



AMERICAN
BANKRUPTCY
INSTITUTE

Mid-Atlantic Bankruptcy Workshop

A Conversation About Mental Health and the Practice of Law

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ABI Mid-Atlantic Bankruptcy Workshop, August 5, 2022

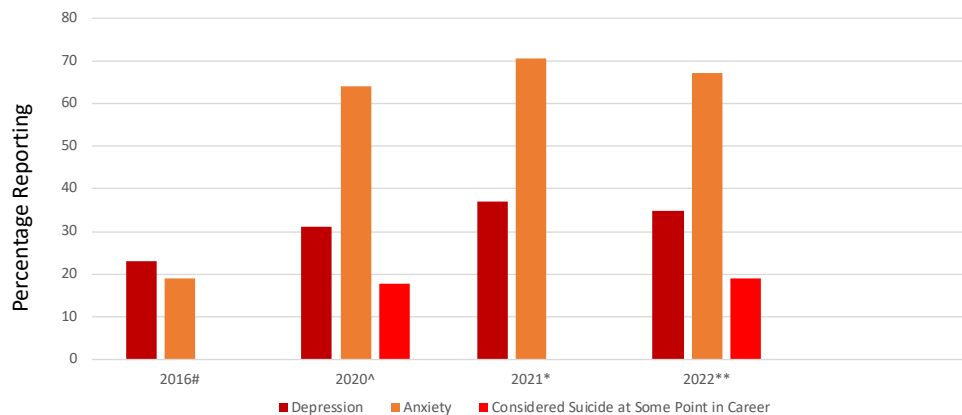
A Conversation About Mental Health in the Practice of Law

Panelists:

- Honorable Tiiara N.A. Patton, United States Bankruptcy Judge for the Northern District of Ohio
- Niki L. Irish, LICSW, Outreach and Education Coordinator, DC-LAP
- Carol P. Waldhauser, Executive Director, DE-LAP
- Prof. Bruce Grohsgal, Helen S. Balick Professor in Business Bankruptcy Law, Widener University Delaware School of Law
- Sarah Tomlinson, Esq., Office of the United States Trustee
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Moderator: Lisa Bittle Tancredi, Of Counsel, Womble Bond Dickinson (US) LLP

Depression and Anxiety among Lawyers



#The Prevalence of Substance Use and Other Mental Health Concerns among America Attorneys (2016)

^ALM's Mental health and Substance Abuse Survey (2020)

*The American Lawyer's Mental Health & Substance Abuse Survey (2021)

**Law.com and ALM Intelligence's Annual Mental Health Survey Results (2022)

Stressors of the Practice of Law

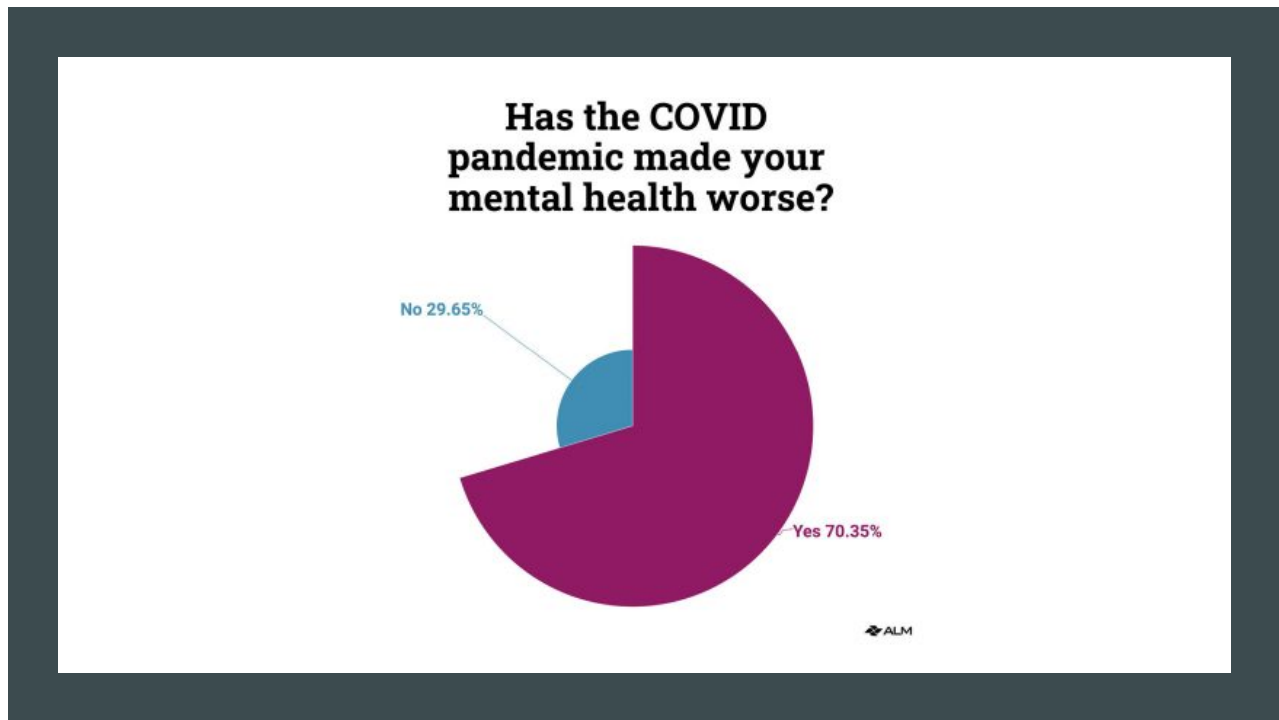
74.3% of lawyers reported that their work environment contributed to their mental health issues.*

Lean teams	56.3%
Always being on call	72%
Billable hours	59%
Client demands	57%
Lack of sleep	55%

* ALM's Mental health and Substance Abuse Survey (2020)



What is the Impact of
Mental Health Issues?



What is the “new normal”?

How does remote work affect mental health?

Remote work improves mental health 37%

Remote work causes mental health to suffer 35%

Stress levels improves 36%

Stress levels worsens 32%

Physical health improves 46%

Physical health suffers 28%

2022 MID-ATLANTIC BANKRUPTCY WORKSHOP



Seeing Behind the Image

A basic checklist for identifying illness based impairment, i.e.:

Alcoholism, Drug Addiction, Substance Abuse, Compulsive Gambling, Depression, Anxiety and Stress

Every aspect of an addicted or depressed attorney's life is affected. If you recognize the following warning signs in yourself or a colleague, call The Delaware Lawyers Assistance Program (De-LAP) (302) 777-0124 or toll-free 1-877-24DELAP or e-mail cwaldhauser@de-lap.org.

Attendance Problems:

- Late
- Leaving early
- Taking "long lunches"
- Not returning to work after lunch
- Missing appointments
- Unable to be located
- Ill with vague ailments
- Absent (especially Monday)
- Frequent rest room breaks
- Implausible excuses for Absences
- Last minute cancellations

Relationship Problems:

