

Ethics & Professionalism: Interrupting Implicit Bias to Improve Mental Health in the Legal Profession

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Background on the Well-Being in the Legal Profession

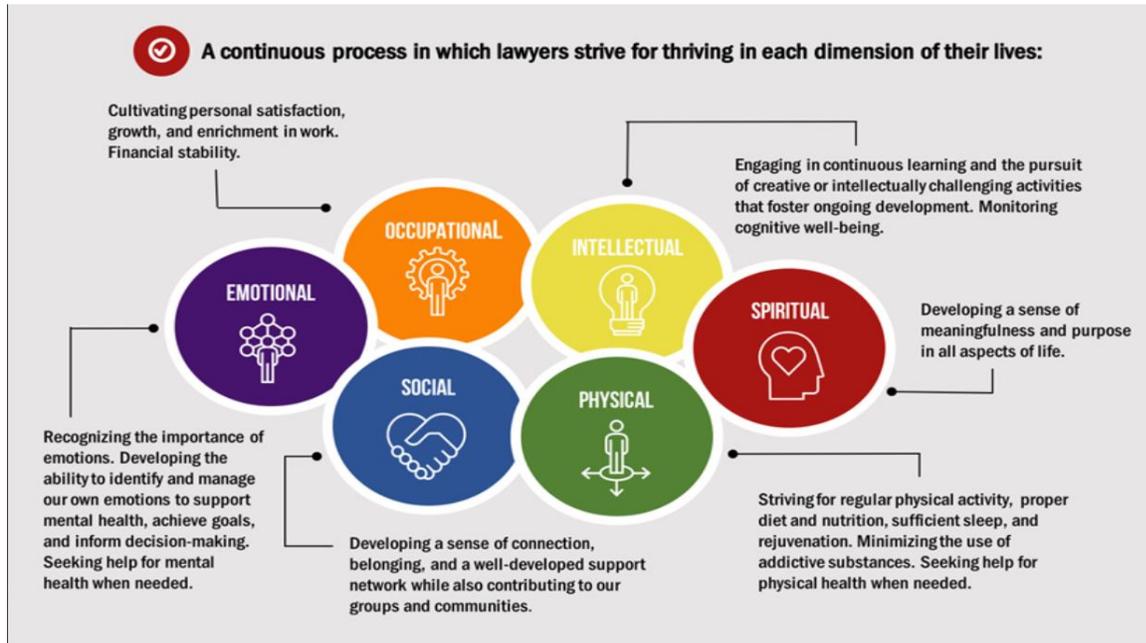
Reports:

- *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, Report of the National Task Force on Lawyer Well-Being, published in 2017 and available at <https://lawyerwellbeing.net/>
- *A Profession at Risk*, Report of the Committee on Lawyer Well-Being of the Supreme Court of Virginia, published in 2018 and available at http://www.courts.state.va.us/programs/concluded/clw/2018_0921_final_report.pdf
- *The Occupational Risks of the Practice of Law*, Report of the Virginia State Bar President's Special Committee on Lawyer Well-Being, published in 2019 and available at https://www.vsb.org/docs/VSB_wellness_report.pdf
- *Well-Being Toolkit for Lawyers and Legal Employers*, American Bar Association, published in 2018 and available at https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lsc_colap_well-being_toolkit_for_lawyers_legal_employers.pdf

Findings: National Studies

- “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys” (2016) found that, among attorneys:
 - 21 – 36% qualified as problem drinkers.
 - 14% reported that problematic drinking began in law school.
 - 28% were experiencing some level of depression.
 - 11% had experienced suicidal thoughts.
- “Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns” (2016) found that, among law students:
 - 25% were at risk for alcoholism.
 - 17% were experiencing depression.
 - 14% were experience severe anxiety.
 - 6% had experienced suicidal thoughts within the past year.

Defining “Well-Being” for Lawyers:



Defining “Well-Being” in a Legal Workplace:

The ABA Committee for Lawyer Assistance Programs (“CoLAP”) used resources from the World Health Organization and the Tristan Jepson Memorial Foundation (an Australian charitable organization focused on healthy legal workplaces) to outline 13 factors that have been identified by extensive research as critical to psychological health.

