withdraw, is that they say too much in moving to withdraw.”

He pointed out that the closer you are to trial, the harder it is to withdraw. Additionally, withdrawing lawyers continue to be bound by the duty of confidentiality. The motion to withdraw should simply reference “professional considerations.” Richmond advised that if pressed for more information, the lawyer should say “no more than you have to until you reach the tipping point where the court will let you withdraw.”

Richmond also addressed the problems that arise when a lack of experience is coupled with a lack of supervision. He advised that senior lawyers, who have supervisory responsibilities under Model Rule 5.1, should remember that newly minted partners still need supervision.

Finally, Richmond cautioned lawyers to steer clear of “saber rattling” tactics such as motions seeking sanctions, disqualification, or judicial recusal.

He observed that “some judges are surprisingly humorless when their capability to hear a matter is questioned.” From the opposite perspective, he advised that a motion by opposing counsel for sanctions or disqualification should not be casually discounted. The response may be to entrust the matter to the general counsel’s office, or to another disinterested lawyer, with the affected lawyer providing assistance.

The Next Wave of Practicing Lawyers

By Michael Zhang, Jenny Mittelman, Christina M. Jones, and Dolores Dorsainvil

Michael Zhang is a Litigation Counsel at the Attorney Registration and Disciplinary Commission, where he is responsible for investigating and prosecuting charges of attorney misconduct. Jenny K. Mittelman is Deputy General Counsel for the State Bar of Georgia. As Deputy General Counsel she prosecutes and supervises the prosecution of disciplinary cases. Christina M. Jones is Special Counsel for Strategic Youth Initiatives. In this role, she advises the Attorney General of the District of Columbia on policy and programming for youth ranging from 0 to 24 years old. Dolores Dorsainvil is an Assistant Disciplinary Counsel with the D.C. Office of Disciplinary Counsel where she investigates and prosecutes District of Columbia lawyers for ethical misconduct. Dolores is also an Adjunct Professor at Georgetown University Law Center and American University's Washington College of Law where she teaches professional responsibility/legal ethics to second and third year law students.

There was a time when it did not matter which generation you were in, as we all played by the same set of rules. However, with the advent of the internet and technology, not only have the rules changed, but the generational landscape has changed too. To get a sense of what the legal profession will look like in the future, we must first examine the millennial generation as they comprise this next generation of lawyers. Then it will be important to understand the core values of millennials, which not only will assist in debunking several negative stereotypes, but will provide a bird's eye view into how this group of lawyers will potentially lead our legal organizations. Next, we will discuss how to effectively manage millennials in the workplace. And lastly, we provide advice for those millennials who may be looking to become part of the management landscape of their organization.

Defining the Generation

James Callahan, a 43-year-old high school sociology teacher in Massachusetts, keeps a running list of slangs he hears students use in their everyday vernacular.¹

Callahan does this to become a better communicator with his students, though the endeavor itself has provided him with endless amusement. To Callahan, a Gen X'er (the forgotten generation), a snack is a small portion of food. To his students, a "snack" is someone who looks good. Below are some highlights of Callahan's exciting discovery of a new dialect:

Extra: too much
 Facts: I agree with you just said
 Finesse: to steal
 Low key: not obvious
 High key: very obvious
 I'm dead: that was amusing
 No cap: I am serious / no lie / for real
 Take the L: willing making a sacrifice
 Millennials, right?²

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The term “millennial” was coined by authors William Strauss and Neil Howe to describe what was then the youngest generation in their thesis: the Strauss-Howe generational theory. While that theory has largely been discredited by academic historians as pseudoscience, the term “millennial” has taken on a life of its own. While the term is meant to describe people born between 1981 and 1997, it is arguably more commonly used as a punch line to describe young people in today’s society. When Joel Stein wrote his May 2013 cover story for Time Magazine, titled “Millennials, The Me Me Me Generation”, he began by boldly (but somewhat accurately) declaring: “I am about to do what old people have done throughout history: call those younger than me lazy, entitled, selfish and shallow.” Stein presented evidence that portrayed millennials as narcissistic, lazy, and entitled. Elspeth Reeve, then writing for The Atlantic, declared that *every* generation has been the “Me Me Me Generation”.³ Reeve presented data that suggested that the traits associated with millennials are less generation-specific and more age-specific. To quote Abe Simpson: “I used to be with it, but they changed what it was. Now what I’m with isn’t it, and what is it seems weird and scary to me. It will happen to you.”