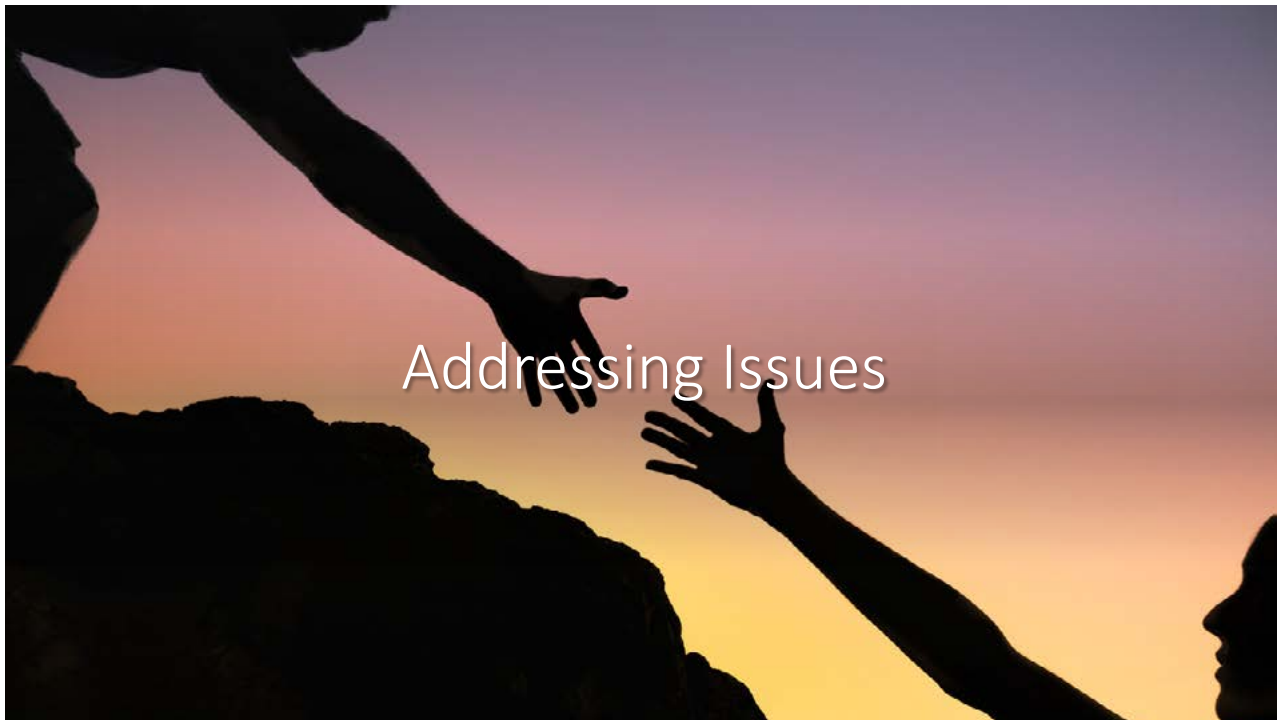
- Complaints from clients
- Problems with Supervisors
- Disagreements or inability to work with colleagues
- Avoidance of others
- Irritable, impatient
- Angry outbursts
- Inconsistencies or discrepancies in describing events
- Hostile attitude
- Overreacts to criticism
- Unpredictable, rapid mood swings

Performance Problems:

- Missed deadlines
- Decreased efficiency
- Inadequate follow through
- Lack of attention
- Poor judgment
- Inability to concentrate
- Difficulty remembering details or directions
- General difficulty with recall

Unique to the Legal Community:

- Missing checks to be deposited
- Debit card withdrawals
- Incomplete or irregular records
- Pay office expenses from trust
- Pay personal expenses from trust
- "Borrowing" from trust
- Failure to timely disburse
- Incomplete accounting for receipts and disbursements
- Failure to renew law license
- Non-compliance with CLE
- Non-responsive to Discipline
- Lapsed insurance policies
- Failure to file and failure to pay taxes.



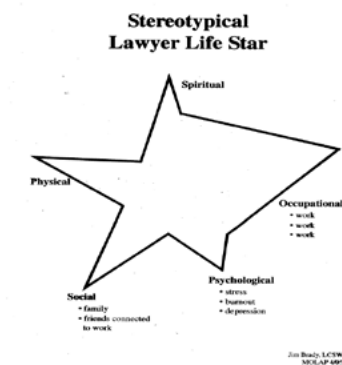
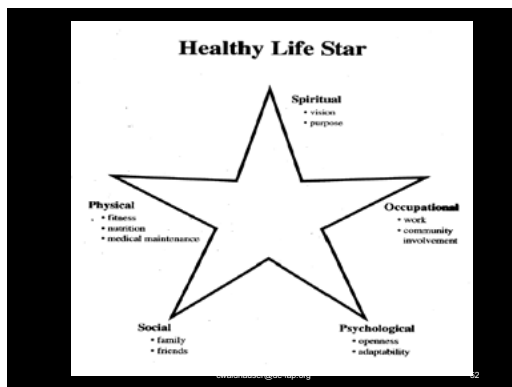
Addressing Issues

What does help
look like?



Prevention/Mitigation

Maintaining Well-being



Resources

- 988/911
- National Suicide Prevention Hotline:
800.273.8255 (TALK)
- Directory of State Lawyer Assistance
Programs:
[americanbar.org/groups/lawyer_assistance/
resources/lap_programs_by_state/](https://americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/)
- Lawyers Depression Project: 1.718.517.0132
joe@knowtime.com
- Employee Assistance Programs

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Introduction

93% of people in a recent survey said that they used the past year to reflect on their lives, and 88% said the meaning of success had changed for them since the pandemic. And yet, the number of lawyers suffering from depression, anxiety and substance abuse is greater than ever. How can we help others – and ourselves – navigate this dichotomy?

Objectives

1. Examine the prevalence of mental health challenges in the legal industry.
2. Consider some of the characteristics of the practice of law that challenge mental health.
3. Recognize that mental health can affect competency and ethical obligations.
4. Learn symptoms of mental illness and substance abuse.
5. Combat stigma and open pathways to help.
6. Identify potential resources.

Prevalence of Mental Health Challenges In the Legal Industry

A. Research/Statistics

- a. [The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys \(2016\)](#)
 - i. 36.4% of the respondents qualified as problem drinkers, when asked solely about frequency of alcohol consumption. More than 20% of licensed attorneys drink at levels that are considered "hazardous, harmful, and potentially alcohol-dependent." That's twice the percentage of highly educated workers.
 - ii. 36.4% of the respondents qualified as problem drinkers, when asked solely about frequency of alcohol consumption. More than 20% of licensed attorneys drink at levels that are considered "hazardous, harmful, and potentially alcohol-dependent." That's twice the percentage of highly educated workers.
 - iii. Male lawyers had higher rates of problem drinking than women, 25.1 percent compared to 15.5 percent.
 - iv. 44% of lawyers reported that their use of alcohol was problematic during the 15-year period that followed graduation of law school. The highest rates overall were among lawyers under 30 (31.9 percent) and junior associates at law firms (31.1 percent).
 - v. 28% report mild or higher depression symptoms. Highest for men and solo practitioners
 - vi. 23% report mild or higher stress symptoms. Highest for women and solo practitioners.
 - vii. 19% report mild or higher anxiety symptoms. Highest for women and solo practitioners.
 - viii. The largest barriers to treatment are not wanting others to find out (67%) and privacy and confidentiality concerns (64%).
- b. [ALM's Mental Health and Substance Abuse Survey \(2020\)](#)
 - a) 74% said the legal profession has had a negative effect on their mental health over time;
 - b) 56% of respondents said mental health problems and substance abuse are worse in the legal industry than in other industries;
 - c) 41% of respondents said mental health problems and substance abuse are at a crisis level in the legal industry;
 - d) 17.9% of respondents said they have contemplated suicide during their professional legal career;
 - e) 31.2% of respondents said they are depressed;
 - f) 64% of respondents said they have anxiety;
 - g) 10.1% of respondents said they have an alcohol problem; and

- h) 2.8% of respondents said they have a drug problem.
- c. [“Stress, Drink, Leave”](#) (2021) study (survey of almost 3,000 lawyers in California and DC)
 - i. Found levels of mental health problems and problematic drinking to be *high among practicing lawyers* generally.
 - ii. Found women attorneys have *a higher prevalence and severity* of depression, anxiety, stress, risky and hazardous drinking, and attrition compared to their male counterparts.
 - iii. *Overall findings*: 28% of the lawyers reported symptoms of depression; 23% maladaptive stress; 21-36% engage in hazardous drinking
 - iv. *More on alcohol*: Over 80% of all the lawyers sampled reported being current drinkers (10% higher than general population); 30% screened positive for high-risk hazardous drinking; only 2% reported being diagnosed with an alcohol use disorder.
 - i. Women attorney findings: 56% engaged in risky drinking behavior; 34% were high-risk or hazardous drinking (c.f., 46% of men engaged in risky drinking; 25% were high-risk or hazardous drinkers).
 - ii. Note: 34.6% of the women and 29.2% of the men reported that their drinking has increased during the pandemic. Women who reported an increase in drinking were seven times more likely to engage in risky drinking (men were nearly four times more likely).
 - iii. Implications: gender disparity; under-diagnosis and treatment
 - v. *More on mental health*:
 - i. 5.2% of women had symptoms indicating moderately severe depression, compared with 4.2% of the men.
 - ii. 8.4% of the women and 4.5% of the men had severe anxiety.
 - iii. 37.5% of the women and 30.1% of the men reported high effort-reward imbalances.
 - vi. *Attrition*: 25% of women contemplated leaving the profession due to mental health concerns, compared with 17% of men (note: a significantly higher proportion of male attorneys were in senior position).
 - vii. The study also looked beyond prevalence data; it looks at the predictors of those factors that have been shown to negatively impact the legal profession. Several occupational factors were found to significantly contribute to these problems. Women's responses demonstrated a greater level of effort needed to elicit reward at work when compared with men, significantly higher levels of over-commitment and work-family conflict, and a lower likelihood of promotion.

