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CLE Seminar for In-House Counsel
Wednesday, December 9

Interplay Between the Rules of Professional Conduct and the Reality of Attorney Mental Health Issues

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2020

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Overview

- The legal profession collectively suffers from depression, suicide, and other mental health issues in significantly greater percentages than the general population
- US population continues to live longer, and lawyers are practicing well past age 65 in increasing numbers
- Substance abuse, mental health issues, and dementia can destabilize lawyer's lives; adversely affect their legal performance; and impair their ability to comply fully with their professional responsibility obligations

Lawyer Mental Health Issues: How Big a Problem is This?

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Alcohol and Drug Use

- In 2016 ABA Commission on Lawyer Assistance Programs, and Hazelden Betty Ford Foundation published a mental health study of nearly 13,000 practicing lawyers, based on self-reporting responses to diagnostic questions from well-established tests
- 21% of lawyers in the survey screened positive for “hazardous, harmful, and potentially alcohol-dependent drinking,” compared to 12% of professionals in the general population
- For lawyers who weekly used legal or illegal drugs affecting mood or behavior, 71% used stimulants; 51.3% used sedatives; 31% used marijuana, and 21.6% used opioids
- 22% of lawyers surveyed stated that their use of alcohol or drugs had been problematic at some point in their career

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Mental Health Conditions

What type of mental health conditions unrelated to substance abuse commonly affect lawyers?

Mental Health Conditions

- Mental health conditions unrelated to substance abuse also are prevalent and can impair lawyers' performance:
 - Anxiety
 - Depression
 - Social Anxiety
- 28% of lawyers surveyed reported experiencing depression at some point in their careers, and nearly 12% have had suicidal thoughts

Senior Lawyers

What mental health issues affect older lawyers?

Mental Health Issues That May Affect Senior Lawyers

- Growing numbers of lawyers over 65 are choosing to continue working, for a variety of reasons
- The ABA's Senior Lawyers Division has over 63,000 members
- Senior lawyers offer significant expertise and experience; however, as people age, everyone becomes more vulnerable to physical illness, dementia, and depression
- Dementia and depression in older adults share some similar symptoms, and apparent mental impairment in senior lawyers can mask physical illness, substance abuse, or treatable mental health conditions

Self-Reporting

What Keeps Lawyers from Seeking Treatment?

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What Keeps Lawyers from Seeking Treatment for Mental Health and Substance Abuse Issues?

- The ABA's study found lawyers with mental health and substance abuse issues had common reasons why they did not seek treatment:
 - Denial
 - Perceived ability to "solve my own problem"
 - Not wanting others to find out they needed help
 - Concerns regarding privacy or confidentiality
 - Losing their law licenses
 - Did not know who to ask or how to pay for treatment

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Consequences of Impaired Mental Health

What are the consequences of impaired mental health?

Consequences of Impaired Mental Health

- Professional
 - Malpractice
 - Loss of Clients
 - Loss of Reputation
 - State Bar Discipline
 - Withdrawal from the Profession
- Personal
 - Other Health Troubles
 - Hospitalization
 - Suicide

The Rules of Professional Responsibility Applicable to Lawyer Mental Health

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The Rules of Professional Conduct and Impaired Lawyers

- The Rules of Professional conduct apply equally to all lawyers, regardless of physical or mental health:
 - ABA Formal Opinion 03-429 (2018) states, “mental impairment does not lessen a lawyer’s obligation to provide clients with competent representation”
- If a lawyer becomes “materially impaired” in his or her ability to represent the client, withdrawal from a matter or matters is mandatory under Rule 1.16(b)(2)
- Diminished performance by a mentally impaired lawyer can pose risk of Rule violation, client relationship issues, or financial or reputational loss

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Rules 1.1 and 1.3: Competency and Diligence

- Rule 1.1, **Competence**
 - “A lawyer shall provide **competent representation** to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. . . .” Competence includes the “**mental, emotional and physical ability reasonably necessary**” for performance of the legal service
- Rule 1.3, **Diligence**
 - “A lawyer shall not . . . Repeatedly, recklessly or with gross negligence **fail to act with reasonable diligence . . .**” “Reasonable” diligence means the lawyer “**does not neglect or disregard, or unduly delay** a legal matter”

Rules 1.4, 1.6, and 1.15: Communication, Confidentiality and Client Funds

- Rule 1.4, “**Communication**”, requires a lawyer to notify a client, promptly, of information or circumstances material to a matter; to keep the client reasonably informed of developments, and to promptly comply with a client’s requests for information
- Rule 1.6, “**Confidential Information of a Client**,” states that a lawyer “shall not knowingly reveal or use confidential information to the disadvantage of a client or for the advantage of a third person”
- Rule 1.15, **Preserving Identity of Funds and Property of Others**
 - Prohibits co-mingling and misappropriation of client funds; describes required trust account and bookkeeping procedures

What the Rules Require of “Law Firms”

- “Law Firm” reporting obligation extend to private law firms, corporate legal departments, and lawyers in government entities and charitable organizations (Rule 1.0(h), (m))
- Both a “law firm,” “a lawyer with management responsibility,” and “a lawyer with direct supervisory authority over another lawyer” are required to “make reasonable efforts to ensure that all lawyers in the firm conform to the Rules” (Rule 5.1)
- Lawyers with partner-like managerial responsibility, and lawyers with direct supervisory authority over another lawyer, are responsible for Rule violations “if they reasonably could have prevented the violation, or mitigated its consequences, but failed to take reasonable remedial action”