1. **Organizational Culture:** A culture characterized by trust, honesty, and fairness.
2. **Psychological Support:** Supervisors and coworkers are supportive of organizational members’ psychological and mental health concerns, and respond appropriately.
3. **Clear Leadership & Expectations:** There is effective leadership and support that helps organizational members know what they need to do, how their work contributes to the organization, and whether there are impending changes.
4. **Civility & Respect:** Employees are respectful and considerate in their interactions with one another, as well as with clients and the public.
5. **Psychological Competencies & Requirements:** There is a good fit between employees’ interpersonal and emotional competencies and the requirements of the position they hold.
6. **Growth & Development:** Employees receive encouragement and support in the development of their interpersonal, emotional, and job skills.
7. **Recognition & Reward:** There is appropriate acknowledgment and appreciation of organizational members’ efforts in a fair and timely manner.
8. **Involvement & Influence:** Organizational members are included in discussions about how their work is done and how important decisions are made.
9. **Workload Management:** Tasks and responsibilities can be accomplished successfully within the time available.

10. **Engagement:** Organizational members feel connected to their work and are motivated to do their job well.
11. **Balance:** There is recognition of the need for balance between the demands of work, family, and personal life.
12. **Psychological Protection:** Organizational members' psychological safety is ensured.
13. **Protection of Physical Safety:** Management takes appropriate action to protect the physical safety of organizational members.

Ethical Considerations

VA Rules of Professional Conduct

Rule 1.1 and Comment 7: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation... 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."

Relevant sections of Rule 8.3 provide that: "(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 that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority...(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 a trained intervenor or volunteer for such a program or committee, 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."

Comment [5] to Rule 8.3 explains this exemption: "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 ...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."

Bias

Explicit versus Implicit Biases

Bias is the “pre-judging of a person based on his or her, perceived or actual, status of being a member of a particular group, without regard to that person’s actual conduct or performance.” Chris Chambers Goodman, *Shadowing the Bar: Attorneys’ Own Implicit Bias*, 28 La Raza L. J. 18, 19 (2017). Researchers who study how human brains work to process information and make decisions have identified two types of bias - explicit bias and implicit bias. The distinguishing feature of each form of bias depends on the extent of an individual’s awareness of the bias. Thus, people who knowingly, and sometimes openly, embrace a stereotype or bias are exhibiting explicit bias. On the other hand, implicit bias involves far more subtle stereotypical associations. People are unaware that they are thinking or acting in a particular way because of the influence of that bias. Researchers have learned that individuals are more likely to rely on the automatic processing by their brains, sometimes referred to as “intuition” or “gut feelings”, when they must make decisions quickly. When they have more time to evaluate information using their analytical skills, according to the researchers, people’s decisions are more thoughtful and deliberate, that is, less influenced by implicit bias.

Empirical research has also determined that automatic brain processing is just as common among key decision-makers in the justice system as it is among lay people. Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich, Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1196, 1197 (2008-2009). Judges, prosecutors, defense attorneys, police, witnesses, jury members, probation officers, and court personnel all hold implicit biases that may might lead them to make decisions based on their biases, rather than on the facts of the case, without even intending it.

Measuring Implicit Bias: the IAT

The IAT asks a user to pair two concepts (e.g., anxious and me, or calm and me). The more closely associated the two concepts are, the easier it is to respond to them as a single unit. So, if calm and me are strongly associated, it should be easier to respond faster when you are asked to give the same response (i.e. the 'E' or 'I' key) when classifying items in these two concept categories. If anxious and me are not so strongly associated, it should be harder to respond fast when they are paired. This gives a measure of how strongly associated the two types of concepts are. The more associated, the more rapidly you should be able to respond. The IAT is one method for measuring implicit or automatic attitudes and is featured on Harvard’s Project Implicit Mental Health Website: <https://implicit.harvard.edu/implicit/user/pih/pih/index.jsp>

Tasks

Marijuana Risk IAT: Do you implicitly associate marijuana with risk?

Anxiety IAT: Do you implicitly associate yourself with being anxious or calm?

Eating Shame IAT: Do you implicitly associate eating high-fat food with shame?

Alcohol IAT: Do you implicitly associate yourself with being a drinker?

Mental Illness IAT: Do you implicitly associate people with mental illnesses with danger?

Exercise IAT: Do you implicitly associate exercise with positivity or negativity?

Treatment IAT: Do you implicitly associate medication or talk therapy with effectiveness?

Depression IAT: Do you implicitly associate yourself with being happy or sad?

Healthy Food IAT: Do you implicitly associate good taste with healthy or unhealthy foods?

Healthy Self IAT: Do you implicitly associate yourself with healthy or unhealthy?

Language and Stigma

See the attached article from Everymind, an Australian non-profit Institute dedicated to reducing mental ill-health, reducing suicide and improving wellbeing, which explains how the language we use can contribute to myths and stereotypes about mental health.