B. What is Depression? “Depression is a medical illness that affects a person’s body, mood, and thoughts – the whole person. It affects eating and sleeping habits, feelings about self, and everyday thoughts. These mood changes may be temporary

or long-lasting. They may range from a relatively minor feeling of melancholy to a deeply negative view of the world and an inability to function effectively.” De-lap.org/depression.htm, quoting Abnormal Psychology, p. 267

C. What About the Practice of Law Presents Occupational Risks?

i. Physical Risks:

1. **Sedentary Nature of Work:** Lawyers spend most working hours (and off-hours) in the seated position. Mounting evidence suggests that prolonged sitting can be as serious an issue as obesity and smoking, and can pose serious health risks, including an elevated risk of mortality.
2. **Managing Long and Unusual Hours:** The competing demands of clients, employers, and the judiciary take a toll on a lawyer's time and energy. The result is a profession characterized by long and unusual working hours that can lead to stress, exhaustion and, ultimately, burnout.
3. **Sleep Deprivation:** The nature and stressors associated with a lawyer's work upset sleep, making legal professionals among the most sleep-deprived in the work force. Too little sleep poses dire health consequences, the effects of which can lead to increased risk of illness and physical injury. Sleep deprivation can also lead to a lapse in judgment, affecting a lawyer's representation of clients and increasing malpractice risk.
4. **Working Indoors:** A lawyer's indoor working environment disrupts the circadian rhythm, leads to vitamin deficiencies, and may contribute to Seasonal Affective Disorder (SAD).
5. **Aging of Lawyers:** As lawyers age, our mental and physical capacities decline, creating risks to ourselves, our firms, and our clients. At the same time, other lawyers and legal employers should recognize that aging affects each individual differently, and age is not a litmus test for legal capacity.

ii. Mental and emotional:

1. **Adversarial Nature of Work:** The adversarial nature of the legal profession promotes feelings of anger, guilt, and fear that can lead to depression and chronic stress.
2. **Individual Work:** The individual nature of a lawyer's profession can lead to feelings of isolation. In fact, legal work in general has been considered the loneliest kind of work. Lonely lawyers face a host of health-related risks and impairments, perform poorly, change jobs frequently, and experience greater job dissatisfaction.
3. **Professional Demands:** The practice of law is a demanding one, and the pressure lawyers face from clients, employers, and the judiciary contribute to virtually every risk outlined in this matrix, along with their incident effects and symptoms.

4. **Loss of Control:** In certain practices, the exigency of the work may prevent a lawyer from being able to plan or control their time, which may lead to conflicts with family and friends.
5. **Vicarious Trauma and Managing Others' Problems:** Prolonged exposure to our clients' legal problems and dilemmas can be mentally and physically stressful, exhausting and debilitating.
6. **The Duty of Confidentiality:** Ethical adherence to the duty of confidentiality can cause lawyers to feel isolated, delay necessary case-related tasks, and exacerbate the existing disincentives to seek help.
7. **Educational Debt:** Law school debt is debilitating. Most law students take out significant debt with the unrealistic and unlikely expectation that they will land a high-paying job. As a result, many will be saddled with crushing monthly payments for the foreseeable future, contributing significantly to overall feelings of stress, anxiety, and disenfranchisement with the profession.
8. **Business Management of the Practice of Law:** Managing the business component of the practice of law is stressful. New lawyers largely enter practice without any formal financial education, contributing to financial stress.
9. **The Need to Display Confidence and Conceal Vulnerability:** Law practice and legal education are inherently competitive, discouraging help-seeking behavior as an admission of weakness and incentivizing lawyers to wear a confident façade despite suffering wellness issues.

iii. **Adaptation Risks:**

1. **Changing Legal Paradigms:** The nature of law practice has changed dramatically since the digital revolution, with wildly fluctuating market conditions, new business models, and evolving technologies making adaptation challenging, but necessary.
2. **Technology Addiction:** Ever-connected lawyers who feel obligated to be available at all hours experience reduced attention span and productivity, harm to personal relationships, and risk revealing confidential information through sloppy data use.
3. **Lack of Diversity in the Legal Profession:** Diverse and inclusive working environments foster lawyer wellness. A lack of diversity, however, can lead to isolation, a sense of exclusion, and ultimately poor performance and a lack of autonomy.
4. **External Pressures on Lawyer Independence:** Economic pressures and changing market dynamics, such as the rise of alternative legal business structures and attorney-client matching services (ACMSs), are incentivizing attorneys to compromise their independence, risking professional sanction and harm to the rule of law.

iv. **Self-actualization:**

1. **Losing Control of Professional Destiny:** Becoming trapped in a particular area of law or type of legal employment the lawyer does not enjoy is at best

unfulfilling and at worst actively detrimental to a lawyer's health and well-being.

2. **Values Conflict with Client or Practice Setting:** Lawyers carrying out instructions or practicing in a subject area contrary to their personal beliefs experience cognitive dissonance that can harm not only their practices, but also their sense of personal integrity.
 3. **The Expectations-Reality Gap in Law Practice:** Many people enter law school with certain expectations about life as an attorney, only to have those expectations disappointed by practical realities, resulting in career regret and a sense of feeling trapped.
-

Effect on Legal Competency and Ethical Considerations

A. Competence Elements: The first rule for lawyers

1. Legal knowledge (keep abreast of changes in the law and its practice; continuing study and education);
2. Skill (including benefits and risk associated with relevant technology);
3. Thoroughness;
4. Preparation reasonably necessary; and
5. Mental, emotional, and physical ability reasonably necessary for the representation.

B. Rules of Professional Conduct Preamble and Scope

1. Rules of Professional Conduct, Preamble

- a. *...In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law. ...*
- b. *... Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.*
- c. *Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship. ...*

2. Rules of Professional Conduct, Scope

- a. *... Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law. ...*
- b. *... Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon*

uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations. ...

Ethical Requirements Related to Competency

A. Rule 1.1 Competence

1. *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*
2. Comment Maintaining Competence ... [7] *A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2). (Note: Comment [7] became effective on October 31, 2018).*

B. Rule 1.3 Diligence

1. (a) *A lawyer shall act with reasonable diligence and promptness in representing a client.*
2. (b) *A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.*
3. Comment
 - a.[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.
 - b.[5] A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity. (Note: Comment [5] became effective on February 2, 2006).

C. Rule 1.4 Communication

- (a) *A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.*

D. Rule 1.6 Confidentiality of Information

1. (c) *A lawyer shall promptly reveal: ... (2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.*
2. Comment Attorney Misconduct
 - a.[13] Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession. Paragraph (c)(2) requires an attorney who has information indicating that another attorney has violated the Rules of Professional Conduct, learned during the course of representing a client and protected as a confidence or secret under Rule 1.6, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.
 - b.[14] Although paragraph (c)(2) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.

E. Rule 1.16

1. (a) *... a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: ... (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;*
2. Comment
 - a.[1] A lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

F. Rule 5.1 Responsibilities of Partners and Supervisory Lawyers

1. (a) *A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.*
2. (b) *A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.*

3. (c) *A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: ... (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.*
4. Comment
 - a.[5] ... Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.
 - b.[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.
 - c.[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

G. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

1. *With respect to a nonlawyer employed or retained or associated with a lawyer: (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: ... (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.*
2. Committee Commentary: The Committee inserted the phrase "or should have known" in Rule 5.3(c)(2) to reflect a negligence standard. The Committee also deemed it appropriate to add the language in the last sentence of the Comment to cover such recognized and accepted activities as those described.
3. ABA Formal Opinion 03-429: "The firm's paramount obligation is to take steps to protect the interests of clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability to handle matters or deal with clients" (page 4).

H. Rules 8.3 Reporting Misconduct

1. (a) *A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer shall inform the appropriate professional authority*
2. (d) *This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge who is a member of an approved lawyer's assistance program, or who is otherwise cooperating in a particular assistance effort, when such information is obtained for the purposes of fulfilling the recognized objectives of the program.*
3. Comment
 - a.[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.
 - b.[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer or judge whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.
 - c.[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in or cooperation with an approved lawyers or judges assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such program. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. The duty to report, therefore, does not apply to a lawyer who is participating in or cooperating with an approved lawyer assistance program such as the Virginia Bar Association's Committee on Substance Abuse and who learns of the confidences and secrets of another lawyer who is the object of a particular assistance effort when such information is obtained for the purpose of fulfilling the recognized objectives of the program. Such confidences and secrets are to be protected to the same extent as the confidences and secrets of a lawyer's client in order to promote the purposes of the assistance program. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report

misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to personal use.