Reporting Obligations

- Rule 8.3 requires lawyers to report violations of the Rules by another in limited circumstances:
 - The violation raises a “substantial question” as to the lawyer’s honesty, trustworthiness or fitness as a lawyer
 - Rule 8.3’s use of the word “substantial” refers to the seriousness of the violation and not the quantum of evidence, although a single violation may be “substantial”
- Comment 5 to Rule 8.3 makes an exception to the reporting obligation if the information about the misconduct or fitness is disclosed in the course of a “bona fide assistance program for lawyers”

Taking Steps to Address Lawyer Mental Health Issues

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Determining When a Lawyer Has Impaired Mental Health

- Lawyers are not medical health professionals, and it is not a law firm's role to diagnose substance abuse, mental health conditions or dementia; and both impaired lawyers and their co-workers tend to cover up problems
- On the other hand, significant behavior or work performance problems should always be addressed, and they may result from an underlying mental health impairment:
 - Repeatedly missed deadlines or late arrivals at meetings or hearings
 - Repeated failures to return calls
 - Persistent forgetfulness
 - Lapses in work performance
 - Significant changes in interpersonal behavior
 - Client or co-worker complaints

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Confronting an Impaired Lawyer

How to do you have a conversation with an impaired lawyer?

How to Have the Conversation with an Impaired Lawyer

- Consult HR to ensure conversation and suggested action does not infringe on rights
- Be respectful and non-confrontational
- Be specific and direct about lawyer's performance or other conduct that causes concern
- Come prepared with specific suggestions for addressing the conduct of concern, including, if appropriate, contact information for the company's Employee Assistance Program, or the State Bar's Lawyer Assistance Program
- Listen carefully and patiently to what the lawyer has to say in response
- One conversation may not suffice to achieve a resolution acceptable to the company
- Consider involving a family member

Support for Employees

What can managers and HR professionals do to support employees during the current remote working environment?

Implications of the COVID-19 Pandemic for Mental Health

53% of adults in the U.S. reported that their mental health has been negatively impacted due to worry and stress over the coronavirus, including as a result of concerns related to:

- Social isolation,
- Balancing child-care, elder care, and other family responsibilities,
- Job loss and income insecurity,
- Underlying health conditions,
- Bereavement, and
- Burnout and strain among frontline health care workers.

What can managers and HR professionals do to support employees during the current remote working environment?

With many organizations requiring employees to stay out of the office, it's more important than ever to encourage and facilitate regular communication with employees:

- Recognize the impact of isolation and loneliness;
- Show empathy and be available;
- Stay connected with communication & meeting tools to allow employees to connect face-to-face;
- Encourage online training; and
- Check in with your EAP & Health Plan to confirm availability and coordinate support for employees.

Center for Workplace Mental Health, "Working Remotely During COVID-19: Your Mental Health & Well-Being," available at <http://workplacementalhealth.org/getmedia/f08a9b98-b491-4668-8f27-2b159b00e475/Working-Remotely-During-COVID-19-CWWMH-Guide> (last accessed Nov. 10, 2020).

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Lawyer Assistance Programs

- All 50 States have Lawyer Assistance Programs that can help lawyers struggling with substance abuse issues, mental health concerns, burnout, stress, and other issues, through direct counseling or referrals to other sources of help
- Many Lawyer Assistance Programs are available to both lawyers and their families, and are entirely confidential, even from the State Bar
- New York
 - <http://www.nysba.org/lap/>
 - <http://www.nylat.org/>
 - <https://www.nycbar.org/member-and-career-services/committees/lawyer-assistance-program-confidential-helpline>
- Lawyer-volunteers who have overcome or successfully coped with their own mental health issues can be a significant asset to treatment

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The Emerging Concept of Attorney “Wellness”

- 2017’s National Task Force on Lawyer Well-Being built on the data provided by the ABA’s 2016 empirical study of lawyer mental health issues, recommending five central themes for “positive change” in the legal profession:
 - Identifying stakeholders and the role they can play in reducing the level of “toxicity” in the legal profession
 - Eliminating the stigma associated with seeking help
 - Emphasizing well-being as an indispensable part of lawyer competence
 - Education for lawyers on “well-being” issues
 - Taking incremental steps to address how law is practiced, to increase lawyer well-being

The ABA’s Wellness Pledge for Law Firms and Legal Departments

- In September 2018 the ABA Working Group called for a pledge by legal employers to take seven steps to improve the health of lawyers, and nearly 100 law firms, legal departments and law schools have made the commitment to:
 - Providing educational opportunities on wellness issues;
 - De-emphasize alcohol at company events;
 - Develop partnerships with lawyer assistance programs;
 - Provide confidential access to mental health and addiction experts for all employees;
 - Develop a written protocol and leave policy that covers assessment and treatment of substance use and mental health problems; and
 - Promote help-seeking and self-care as a core value.

Dentons' "Mindfulness" Program

- Our "Wellness for Life" program offers monthly live and recorded webinars on mindfulness topics
- Pilot program in three offices to make licensed therapist available on site once a week for 2-3 hours
- Parent Professional Network
- Free app called "Headspace," which provides guided meditation sessions for anywhere from 1 minute to 20 minutes
- Firm-wide policy on alcohol use in the workplace, discouraging use, requiring a partner-level monitor at all events offering alcohol, and reminding employees of firm's Employee Assistance Program
- Signage in each office promoting mindfulness and wellness topics

Thank you

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