Combatting Implicit Bias Through Interrupters

Raising awareness about biases relating to mental health is only the first step in addressing biased behaviors. Once individual attorneys are aware of their implicit bias in different areas, they can begin to interrupt those biased thoughts before they translate into behaviors that further stigmatize common mental health problems.

Organizations can support these efforts by crafting policies and procedures that encourage fair treatment of all, regardless of perceived mental health status. The following section summarizes recommendations made by the SCV Committee that have already been implemented across the profession to reduce stigma and remove barriers that prevent lawyers from seeking help.

The Virginian Response

Structural and Funding Recommendations Implemented

- *Create a position and program within the Office of the Executive Secretary of the Supreme Court of Virginia (SCV) to coordinate comprehensive well-being initiatives.*
 - ✓ Margaret Hannapel Ogden was hired as the inaugural Wellness Coordinator in October 2019.

- ✓ [The Virginia Lawyers' Wellness Initiative page on SCV's website](#) went live in December 2019, including a section for reports & other resources.
- *Provide adequate funding to Lawyers Helping Lawyers (LHL) (now the Virginia Judges and Lawyers Assistance Program: vjlap.org) for implementation of its statewide plan.*
 - ✓ VJLAP began receiving Attorney Wellness Fund money, administered by OES, in September 2019, [to expand their staff of 1.5 employees to 5.](#)
 - ✓ VJLAP hired Barbara Mardigian as Deputy Clinical Director in Richmond in September 2019. Angeline Saferight Lloyd and Janet van Cuyk began as the Southwest and Tidewater Regional Program Managers, respectively, in January 2020.
- *Funding for these initiatives should be the collective responsibility of all members of the Bar.*
 - ✓ Line item in Bar Dues first collected in 2019 to create the Attorney Wellness Fund.
- *CLEs should be provided on a range of wellness topics.*
 - ✓ MCLE Opinion 19 was amended in September 2018 to clarify that wellness topics may receive CLE credit.
 - ✓ In January 2020, [VA CLE introduced five no-cost modules focused on well-being](#) topics, of which attorneys may take up to two a year. They will continue to add two new courses annually to create a library of free CLEs to address a range of occupational risks.
 - ✓ VJLAP, in collaboration with the VLWI, has expanded its educational offerings to offer a range of no cost and virtual CLEs.
 - ✓ Justice Mims and Margaret Ogden shared a VLWI update at the March 2020 Bar Leadership Institute, encouraging local and specialty bar association Presidents to sponsor no- or low-cost CLEs on wellness topics.

Judicial Task Force Recommendations Implemented

- *Communicate that well-being is a priority and reduce the stigma of mental health and substance use disorders.*
 - ✓ Members of the SCV, the past-Virginia State Bar President, VJLAP Board members, and VSB staff attorneys have spoken locally and nationally on attorney well-being.
 - ✓ [OES issued a press release detailing the hiring of the Wellness Coordinator](#) and the creation of the Virginia Lawyers' Wellness Initiative on January 7, 2020.
- *Recognize and fully support an assistance program for judges.*
 - ✓ LHL became VJLAP, with a new titular emphasis on judges, in 2019.
- *Provide well-being programming for judges and staff.*
 - ✓ Wellness topics were included in mandatory judicial conferences conducted by OES in 2019 and were expanded in 2020.
 - ✓ In conjunction with National Lawyer Well-Being Week, the VLWI hosted a WebEx for judges entitled "Occupational Wellness: Clinical, Ethical, and Judicial Perspectives," featuring Justice Mims, Judge John Tran of Fairfax Circuit Court, Barbara Mardigian, and Jim McCauley.

Law Schools & Board of Bar Examiners Recommendations Implemented

- *Re-evaluate bar application inquiries about mental health history.*
 - ✓ The current Character and Fitness Questionnaire emphasizes "the mere fact of treatment for health problems is not, in itself, a basis on which an application is denied admission in Virginia, and the Board of Bar Examiners regularly licenses individuals who have demonstrated personal responsibility and maturity in dealing with health issues. The Board encourages applications who may benefit from treatment to seek it...The Board does not, by its questions, seek information that is fairly characterized as situational counseling. Examples of situational counseling include stress counseling, domestic counseling, grief counseling, and counseling for eating or sleeping disorders. Generally, the Board does not view these types of counseling as relevant to the issue of whether and applicant is qualified to practice law."