4. ABA Formal Opinion 03-429:

a. "... if partners in the firm and the supervisory lawyer reasonable believe that the previously impaired attorney has resolved a short-term psychiatric problem that made the lawyer unable to represent clients competently and diligently, there is nothing to report. Similarly if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the Model Rules through close supervision of the lawyers work, it would not be required to report the lawyer's violation. However.....

b. "...if, on the other hand, a lawyers mental impairment renders the lawyer unable to represent clients competently, diligently, and otherwise as required by the Model Rules and he nevertheless continues to practice, partners in the firm or the supervising attorney must report the violation" (page 5).

Competency and Impairment

A. ABA: Top 10 Necessary Skills

1. Keeping confidentiality.
2. Arriving on time.
3. Honoring commitments.
4. Integrity and trustworthiness.
5. Treating others with courtesy and respect.
6. Listening attentively and respectfully.
7. Responding promptly.
8. Diligence.
9. Having a strong work ethic.
10. Paying attention to detail.

B. Impact of Mental Health and Substance Use Concerns

1. Mental impairment does not lessen a lawyer's obligation to provide clients with competent representation
2. Lawyers who suffer from substance abuse, mental illness, physical illness, and personal problems may have impairment in their ability to provide competent services (they may be undertaking work they do not have the competency to do despite possessing the requisite learning and skill).
3. Depressed, anxious, substance abusing lawyers may struggle with follow through, attention, integrity, trustworthiness, responding promptly, diligence.

4. Sometimes these problems mask their ability to understand their limitations and sometimes sheer economic necessity compels them to undertake matters beyond their competency.
5. There is an interface between these struggles and ethical violations.

Recognizing When There is a Potential Problem

What Do Depression, Anxiety and Substance Abuse Look Like in Lawyers?

- A. Examples of Behaviors** (Connected to Lawyer Mental Health or Substance Use Concerns with Potential Ethical Consequences)
1. Practice-based
 - a. Missed deadlines
 - b. Unable to open mail or answer the telephone
 - c. Last minute requests for continuances
 - d. Frequent absenteeism
 - e. Sub-par work product
 - f. Lack of communication with clients and/or colleagues
 - g. Failure to advocate for client's interests
 - h. Late for or missed appointments and/or hearings
 - i. Errors in fiscal management
 - j. False representations
 2. Personal signs
 - a. Depressed mood
 - b. Significant weight loss or gain
 - c. Indecisiveness and diminished ability to think
 - d. Fatigue or loss of energy
 - e. Sleep disturbances (insomnia or sleeping longer than usual)
 - f. Feelings of worthlessness or inappropriate guilt
 - g. Decreased energy levels
 - h. Slowed speech, increased pauses before answering questions, monotonous speech tone
 - i. Thoughts of death or suicide
 - j. Unexplained crying
 - k. Heart palpitations, chest pain, headaches, difficulty breathing, back pain, stomach problems
 - l. Increase in frequency and amount of substance use
 - m. Development of tolerance to the substance
 - n. Use of the substance at times that are socially unacceptable
 - o. Use of substance to cope with emotional upsets and other problems
 - p. Spouse complains about use
 - q. Blaming others for substance use
 - r. Hiding use/using alone
 - s. Evading attempts to discuss use
 3. Attorney signs
 - a. Acting different from prior functioning
 - b. Socially withdrawn
 - c. Procrastination

- d. Unpredictable and frequent mood swings
 - e. Unwarranted anger or hostility
 - f. Blaming others for personal failings
 - g. Unexplained absences
4. Example:
- a. Depression: A depressed attorney will typically demonstrate low motivation, low energy, fatigue, and difficulty concentrating. At work, such an attorney may take a long time to learn something new or to respond to client calls or answer mail. They may avoid responding to emails, mail, or phone calls. The lawyer may procrastinate and leave a job unfinished for someone else to complete, come into work late, leave early, or not come into the office at all for several days. They may file motions or briefs that omit important details because the attorney could not concentrate and could not remember specific information. If asked to redo something, the lawyer may feel overwhelmed and too stressed to manage.

Combatting Stigma and Opening Pathways to Help

A. Impact of the problem:

1. Human Toll
 - a. Health impacts on the individual
 - b. Damage to families and relationships
 - c. Loss of career and financial problems
 - d. Serious disability or death
2. Work Environment
 - a. Culture and morale
 - b. Direct impact on colleagues
 - c. Reputation/ trust
 - d. Clients and business
3. Productivity
 - a. Individual and Team work product
 - b. Management time
4. Financial
 - a. Human capital
 - b. Unwanted turnover
 - c. Legal, work comp. or disability claims
 - d. Lawsuits/ malpractice

B. Business Case for Taking Action

1. Malpractice avoidance and ethical adherence
2. Firm image and overall customer satisfaction
3. Delivery of quality, effective client service
4. Individual employee performance, development, and retention
5. Collective culture and morale
6. Turnover and healthcare costs.

C. Lawyer Hesitance:

1. Most do not receive treatment services
 - a. MH: 37% yes; 63% no
 - b. Addiction: 7% yes; 93 % no
2. Lawyers are hesitant to seek help for their mental health or substance use problems.
 - a. Concerns about privacy or confidentiality
 - b. Not wanting others to find out - Stigma
 - i. Fear of being judged
 - ii. Fear it will harm their professional reputations

- iii. Fear it would impact their license
- c. Think they can solve the problem themselves
- d. Denial about the existence or severity of the problem

D. Fighting Stigma

1. Poor mental health is a medical condition and must be treated as such; attorneys with mental health challenges can thrive in the profession.
2. Profession-wide collaboration:
 - a. Change the messaging. There is no shame in mental illness. There is no shame in asking for help. There is no shame in the struggle to wellness.
 - i. Asking for help is the smart thing to do.
 - ii. Acknowledge the issues.
 - b. Educate
 - i. Profession-wide summits for health and wellness
 - ii. Awareness of the impact of obsessing over a desire for perfection.
 - c. Prevent
 - i. Develop strategies for improving well-being
 - ii. Promote health and wellness activities
 - d. Refer
 - i. To LAPs often and early – prior to, during, or after discipline
 - ii. Early identification is the key and a duty
 - iii. Often, by the time an attorney is referred into a program, they are severely impaired which may negatively impact the outcome.
3. Suggestions for Firms: Assess your firm's culture, philosophy, and history; define your firm's goals; evaluate your firm's policies, protocols, and practices; invest in education, training, guidance, and support; change; track progress. Create a safe environment within your firm for attorneys to feel safe in asking for help.

Summary of
Report of the National Task Force on Lawyer Well-Being
The Path to Lawyer Well-Being: Practical Recommendations for Positive Change
and
The Report's Recommendations for Judges, Regulators, Legal Employers, and Law Schools

The Task Force on Lawyer Well-Being was initiated in 2016 by the ABA Commission on Lawyer Assistance Programs, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers.¹ Participating entities included: several ABA committees and divisions; The National Organization of Bar Counsel; the Association of Professional Responsibility Lawyers; the National Conference of Chief Justices; and the National Conference of Bar Examiners.²

The Task Force in its Report declared: “To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being.” Too many lawyers and law students “experience chronic stress and high rates of depression and substance use.” These findings are incompatible, the Task Force continued, “with a sustainable legal profession, and they raise troubling implications for many lawyers’ basic competence.”³

The Task Force Report’s recommendations “focused on five central themes: (1) identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession, (2) eliminating the stigma associated with help-seeking behaviors, (3) emphasizing that well-being is an indispensable part of a lawyer’s duty of competence, (4) educating lawyers, judges, and law students on lawyer well-being issues, and (5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.”⁴

The Report stressed that the profession has tended to address individual impairment reactively, and has not sought to foster lawyers’ health prospectively. “Historically, law firms, law schools, bar associations, courts, and malpractice insurers have taken a largely hands-off approach to these issues. They have dealt with them only when forced to because of impairment that can no longer be ignored. The dedication and hard work of lawyer assistance programs aside, we have not done enough to help, encourage, or require lawyers to be, get, or stay well.”⁵

The Task Force in its Report urged: “Genuine efforts to enhance lawyer well-being [that] extend beyond disorder detection and treatment. Efforts aimed at remodeling institutional and organizational features that breed stress are crucial, as are those designed to cultivate lawyers’ personal resources to boost resilience.”⁶

The Task Force Report made recommendations for: Judges; Regulators; Legal Employers; Law Schools; Bar Associations; Professional Liability Carriers; and Lawyers Assistance

¹ REPORT FROM THE NATIONAL TASK FORCE ON LAWYER WELL-BEING [Task Force Report] (Aug. 14, 2017) at 1, available at https://www.americanbar.org/groups/lawyer_assistance/task_force_report/ (Nov. 9, 2018).