A generation typically refers to groups of people born over a 15-20-year span. Baby boomers, the only generation officially defined by the U.S. Census Bureau, stake their generational claim from 1946 to 1964. Using the boomers as a starting point, Generation X encompasses years 1965 to 1980, millennials from 1981 to 1997, and Generation Z, Callahan’s students, from 1998 to 2012. Each generation is shaped by circumstances that are unique to them. For the purposes of this article, we will, as Joel Stein and so many others have done, focus on these insufferable s millennials,⁴ the youngest of whom are 22 this year, and the oldest have just turned 38. The reason for the countless articles on the millennial generation is simple: millennials have become the predominant generation in the workforce. In 2015, the number of millennials in the workforce passed boomers for the first time, making up 34% of the global workforce (and nearly a quarter of all lawyers in the U.S.) As with every generation, a multitude of factors have shaped the millennials’ values. For this article, we will address three: the cost of a legal education, the risks of the profession, and the changing legal landscape.

Let’s first examine cost. The average cost of attending a private law school is \$43,000 per year. For 2019, the projected full debt-financed cost of attending University of Chicago Law School for three years, using cost of living as reported by the school and factoring interest calculations, is more than \$360,000. That figure is even more daunting when taking into consideration that 28% of law students paid the full sticker price for tuition and fees in 2018. The U.S. government lends approximately \$100 billion in student loans and, in turn, makes \$1.6 billion per year in loan repayments. The ever-rising cost of education is not balanced by increasing salary: the median starting salary for private-sector law firms in 2016 was slightly more than \$68,000, while the public sector reported a median salary of \$53,500.⁵ It is no surprise, then, that millennials, saddled with student loan debt, are marrying and starting families at a later age than prior generations. The percentage of married adults over the age of 18 dropped from 72% in 1960 to 50% in 2016, while the median age for first marriage has increased roughly seven years during that time.⁶ Of those who have never married, about four in ten cite financial stability as a major reason why they are not currently married.

Millennial lawyers, like other generations of lawyer before them, are asked to excel in a high-stress environment. Unlike previous generations, however, Millennials have at their disposal a wealth of information about the inherent risks of a profession that boasts one of the highest rates of mental health issues and substance abuse. In a study published in the Journal of Addiction Medicine in 2016, using a sample of nearly 13,000 employed attorneys, the authors found that 20.6% screened positive for hazardous and potentially alcohol-dependent drinking, compared to 11.8% of a broader, highly educated workforce.⁷ Interestingly, it also found that the highest rates of problematic drinking occur in attorneys under the age of 30 at 32.3%. Bar associations, regulators, and law schools across all jurisdictions have

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taken concrete action in the form of lawyers' assistance programs and various preventive measures to address the high rate of substance abuse and mental health issues experienced by lawyers. Millennials, cognizant of these risks, are not eager to replicate the same lifestyle but instead strive for that coveted work-life balance.

Finally, the legal market has experienced irreversible change in the past decade. Georgetown Law's Center for the Study of the Legal Profession's 2017 report on the state of the legal market concluded that the financial crisis of 2008 brought an end to almost a decade of uninterrupted growth for law firms. As growth stagnated, clients have begun to demand more value for their "legal spend", effectively changing the legal market from a "seller's market" to a "buyer's market".⁸ As a result, firms have shifted away from the traditional billable hour pricing. Many firms' standard rates are merely nominal and are never paid by any significant client. Instead, the 2017 report found that the combination of alternative fee arrangements ("AFAs") and budget-based pricing account for 80-90% of all revenues amongst some firms. The same client emphasis on reducing legal costs has led to the erosion of the traditional law firm franchise. Georgetown's 2018 report concluded that the same trends have continued: of sluggish growth, decreasing realization, and shrinking market for law firm services.⁹

Against that backdrop, firms have struggled with retention. In 2018, the starting salary for several national law firms jumped to \$190,000. Despite the eyebrow-raising number, however, the retention rate for these firms has more or less stayed consistent: at large firm, almost 80% of associates leave within five years. Firms lose an estimated \$200,000 to \$500,000 per departing attorney when factoring in recruiting and training costs, while the turnover rate costs the U.S. economy about \$30 billion annually.¹⁰ The traditional motivational devices (the six-figure salary, the year-end bonus, and the promise of partnership) are clearly not enough to buck the trend of this increasingly itinerant generation.