- *Create best practices for detecting and assisting students experiencing psychological distress. Provide training to faculty members relating to student mental health and substance use disorders.*
 - ✓ A Law Student Wellness Workgroup has been established with associate deans from each of the 8 law schools, the Wellness Coordinator, and representatives from VJLAP. The group held its first meeting at U of R in January 2020, and continues to hold monthly conference calls to collaborate on wellness programming for students and faculty.
- *Include well-being topics in courses on professional responsibility.*
 - ✓ The VSB one day course on professional responsibility, which is given at all Virginian law schools, has been updated to include more hypotheticals dealing with lawyer impairment and general wellness topics.
- *Create a well-being course and lecture series for students.*
 - ✓ In February 2019, the first annual Law School Summit on Wellness was held in Charlottesville. Most of the members of the Supreme Court of Virginia attended as well as the Deans of all eight Virginia law schools. VJLAP, Virginia CLE and the VBA were sponsors of this event.
 - ✓ Planning for the second annual summit is underway (originally scheduled for April 1, 2020 but postponed due to COVID-19) at the University of Richmond School of Law.

Private Sector Task Force Recommendations Implemented

- *Strengthen the relationship between VJLAP and SCV.*
 - ✓ SCV appointed 8 new members to VJLAP's Board of Directors in September 2019.
- *Form a blue-ribbon panel of lawyers and health care professionals to establish aspiration recommendations for lawyers to implement.*
 - ✓ VSB President Len Heath convened a committee, which published the landmark report, [*The Occupational Risks of the Practice of Law*](#) in May 2019. This report includes recommendations to ameliorate 20 unique risks within the legal profession, including physical, mental & emotional, adaptation, and self-actualization risks.
- *Prepare an informational pamphlet for lay audiences, such as families and staff of lawyers and law students.*
 - ✓ VJLAP materials have been updated in conjunction with the VLWI, including posters available beginning March 2020 for legal workplaces and law schools.
 - ✓ Included in the VSB report is a "matrix of risk," (see example below) which includes straightforward, well-sourced information designed to be accessible to non-lawyers.

MENTAL AND EMOTIONAL RISKS

Risk Description	Potential Effects	Practice Pointers for Individuals	Practice Pointers for Organizations
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.	<ul style="list-style-type: none"> • Develop a support network of family, friends, and fellow attorneys with whom vulnerability can be safely discussed. • Law students should seek to understand that the character and fitness process is not a trap. • Do not fear seeking counseling or other treatment, if needed. • Understand “imposter’s syndrome.” • Participate in an Inn of Court. • Participate in bar association activities. • Seek an experienced mentor. 	<ul style="list-style-type: none"> • Promote an organizational culture encouraging help-seeking behavior such that all employees know that nothing is wrong with knowing their limits and asking for help. • Consider developing wellness committees or providing counseling services. • Bar examiners should strive to create a transparent character and fitness process and make clear that those who need help should seek treatment without fear of penalty. • Offer an Employee Assistance Program (EAP).

ADAPTATION RISKS

Risk Description	Potential Effects	Practice Pointers for Individuals	Practice Pointers for Organizations
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.	<ul style="list-style-type: none"> • Develop the attitude of a lifelong learner. • Study the reports of VSB committees addressing the future of law practice. • Attend programming such as the VSB Techshow. • Participate in bar organizations to develop relationships and stay up-to-date on changing legal technologies. • Stay current on ethics guidelines and opinions addressing changing business models and evolving technologies. 	<ul style="list-style-type: none"> • Study and emulate business models of “dynamic” law firms that are successfully adapting to the new practice realities. • Consider revising billing models, adopting new technologies, and overhauling internal workflows to better meet client needs. • Encourage attorneys to streamline their practice with the utilization of new technologies. • Stay current on ethics guidelines and opinions addressing changing business models and evolving technologies.

Mental Health Well-Being Practice Pointers

1. Remember your ethical obligations relating to impairment.

See the attached Legal Ethics Opinions 1886 and 1887 from the Virginia State Bar. The Virginia Judges and Lawyers Assistance Program is available 24/7, remotely for confidential, non-disciplinary, free help for judges, lawyers, law students, and legal professionals dealing with a range of mental health and substance use issues. You can contact them with concerns for a colleague, family member, friend, or yourself.

2. Use proven time management techniques to make space in your day for wellness routines.

- Know how you spend your time: keep a log of daily activities.
- Set priorities: know the difference between important and urgent.
- Use a planning tool: write down tasks and review them daily.
- Get organized: reduce clutter.
- Schedule time appropriately: block out time for important tasks and avoid interruptions.
- Delegate: request help from others.
- Stop procrastinating: break up overwhelming tasks into manageable parts.
- Manage external time consumers: phone, email, unexpected visitors, meetings, and family.
- Avoid multi-tasking: switching from one task to another costs time and reduces productivity.
- Stay healthy: schedule time to relax and recharge physically and mentally