² Task Force Report at 1.

³ Task Force Report at 1.

⁴ Task Force Report at 2.

⁵ Task Force Report at 11.

⁶ Task Force Report at 18.

Programs. The first four of these are summarized below. In 2022, the ABA – which accredits U.S. law schools – amended its accreditation standards to address well-being issues for the first time, an action that might trace its roots to the Task Force Report. These amendments also are summarized below.

Recommendations

The proposals in the Task Force Report tend to emphasize fostering attitudinal changes, including by destigmatizing mental health and substance use disorders, and by increased well-being education and monitoring for impairment. If the Report comes up short, it is for its lack of focus on features of the workplace that intensify the stresses that foster impairment, many of which may be unnecessary and even detrimental to providing legal advice, counsel, and dispute resolution.

Recommendations for Judges:

The Task Force Report recognizes the burden on a judge to make the right decisions, in cases in which the outcome will deeply affect the parties. Violence is increasing against judges, inside and outside of the courtroom. Judges, on taking the bench, may find themselves isolated. Many judges “have the same reticence in seeking help out of the same fear of embarrassment and occupational repercussions that lawyers have,” and the “public nature of the bench often heightens the sense of peril in coming forward.”⁷

The Report’s recommendations for judges include communicating that well-being is a priority, developing policies for impaired judges, reducing the stigma of mental health and substance use disorders, conducting judicial well-being surveys, and providing well-being programming for judges and staff.⁸ The Report also recognizes that judges “often are among the first to detect lawyers suffering from an impairment,” and recommends their partnering with lawyer assistance programs to provide early and effective responses.⁹

Recommendations for Regulators:

The Task Force Report defines “regulators” to include those who assist the highest court in each state in regulating the practice of law. These regulators “play a vital role in fostering individual lawyer well-being and a professional culture that makes it possible.”¹⁰

The Report’s recommendations for regulators include communicating that well-being is a priority, modifying the rules of professional conduct to endorse well-being as part of a lawyer’s duty of competence, expanding education requirements to include well-being topics, requiring law schools to create well-being education for students as an accreditation requirement, re-evaluating bar application inquiries about mental health history and adopting clear eligibility guidelines for lawyers with mental or physical impairments, allowing one-way sharing of lawyer well-being information from regulators to lawyer assistance programs, and adopting diversion programs and other alternatives to discipline.¹¹

⁷ Task Force Report at 22.

⁸ Task Force Report at 22-24.

⁹ Task Force Report at 24.

¹⁰ Task Force Report at 25.

¹¹ Task Force Report at 25-30.

Recommendations for Legal Employers:

The Task Force Report asserted that legal employers, who employ multiple practicing lawyers, can play a large role. The Report recognized that this is “a broad and sizable group with considerable diversity,” but proposed that the crux of each of its recommendations applied to all.”¹²

The Report recommended that legal employers form a lawyer well-being committee, assess lawyers’ well-being, monitor for signs of work addiction and poor self-care, actively combat social isolation and encourage interconnectivity, emphasize the firm’s service-centered mission more than competitive, self-serving goals, and “set standards, align incentives, and give feedback about progress on lawyer well-being topics.”¹³

Recommendations for Law Schools:

The Task Force Report stated that law students “start law school with high life satisfaction and strong mental health measures. But within the first year of law school, they experience a significant increase in anxiety and depression. Research suggests that law students are among the most dissatisfied, demoralized, and depressed of any graduate student population.”¹⁴ Students are discouraged from seeking help by “concerns that it would threaten their bar admission, job, or academic status; social stigma; privacy concerns; financial reasons; belief that they could handle problems on their own; and not having enough time.”¹⁵

The Report recommended that law schools provide training to faculty members relating to student mental health and substance use disorders, adopt attendance policies designed to detect early warning signs of students in crisis, provide mental health and substance use disorder resources, assess law school practices and offer faculty education on promoting well-being in the classroom and empowering students to help their fellow students in need, add well-being topics to courses on professional responsibility, commit resources for onsite professional counselors, and provide well-being programming during the 1L year and well-being courses and lecture series for students.

Some of these recommendations were incorporated in early 2022 in the ABA’s accreditation Standards for law schools, by the ABA’s amending Standards 303 and 508 and the accompanying Interpretations of those Standards. These amendments are summarized below.

Amendments to the ABA Law School Accreditation Standards:

The ABA accredits U.S. law schools, through its Law School Accreditation Standards and Rules of Procedure for Approval of Law Schools promulgated by an ABA Council. In 2022, the ABA amended those standards and rules to address student well-being for the first time. Some advocates were disappointed that the ABA Council “set aside requests that substance use and mental health education become a mandatory component of every law school curriculum.”¹⁶

¹² Task Force Report at 31.

¹³ Task Force Report at 31-34.

¹⁴ Task Force Report at 35.

¹⁵ Task Force Report at 36.

¹⁶ David Jaffe, “What ABA Student Well-Being Standards Mean for Law Firms,” Law 360 Pulse (March 15, 2022), <https://www.law360.com/pulse/articles/1473049/what-aba-student-well-being-standards-mean-for-law-firms>.

The accreditation amendments included well-being within the scope of a lawyer's professional identity. Standard 303(b)(3) now requires the curriculum to include "substantial opportunities to students for: ... (3) the development of a professional identity."¹⁷

Interpretation 303-5 adds that:

Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities.¹⁸

Standard 508 also was amended, to require law schools to provide to all students: "Information on law student well-being resources."

Interpretation 508-1 adds that law student well-being resources include information or services related to mental health, including substance use disorders, and may include information for students in need of critical services such as food pantries or emergency financial assistance. Such resources also encompass counseling services provided in-house by the law school, through the university of which the law school is a part, or by a lawyer assistance program. Law schools are directed to strive to mitigate barriers and stigma to accessing such services, "whether within the law school or larger professional community."

And Interpretation 508-2 provides that: "Reasonable access, at a minimum, involves informing law students and providing guidance regarding relevant information and services, including assistance on where the information and services can be found or accessed."¹⁹

¹⁷ Revisions to the 2021-2022 ABA Standards and Rules of Procedure for Approval of Law Schools, Revisions Effective February 2022 [Standard 303 Amendment], https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/21-22-standards-book-revisions-since-printed.pdf.

¹⁸ Standard 303 Amendment.

¹⁹ Revisions to the 2021-2022 ABA Standards and Rules of Procedure for Approval of Law Schools, Revisions Effective February 2022 [Standard 508 Amendment], https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/21-22-standards-book-revisions-since-printed.pdf.