In a 2010 Pew Research Center analysis, the top three priorities amongst Millennials were: being a good parent, having a successful marriage, and helping others in need.¹¹ Having a high paying career came in at number six with 15% of Millennials who were polled listing it as an important priority.

Managing and Retaining Millennial Lawyers

Managing millennial lawyers has some baby boomers scratching their heads. Though boomers managed a generation of lawyers before the millennials entered our profession (back to the forgotten Generation X'ers), there is something about the millennial generation personality that engenders articles and panel discussions and conversations about how to manage and mentor them. It is undeniably time to consider what is important to this new generation of lawyers, and to embrace their strengths, as older lawyers retire and get out of their way.

Baby boomers grew up with post-WWII opportunity and in the wake of significant societal change. When we paint baby boomers with a broad brush, we think of individuals whose identities are tied to what they achieve professionally. They are loyal to their careers and their employers, value in-person communication, and have no concept of themselves as "old."

Millennials have come to the workplace with record levels of education, but at the price of crippling student loan debt. They came into the workforce during the Great Recession, entering the profession during a saturated market. Despite a decade of economic growth, they will likely have lower earnings for the rest of their lives. Economists think this is simply bad luck, but as a result, Millennials have less wealth, less property, lower marriage rates and fewer children than each generation born since the Great Depression. Dissatisfaction with pay and absence of opportunities for advancement are the top reasons

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for Millennials' seeming lack of loyalty to employers. Forty-nine percent say they would quit their current job in the next two years if they had a choice.¹² Put this all together and you have a generation of lawyers who look closely at: (1) commitment to work/life balance, (2) compensation and (3) training and professional development, when evaluating potential employers.¹³ Millennial lawyers prioritize collaboration and embrace non-hierarchical management in a way that their predecessors have not. The industry, in turn, must adjust.

JP Box, millennial lawyer-turned-entrepreneur, believes that status and pecuniary gain are not the primary motivating factors for the millennial generation.¹⁴ In his book, *The Millennial Lawyer*, Box's proposed solution to achieving the elusive work-life balance was to stop viewing "work" and "life" as two competing concepts that need to be balanced at the cost of one another. Instead, Box suggested that because millennial lawyers view work and life as intertwined, firms should focus on ways for their lawyers to achieve a "work-life blend". To do so, they should empower their lawyers, particularly their younger lawyers, with five freedoms: 1) the freedom to rethink when and where work happens; 2) the freedom to bring life into work; 3) the freedom to think of work space as living space; 4) the freedom to work, think, and connect digitally; and 5) the freedom to unplug. If the goal is for firms and organizations to attract and retain talent in a legal landscape that is experiencing irreversible changes, Box suggested that they focus on the core values of the largest global workforce, and take the following steps:

1. Embrace the work-life blend;
2. Let go of vertical hierarchies;
3. Allow associates to make immediate contributions;
4. Embrace your role as mentor;
5. Promote teamwork and collaboration;
6. Inspire young attorneys with great experience, not the promise of high pay; and
7. Embrace the notion of doing well by doing good.

One day, in the very near future, our focus will shift to Generation Z, then the generation after that, which has apparently been named Generation Alpha.¹⁵ But for now, the topic of conversation, out of both curiosity and necessity, will be on the generation that will dominate the workforce for the next few decades.

The best advice for boomer managers is to play to younger lawyers' strengths, and to recognize that there is plenty of common ground. Do you consider millennials impatient? They are "go getters" and yearn for responsibility, so give them some. Do you worry millennials require constant praise? Let them work collaboratively – a forum that ensures frequent feedback from coworkers and encourages coaching in place of traditional supervision. Do you have decades of experience? Millennials crave mentoring. So be a mentor and involve them in what you do as often as you can. Give them the training and technology they need to succeed. Is your management structure hierarchical? You may not be ready to level that hierarchy to please your younger colleagues but consider more transparent leadership as the first step. Talk to millennial lawyers and learn why certain issues matter to them, then incorporate their priorities when you can.

Overall, generational differences are just a matter of perspective. Millennial lawyers may ultimately manage very differently than the generation preceding them, but there is no question that they will eventually be in charge. For baby boomers that means it is important to share what you know, develop a succession plan, and embrace the idea of retirement. It is something we all deserve!

Millennials in Management

If you think today's young adults are more ambitious, outspoken and looking for the next step in their career, you are correct. Not only are millennials changing the workplace culture, but they are also a force to be reckoned with as they enter management.