Resources

- [The D.C. Bar Lawyer Assistance Program](#) offers free and confidential services to attorneys, judges, and law students whose well-being is impacted personally or professionally. Email LAP@dcbar.org or call 202.347.3131.
- [The Delaware Bar Lawyer Assistance Program](#) provides confidential assistance to judges and lawyers, assessment, referral, support and guidance. Email cwaldhauer@de-lap.org or call 877-243-3527 or (302) 777-0124. www.de-lap.org.
- [National Directory of Lawyer Assistance Programs](#) - Lawyer Assistance Programs provide confidential services and support to judges, lawyers, and law students who are facing substance use disorders or mental health issues. If you or someone you know is in need of assistance, contact your state or local LAP.
- [The National Suicide Prevention Line](#). This hotline provides free, confidential support 24/7 to people in distress across the United States. Call 1-800-273-TALK (8255) for support.
- [The Lawyers' Depression Project](#). This is a support group of lawyers suffering from depression. Call 1-718-517-0132 and leave a message, or email to joe@knowtime.com.
- [Employer EAP Programs](#).
- [The SAMHSA Helpline](#). SAMHSA's National Helpline is a free, confidential information service that provides treatment and support referrals 24/7 to people facing mental illness and addictions. Call 1-800-662-HELP (4357) for support.
- [Crisis Text Line](#). Crisis Text Line provides free, confidential support via text message 24/7 to those in crisis situations. Text HOME to 741741 for support.
- [The Trevor Project](#). The Trevor Project provides free, confidential support 24/7 to LGBTQ youth via a helpline, text and online instant messaging system. Call 1-866-488-7386 for support.
- [The Veterans Crisis Line](#). The Veterans Crisis line provides free, confidential support 24/7 to veterans, all service members and their family and friends in times of need. Call 1-800-273-8255 and press 1 or text 838255 for support

- [Mental Health First Aid](#) is a skills-based training course that teaches participants about mental health and substance-use issues.
- [The Path to Lawyer Well-Being: Practical Recommendations for Positive Change](#). The release of the report resulted in a national movement among stakeholders in the legal profession to take action to improve well-being. In December 2020, the Institute for Well-Being in Law (IWIL) was formed to carry on the movement launched by the National Task Force. Parts of the report, and the ABA well-being amendments to its law school accreditation standards, are summarized above.
- [The Mental Health Coalition's Resource Library](#) is made available by an alliance of the leading mental health organizations. Browse this database to learn about mental health, help a loved one, learn coping skills and seek support.

Case Summaries

In re Carucci, 132 A.3d 1161 (Del. 2016)- The Supreme Court of Delaware accepted the Report and Recommendation of the Board of Professional Responsibility which suggested suspending the subject attorney from practice for 18 months.

The subject attorney admitted to violating the rules of professional conduct and failing in his obligations to eleven (11) different clients. The subject attorney also admitted to failing to safeguard client funds.

The subject attorney had been a member of the Delaware bar since 2004. In addition to other areas of law, the subject attorney practiced bankruptcy, including representing consumer debtors. In 2011, the subject attorney received a bipolar disorder diagnosis that was aggravated by marital problems. The subject attorney applied for inactive status due to disability in 2013. At this time, the attorney's law firm trust account was minimal, and the operating account was overdrawn.

The subject attorney made voluntary restitution payments to clients requesting refunds, and he even took loans to make these payments.

The subject attorney's acceptance of responsibility, voluntary restitution, mental health diagnosis, and recognition that he needed help stood as mitigating factors for the Board.

Rules Implicated: Del. Law. R. Prof. Conduct 1.1; 1.3; 1.5(f), 1.15(a) and (d); 8.4(c) and (d).

* * *

In re Becker, 947 A.2d 1120 (Del. 2008)- The Supreme Court of Delaware adopted the Report and Recommendation of the Board of Professional Responsibility which suggested suspending the subject attorney from practice for three years.

The subject attorney was admitted to the bar in 1983. He previously was sanctioned by the court in 2001 for misconduct, and he failed to comply with the terms of probation. The subject attorney continued to violate the governing Rules of Professional Conduct, and his problems appeared to get progressively worse.

In one matter, the subject attorney, failed to file a complaint to object to the dischargeability of a debt in bankruptcy court before the deadline passed. The creditor-client sued the subject attorney and his law firm for malpractice and received a judgment in excess of \$1 million dollars. Del. Law. R. Prof. Conduct. 1.1; 1.2(a); 1.3; 1.4(a).

The Board found that the subject attorney repeatedly made misrepresentations, including regarding filing documents falsely representing compliance with tax filing obligations. Del. Law. R. Prof. Conduct. 8.4(c) and (d).

The Board did note that the subject attorney failed to comply with the order to undergo a psychiatric evaluation, but the Board stated that this failure was due to financial inability not bad faith. The lack of psychiatric records to show some cause for the personal difficulties weighed against the subject attorney.

Rules Implicated: Del. Law. R. Prof. Conduct. 1.1; 1.2(a); 1.3; 1.4(a) and (b); 1.15(a) and (d); 8.1; 8.1(b); 8.4(c) and (d); Del. Law. R. Disc. P. 7(c)

* * *

Attorney Griev. Com'n of Md. v. Santos, 803 A.2d 505 (Md. 2002)- The Court of Appeals ordered an indefinite suspension from which the subject attorney could apply for reinstatement after 90 days if all unearned fees were refunded or appropriate arrangements to refund all unearned fees were made.

Complaints against the attorney arose from clients and a referral from a bankruptcy judge. The complaints included that the attorney took fees but never filed cases, filed

cases but failed to appear for hearings, failed to advance pending matters, failed to return unearned fees, and failed to return phone calls.

The subject attorney described his failures as the result of his undiagnosed mental and physical concerns, other external stressors, and a need for more structure. The court noted that the subject attorney currently had an offer of an employment from a public defender's office.

The court viewed disbarment as too harsh given the lack of previous disciplinary history and focused its decision on protecting the public in crafting the sanction.

Rules Implicated: Md. R. Prof. Conduct. 1.3; 1.4; 1.15; 1.16; 8.1; 8.4(c) and (d); Md. R. 16-604.

* * *

In re Schuman, 251 A.3d 1044 (D.C. 2021)- The D.C. Court of Appeals adopted the Board of Professional Responsibility's recommendation that the subject attorney be disbarred for misappropriating client funds, failing to keep proper records, and engaging in dishonest conduct.

The subject attorney became a member of the D.C. Bar in 1998 and joined the at-issue law firm at the same time. The subject attorney was the sole managing partner of the law firm that conducted evictions on behalf of landlords. The D.C. Superior Court sent the law firm a number of checks representing refunds for court fees for evictions that never took place. These refunds belonged to clients not the firm. However, the subject attorney directed current clients receive the refunds and former client funds be deposited into the firm's operating account.

D.C. uses a three-pronged test to determine if an attorney should receive a mitigated punishment. This test requires that an attorney show

1. by clear and convincing evidence that he had a disability;
2. by a preponderance of the evidence that the disability substantially affected his misconduct; and
3. by clear convincing evidence that he has been substantially rehabilitated.¹

The court did not find mitigation appropriate, because the subject attorney did not show that his misconduct was greatly affected by his depression.

Rules Implicated: D.C. R. Prof. Conduct 1.15, 8.4(c)

* * *

Attorney Griev. Com'n of Md. v. Zarkoff, 876 A.2d 664 (Md. 2005)- The Court of Appeals ordered disbarment of the subject attorney for knowing, repeated, and excessive trust fund misuse, failure to maintain candor to the tribunal, and engaging in deceitful or fraudulent conduct after the Attorney Grievance Commission petitioned for disciplinary action alleging violations of Maryland Rules of Professional Conduct 1.3, 1.15(a), (b), (c), 8.4(a), (b), (c), (d), and various occupational statutes and rules under Maryland law.

The subject attorney started practicing law in 1973 and maintained an office in Bethesda, Maryland from 1986 until the time of the opinion. The office predominantly handled personal injury, bankruptcy, and collection matters. The subject attorney was the sole stockholder in the firm, and the sole signatory on all office accounts.

The petitioner presented evidence that the subject attorney delayed disbursements in personal injury matters or directed funds transferred from other accounts to cover low balances. A spot audit discovered the accounting irregularities and a more in-depth investigation occurred. Once the in-depth investigation began the subject attorney

¹ *In re Lopes*, 770 A. 2d 561, 571 (D.C. 2001) (discussing the *Kersey* test).

began depositing more personal funds into the trust account to cover checks written on the account. The investigation discovered accounting irregularities in all accounts used by the firm.

Even though the evidence presented demonstrated the subject attorney's actions occurred without a real financial need or without ill intent towards clients, the court found the subject attorney's actions occurred knowingly. The recurring nature of the draws on the trust funds, the amounts of funds withdrawn, the system used by the subject attorney to ensure continued access to the funds, and the knowing wrongfulness of the conduct all weighed against any assertion by the subject attorney of a claim of ignorance. The court noted that an insufficient balance is *prima facie* evidence of a violation of an attorney's ethical duty, and the facts outlined indicated that the trust fund rule had been violated repeatedly by the subject attorney. Md. R. Prof. Conduct 1.15.

The court reviewed evidence on the subject attorney's representation of a former bankruptcy client. The subject attorney initially met the debtor in April 2000, and the bankruptcy was not filed until November 2000 by an associate of the firm. The debtor knew he wanted to make a claim against a probate estate, but this claim was not included in the bankruptcy schedules. Instead, the subject attorney sent a demand letter to the estate's attorney in December 2000. At the Section 341 meeting of creditors a different associate showed up as counsel and could not answer the questions asked by the trustee. The trustee only learned of the claim of the debtor after the discharge entered in February 2021.

The court analyzed the actions of the subject attorney regarding his acts relating to the representation of a Chapter 7 debtor. The subject attorney did not get the petition and schedules filed as quickly as the debtor hoped, the court did not find these to be

sufficient to find the subject attorney violated his duty of diligence. Md. R. Prof. Conduct 1.3. The court then turned to the subject attorney's violation of certain bankruptcy rules in a specific bankruptcy case by failing to notify the Chapter 7 panel trustee, failing to disclose a potential claim on the bankruptcy schedules, and engaging in surreptitious efforts—including an external lawsuit—to recover funds for a debtor. These acts the court found to be violations of duty of candor to the tribunal and evidence of dishonesty, fraud, deceit, or misrepresentation by the subject attorney. Md. R. Prof. Conduct 3.3(a); 8.4(a), (c), and (d).

The court then looked at the possible mitigating circumstances including a mental health diagnosis. The evidence showed that the subject attorney was crisis driven when he misused trust account funds. The subject attorney began seeking counseling for marital issues in 1999, and he started a medication regimen reluctantly. The subject attorney expressed to a variety of mental health professionals a tendency to take on too much work to avoid disappointing others, and a pattern of finding quick fix solutions were described for the subject attorney's personal and professional problems.

The court recognized and acknowledged the subject attorney's medical diagnosis existed, but the medical professionals disagreed on if the medical diagnosis was the "root cause" of the subject attorney's misconduct.² The court went further to explain that in this situation, even if the diagnosis was the "root cause" the evidence did not support the idea that the diagnosis caused the subject attorney's "utter inability to conform his or her conduct in accordance with the law and with the MRPC."³

² *Attorney Grievance Comm'n of Md. v. Vanderlinde*, 773 A.2d 463, 485 (Md. 2001).

³ *Id.*

To arrive at this conclusion the court highlighted the subject attorney's role as the sole shareholder in a successful law firm for multiple consecutive years, the subject attorney's case load, and the number of hours the attorney worked.

Rules Implicated: Md. R. Prof. Conduct 1.3; 1.15; 3.3; and 8.4

* * *

Attorney Griev. Comm'n of Md. v. Christopher, 861 A.2d 692 (Md. 2004)– The court ordered that the subject attorney be indefinitely suspended from the practice of law for various trust account violations, filing false accountings, and making false representations to the court. The court did find the subject attorney's mental health conditions to be a major mitigating factor.

The subject attorney was admitted to the Maryland bar in 1981. He only maintained a trust account for his firm. He paid all operating expenses from his personal accounts. The subject attorney requested payment from the personal representative of an estate for anticipated fees and costs. He received the check and deposited it into his trust account. Md. R. Prof. Conduct 1.5. The disbursement was not authorized or approved by the required court. The estate representative died. The subject attorney became aware that estate assets were missing, but he failed to report this to the court. Md. R. Prof. Conduct 1.3. During this period, the subject attorney filed several false accountings. Md. R. Prof. Conduct 8.4 The subject attorney overdrew the trust account at least once for personal reasons. Md. R. Prof. Conduct 3.3. The subject attorney did self-report some of his mistakes prior to any investigation launching.

Several months later, the subject attorney referred himself to the Maryland State Bar Association Lawyer Assistance Program for substance abuse and mental health concerns. A few months later the subject attorney was admitted to the hospital for a psychiatric episode, where he remained for almost a month before being transferred to

another hospital for almost two months. The subject attorney remained in treatment for his psychiatric needs and substance abuse concerns.

A medical professional testified that during all times at issue the subject attorney suffered Alcohol Dependence and Sever Major Depression, and these conditions were the “root cause” of the inaccurate accounting and misappropriation but not commingling.

The court found the subject attorney’s mental health and physical health situations to be compelling extenuating circumstances that impaired the subject attorney throughout the implicated time period. The court found in light of these circumstances, disbarment was too harsh and indefinite suspension was more appropriate with reinstatement the subject attorney complying with set conditions.

Rules Implicated: Md. R. Prof. Conduct. 1.1; 1.3; 1.5; 1.15; 3.3; and 8.4

* * *

Butler Cty. Bar Ass’n. v. Minamy, 953 N.E.2d 315 (Ohio 2011)– The court suspended the subject attorney from practice for one year, stayed on the conditions that the subject attorney (1) serve one year of probation supervised by an appointed monitor; (2) limit his law practice to domestic relations, general litigation, and labor law; (3) continue to follow the recommendations of his treating professionals; and (4) commit no further misconduct.

The subject attorney was admitted to the Ohio bar in 1979. In 2009, the Butler County Bar Association filed a four-count complaint against the subject attorney alleging violations of the Ohio Code of Professional Responsibility and the Ohio Rules of Professional Conduct.

The subject attorney cooperated with the initial investigation, but he did not respond to the complaint. A motion for default was granted, and proposed findings of fact and conclusions of law with a recommendation for specific discipline was submitted to the Board of Commissioners on Grievances and Discipline. The recommendation suggested the subject attorney receive a suspension from practice for one year followed by one year of probation. The Board adopted the findings of fact and conclusions of law but recommended to the court a two-year suspension with the second year stayed for monitored probation. The court issued an order to show cause as to why the Board's recommendation should not be accepted.

The subject attorney responded to the order to show cause and sought leave to introduce mitigating evidence. The subject attorney suffered a traumatic brain injury while serving as a member of the Navy Reserve Judge Advocate General's Corps, and he was diagnosed with post-traumatic stress disorder from his active-duty service.

The court remanded the matter to the Board to receive and consider the evidence regarding the subject attorney's health condition. A revised recommendation of a two-year suspension with 18 months stayed on conditions was proposed. The subject attorney objected again.

The court adopted the Board's findings of fact and conclusions of law determining the record clearly and convincingly demonstrated that the subject attorney (1) failed to inform the client regarding his lack of malpractice insurance; (2) neglected that client's matter; (3) failed to communicate with that client regarding that matter; and (4) misled the client on the status of her case.

The court however determined more weight should be afforded to the subject attorney's mitigating mental-health conditions and suspended the subject attorney for one year but stayed the suspension subject to specific conditions.

Rules Implicated: Ohio R. Prof. Resp. DR 1-104; 6-101(A)(3); 1-102(A)(4); Ohio R. Prof. Conduct 1.4(c); 1.3; 1.4(a)(3); 1.4(a)(4); 8.4(c)

* * *

Matter of Frishberg, 163 A.D.3d 103 (1st Dept. N.Y. 2018)– The court suspended the subject attorney for six months and required the subject attorney to participate in the New York City Bar Association Lawyer Assistance Program for one year.

The subject attorney was admitted to the New York bar in 1987. Six charges of misconduct were brought against the subject attorney. He stipulated to responsibility for four of the charges.

The court found mitigating factors in that the misconduct only involved one client and the subject attorney participated in the Lawyer Assistance Program. The court also noted the subject attorney accepted responsibility for four of the allegations and presented competent medical evidence of a mental health diagnosis and mental health treatment which were also viewed in a favorable light.

Rules Implicated: N.Y. R. Prof. Conduct 1.1(a); 1.3(a), (b); 1,4(a)(3), (4); 8.4(h)

* * *

In re Johnson, 893 N.E.2d 783 (Mass. 2008)– The court ordered the subject attorney suspended indefinitely from the practice of law for misappropriating client funds finding that there were no mitigating circumstances warranting a deviation from the presumptive sanction

The Board of Bar Overseers petitioned for discipline against the subject attorney asserting that the subject attorney intentionally commingled funds, misappropriated funds of at least three clients, used the funds of these clients to pay off other client obligations, indorsed checks without client consent, and made false statements to bar

counsel. The subject attorney answered the petition and stipulated to all material facts. A special hearing officer determined that facts supported misconduct, rejected the subject attorney's assertion that mitigating factors warranted a departure from the presumptive sanction, and recommended an indefinite suspension.

The subject attorney appealed to the Board challenging only the rejection of mitigating circumstance. The subject attorney sought a 24-month suspension with conditions on reinstatement and leave to work as a paralegal while suspended. The Board adopted the special hearing officer's recommendation and filed such.