Millennials expect a clear trajectory within their organization. If they are unclear about their path, millennials will leave the organization. Millennials want to gain skills that will make them more marketable which is why they request greater responsibility in their organization.

One option to retain millennials is to promote them into leadership. Promoting millennials allows an organization to leverage the talent it already has cultivated and grow its leadership from within. A recent piece in Forbes estimates the cost of turnover for an "entry-level position turning over at 50 percent of salary; mid-level at 125 percent of salary; and senior executive over 200 percent of salary."¹⁶

However, no one, including millennials, should not be promoted and left to their own devices. The same drive that made millennials great employees may not translate to becoming a great manager. The 140 characters that they use to describe their own thoughts in a Tweet often do not translate when managing people. Everyone, including millennials, needs mentorship.

Mentorship for millennials should include constant feedback. They are used to people – parents, teachers, friends – responding to and commenting on their every thought. Millennials are often unafraid of areas of growth, if they know it is coming from a supportive place. Directly communicate with millennials after they do something well or poorly. The sooner you can correct a millennial, the more likely the millennial will trust your feedback because they will believe you are invested in their growth.

Leaders should also give millennials a seat at the table when making changes within the organization. They will feel more invested in the change because they were able to give input. Allowing millennials a seat at the table will also provide the firm with a different and important perspective for shaping the future of the organization.

Making the decision to invest in your current millennial workforce allows the firm to cultivate young leaders for the future growth of the organization.

Endnotes

1. Mr. Callahan's compilation of Gen Z slangs can be found here: <https://drive.google.com/file/d/1yrJmMHPkZzrxfWbUb4jALN0ncE1tbkgH/view>.
2. Though his students are technically Generation Z, then sentiment is the same.
3. See Elspeth Reed, *Every Every Every Generation Has Been the Me Me Me Generation*, <https://www.theatlantic.com/national/archive/2013/05/me-generation-time/315151/> (last visited Dec. 15, 2019).
4. Full disclosure: two of our authors are millennials.
5. Jim Woodruff, *The Average Starting Salary of Law School Students* (Sept. 24, 2018), <https://work.chron.com/average-starting-salary-law-school-students-7716.html>.
6. Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%*,

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Education Gap in Marital Status Widens (Sept. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/>.

7. Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, *J. Addiction Medicine*, vol. 10, 46-52 (2016).

8. See 2017 REPORT ON THE STATE OF THE LEGAL MARKET, <http://www.legalexecutiveinstitute.com/wp-content/uploads/2017/01/2017-Report-on-the-State-of-the-Legal-Market.pdf>.

9. GEORGETOWN LAW 2018 REPORT ON THE STATE OF THE LEGAL MARKET, <http://www.legalexecutiveinstitute.com/wp-content/uploads/2018/01/2018-Report-on-the-State-of-the-Legal-Market.pdf>.

10. Amy Adkins, *Millennials: The Job-Hopping Generation* (May 12, 2016), <https://www.gallup.com/workplace/236474/millennials-job-hopping-generation.aspx>.

11. *Millennials: A Portrait of Generation Next*, PEW RESEARCH CENTER (2010), <https://www.pewresearch.org/wp-content/uploads/sites/3/2010/10/millennials-confident-connected-open-to-change.pdf>.

12. THE DELOITTE GLOBAL MILLENNIAL SURVEY 2019, <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/deloitte-2019-millennial-survey.pdf>.

13. JP Box, *Unlocking the Talents of the Millennial Lawyer*, *ABA LAW PRACTICE TODAY* (Apr. 13, 2018), <https://www.lawpracticetoday.org/article/unlock-talents-millennial-lawyer/>.

14. Box, a Georgetown Law graduate, worked for six years as a practicing attorney, first at a large international firm, then a large regional firm, finally a small regional firm, before hanging up his legal briefcase and co-founding a merino wool children's wear company.

15. Christina Sterbenz, *Here's Who Comes After Generation Z- and They'll Be The Most Transformative Age Group Ever*, *BUSINESS INSIDER* (Dec. 5, 2019, 4:26 PM), <https://www.businessinsider.com/generation-alpha-2014-7-2>.

16. Bill Conerly, *Companies Need To Know The Dollar Cost Of Employee Turnover*, *FORBES* (Aug. 12, 2018), available at <https://www.forbes.com/sites/billconerly/2018/08/12/companies-need-to-know-the-dollar-cost-of-employee-turnover/#3cc7ab44d590>.

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