The subject attorney appealed again, and the court reviewed the record. The special hearing officer found that the misappropriation was "methodical and systematic" and the funds supported the subject attorney's personal needs, and the court adopted this finding. The court noted that the subject attorney's poor financial condition—amplified by the subject attorney's long-standing gambling habits—caused the misappropriation of client funds, not a psychological matter or medical matter. The court gave special attention to the finding that the subject attorney failed to be candid with her therapist on the misappropriation.

After weighing the findings of the special hearing officer and the record, the court found no just cause to deviate from the presumptive sanction and adopted the recommendation. The court ordered the indefinite suspension of the subject attorney.

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Faculty

Prof. Bruce Grohsgal is the Helen S. Balick Professor in Business Bankruptcy Law at Delaware Law School, Widener University, where he teaches bankruptcy, contracts and other commercial law courses. He previously was a partner in the Wilmington, Del., office of Pachulski Stang Ziehl & Jones, where he represented debtors, creditors' committees and trustees in chapter 11 bankruptcy cases and litigation. Prof. Grohsgal was a Senior Fellow at Americans for Financial Reform, Washington, D.C., from October 2012 to January 2013 while on sabbatical from his former firm. He also chaired the Bankruptcy Section of the Delaware State Bar Association from 2008-09. Prof. Grohsgal has spoken and written on numerous bankruptcy topics, including "first-day" motions, asset sales, the treatment of derivatives, repos and other financial instruments in bankruptcy, financial institution bankruptcies, and structured dismissals. His recent articles include "Why Student Loans Are Nearly Impossible to Discharge in Bankruptcy," *XLI JAN Am. Bankr. Inst. J.* 58 (Jan. 2022); "The Alteration of *Ex Ante* Agreements by the Bankruptcy Code," *95 Am. Bankr. L. J.* 713 (2021); "The Long Strange Trip to a Certainty of Hopelessness: The Legislative and Political History of the Nondischarge of Student Loans in Bankruptcy," *95 Am. Bankr. L. J.* 443 (2021); and "The Argument for a Federal Rule of Decision for a Bankruptcy Court's Recharacterization of a Claim as Equity," *94 Am. Bankr. L. J.* 681 (2020). In addition, he is editor-in-chief of the *Norton Journal of Bankruptcy Law and Practice* and co-editor-in-chief of the *Norton Annual Survey of Bankruptcy Law*, and he is the director of the Institute of Delaware Corporate and Business Law. Prof. Grohsgal received his J.D. in 1980 from Columbia University Law School.

Niki L. Irish, LICSW is the outreach and education coordinator of the District of Columbia Bar Lawyer Assistance Program (LAP) in Washington, D.C., which provides lawyers and law students with addiction and mental health assessments, counseling, consultation and psychoeducation. She has more than 15 years of experience in the mental health field, with a focus on well-being and addiction. For more than 10 years, she had served as LAP's senior counselor. Ms. Irish provides a variety of trainings and educational seminars to law schools, legal employers, voluntary bar associations and other legal organizations. She is licensed to practice clinical social work in the District of Columbia. Ms. Irish received her B.S. in psychology and family studies and her M.S.W. from the University of Maryland School of Social Work, with a concentration in employee-assistance programs.

Hon. Tiara N.A. Patton is a U.S. Bankruptcy Judge for the Northern District of Ohio in Youngstown, appointed in 2020. She previously served with the Office of the U.S. Trustee as a trial attorney in Cleveland and Wilmington, Del. Before joining the Office of the U.S. Trustee, Judge Patton worked as an attorney in private practice at Calfee, Halter & Griswold LLP in Cleveland with a practice focused on bankruptcy, and at LeBeouf, Lamb, Greene and MacRae LLP in New York, with a practice focused on business restructuring. She also clerked for Hon. Burrell Ives Humphreys (ret.) of the New Jersey Superior Court in Passaic County, and Judges Novalyn L. Winfield (ret.), Donald H. Steckroth (ret.) and Morris Stern of the U.S. Bankruptcy Court for the District of New Jersey, Hon. Cornelius Blackshear (ret.) of the U.S. Bankruptcy Court for the Southern District of New York, and Hon. Randolph Baxter (ret.) of the U.S. Bankruptcy Court for the Northern District of Ohio. Judge Patton is a member of ABI and the Mahoning County Bar Association, The Nathaniel R. Jones American Inn of Court, and the National Conference of Bankruptcy Judges's (NCBJ's)

Public Outreach and The Honorable Cornelius Blackshear NCBJ Presidential Fellowship Committees, and she is a lifetime member of the Central State University Alumni Association. She received her Bachelor's degree from Central State University and her J.D. from The Ohio State University Moritz College of Law.

Marc E. Shach is Of Counsel with Coon & Cole, LLC in Towson, Md., where his practice is concentrated on business bankruptcy. His practice also includes commercial transactions and litigation. Mr. Shach has appeared before bankruptcy courts across the country on behalf of numerous financial institutions and Fortune 500 companies. His practice includes the representation of debtors, creditors and creditors' committees. Mr. Shach served as an adjunct professor at the University of Baltimore Law School, where he taught an upper-level course in business bankruptcy. He also served as a trial attorney at the Office of the U.S. Trustee. Mr. Shach is admitted to practice before the U.S. Bankruptcy and District Courts for the District of Maryland, the U.S. Court of Appeals for the Fourth Circuit and the U.S. Supreme Court. He is a longtime member of ABI and the Bankruptcy Bar Association of Maryland, and he currently serves as a board member of the Maryland Volunteer Lawyers Service. Mr. Shach received his M.B.A. and J.D. from the University of Baltimore.

Lisa B. Tancredi is a bankruptcy and creditors' rights attorney and Of Counsel at Womble Bond Dickinson (US) LLP in Baltimore. She currently co-chairs ABI's Mid-Atlantic Bankruptcy Workshop, is a member of the board of directors of the IWIRC Greater Maryland Network, chairs the Maryland Bankruptcy Bar Association's U.S. District Court Liaison Committee, is a commissioner on the Baltimore County Ethics Commission, and is a member of the Shore Bank Advisory Board and is secretary of the USS Landing Craft Infantry National Association. In addition, Ms. Tancredi is a past president of the Maryland Bankruptcy Bar Association and a former chair of the Maryland Local Bankruptcy Rules Committee. She has published numerous legal articles, is a regular contributor to *Law360* and co-authored ABI's *Navigating Banking in Bankruptcy: A Guidebook*. Ms. Tancredi is admitted to the bars of Maryland, Delaware, the District of Columbia and New York, and has appeared in courts across the country. She received her B.S. in mechanical engineering *cum laude* from Virginia Tech and her J.D. from the University of Maryland School of Law, during which time she clerked for the Office of the U.S. Trustee in Baltimore. After graduation, she clerked for Hon. James F. Schneider of the U.S. Bankruptcy Court for the District of Maryland.

Carol P. Waldhauser is the executive director for The Delaware Lawyers Assistance Program (DE-LAP) in Wilmington, Del., which offers confidential assistance to judges and lawyers to help them identify and address problems such as depression, stress, substance abuse/dependence, gambling addiction and other illnesses and to assist them in developing effective solutions to enhance both their quality of life and work. She previously spent more than eight years in professional employee assistance as assistant (deputy) director of the Maryland State Bar Association's Lawyer Assistance Program, where she assisted hundreds of individuals in Maryland's legal community focusing on substance abuse/dependence, stress management and employee assistance programs (EAPs). As an International Certified Employee Assistance Professional and Certified Wellness Inventory Coach, Ms. Waldhauser is trained and/or certified in mediation and conflict resolution, divorce mediation skills, grief counseling, substance abuse professional/federal DOT regulations for substance abuse professionals; wellness inventory facilitator and coach; and suicide prevention and crisis intervention (trained in Critical Incident Stress Debriefing by Jeffrey Mitchell, the developer of the process).

She also received executive certification from the University of Notre Dame, Mendoza College of Business for Nonprofit Fund Development and Grant Writing. Ms. Waldhauser has more than 20 years of law office experience in the small firm/solo environment. She has written many articles that have been published in legal journals throughout the country, speaks to the judiciary and attorneys on problems and solutions regarding quality of life in the legal profession and lawyers' assistance programs specifically, and is executive producer of the DE-LAP podcast Attorney Buoyancy. Ms. Waldhauser received her B.S. in pre-law and business from Stevenson University and did extensive graduate work in public policy, law, organizational counseling/employee assistance, substance abuse and addiction at the University of Baltimore's School of Business and Law, as well as The Johns Hopkins University. She also received certification status from the University of Maryland School of Social Work as a certified international employee assistance professional.