

The Intersection of Client Protection and Lawyer Well-Being: An Ounce of Prevention is Worth a Pound of Cure

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By Renu Brennan

Renu Brennan is Bar Counsel at the Virginia State Bar. Prior to being appointed Bar Counsel, Ms. Brennan served as the bar's Deputy Executive Director where she oversaw the Clients' Protection Fund. Ms. Brennan has prosecuted many cases throughout the Commonwealth before district committees, the Virginia State Bar Disciplinary Board, and three-judge panels. Additionally, she has taught CLEs on various subjects, including aging attorneys and the disciplinary process. Prior to coming to the Bar, Ms. Brennan was a partner with the firm of Vandeventer Black, LLP where she handled professional malpractice and commercial litigation. Ms. Brennan is licensed in Virginia, the District of Columbia, and California, where she practiced in Los Angeles.

With the Privilege of Self-Regulation Comes Responsibility That the Profession Must Shoulder Together

Lawyers should be justly proud of our commitment to public protection and of being the only profession that assesses itself to reimburse the losses caused by a few dishonest members. Indeed, every state and the District of Columbia and every Canadian province has a lawyers' fund for client protection ("Fund"), most of which are financed wholly by lawyer contributions. Our willingness to examine our profession and to pay for the financial malfeasance of our fellow lawyers reflects our commitment to public protection. It is this willingness to examine the profession critically and our demonstrated commitment to right wrongs that ensures we are worthy of the privilege of self-regulation.

Recently, the legal profession has put itself under the microscope and examined hard, critical studies reflecting high rates of chronic stress, depression, and substance use among lawyers. Compelled by the data, leaders in the profession formed the National Task Force on Lawyer Well-Being, which issued a report, [*The Path to Lawyer Well-Being: Practical Recommendations for Positive Change \(Report\)*](#). Through the Report, the task force calls to action all stakeholders in the profession – including judges, regulators, bar associations, professional liability carriers, lawyer assistance programs, and law firms – to join forces to confront our problems in order to maintain public confidence in the profession. The task force recommends specific changes for each stakeholder, and conversation and coordination by all. As task force Co-Chairs Bree Buchanan and James Coyle urged in their August 14, 2017, cover letter: "Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer."¹

¹ Bree Buchanan & James C. Coyle, cover letter, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (Aug. 14, 2017), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>.

Our collective and continuing response to the Report must demonstrate again that the legal profession is worthy of the privilege of self-regulation. “To maintain public confidence in the profession . . . we have to act now.”²

The Reality is that Lawyers’ Funds for Client Protection Confront the Burden of Reimbursing Unpaid Fees of Lawyers Who Suffer from Impairments

The Funds are tasked with reimbursing clients for the financial losses caused by lawyer misappropriation. As part of this of this duty, many Funds compensate clients for the unearned fees of lawyers, who are disabled, impaired, or who have abandoned their practice, and whose licenses are suspended or revoked. (The District of Columbia now compensates even when the lawyer’s license has not been suspended or revoked.) This practice is consistent with the Funds’ purpose of public protection, including the promotion of public confidence in the administration of justice and the integrity of the legal profession.

As set forth in the ABA Model Rules for Lawyers’ Funds for Client Protection, Rule 10.C.1, dishonest conduct that serves as a predicate for eligible claims includes the failure to refund unearned fees received in advance as required by ABA Model Rule of Professional Conduct 1.16. According to the ABA *Survey of Lawyers’ Funds for Client Protection (2014-2016)* (Survey), reporting U.S. jurisdictions paid an average of \$5.2 million, \$7.6 million, and \$4 million in claims between the years of 2014-2016, respectively.³ The amount of reimbursement varies based on reimbursement limits and lawyer population, but some jurisdictions report reimbursements of as much as \$88 million in a single year.⁴ Although the Survey does not yet track Funds’ reimbursement due to lawyer impairment, the numbers are likely significant. Unearned fees consistently remain one of the highest areas of reimbursement. The reality is that Funds have limited resources and limiting losses is essential. Prudent Fund management and self-regulation dictate that those tasked with client protection roll up our sleeves and help in the battle to avert losses by partnering with lawyers’ assistance programs and other interested entities to prevent harm to clients.

Lawyer Well-Being as Loss Prevention - Protects Clients While Helping Lawyers

The mission of the ABA Standing Committee on Public Protection in the Provision of Legal Services (“committee”) is to develop and strengthen client protection mechanisms, including programs to reimburse financial losses caused by lawyer misappropriation of client funds. The committee sponsors educational programs, provides onsite consultations, develops model rules for adoption as ABA policy, and conducts and publishes surveys. It also works with the National

² *Id.*

³ See ABA Standing Committee on Client Protection, *ABA Lawyers Fund for Client Protection (2014-2016)*, Section III, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_16_survey_of_lawyers_funds_for_client_protection_final.pdf (last visited Mar. 11, 2019).

⁴ *Id.*

Client Protection Organization (NCPO) to address current and emerging issues in client protection, including loss prevention.

One of the most important tools, other than creating and gathering resources, is the dialogue the committee facilitates, among jurisdictions, among different entities within the ABA, and with the NCPO. The groups work both independently and collaboratively to foster dialogue and examine the best ways to avoid and prevent harm – not just to reimburse clients after they are harmed.

The committee's current loss prevention resources are robust and include:

- Planning for Lawyer Retirement, Death or Disability
- Payee Notification
- Insurance Disclosure
- Fee Arbitration
- Mediation of Client-Lawyer Disputes
- Client Trust Account Records
- Trust Account Overdraft Notification
- Random Audit of Trust Records

Whether formally or informally, the committee and its members, in coordination with the Commission on Lawyers Assistance Programs and other ABA entities, the NCPO, and members of the broader legal community, should consider additional or enhanced efforts to be proactive in addressing impairment, and the role client protection programs may have in such efforts. Several states including Colorado, Connecticut, Florida, Georgia, Illinois, Massachusetts, New Mexico, Texas, Vermont, Virginia, West Virginia, and Wisconsin have established their own state task force or commission to investigate the Report and the task force's recommendations. Again, dialogue is critical. Small steps forward may include a more robust listserv discussion, as well as webinars to educate the profession about identifying lawyers in crisis, addressing those issues before clients are harmed, and about succession planning. Through enhanced dialogue and focus on prevention, the committee can develop guidance to help ease the pressure on Funds.

Conclusion

An ounce of prevention, particularly with regard to Funds, is worth a pound of cure. Lawyer wellness is critical to the profession and to the public, and as such, must be a sustained commitment by all tasked with the responsibility of public protection. The intersection of lawyer well-being and public protection is obvious; its importance to Funds is clear. We must ensure that wellness is not relegated to the issue *du jour*, or perceived as a flash in the pan. We need to lead through demonstrated commitment to well-being and to educate, so that lawyer wellness is not minimized or portrayed as only lawyer protection, but also as public protection.

What is the value of a lawyer saved? Or better yet, of a lawyer who does not need to be saved because we have been proactive in emphasizing lawyer well-being as an end in and of itself? That is not a riddle. These are questions that bear asking as we consider the high rate of lawyer depression and substance abuse and the Funds needed to reimburse the public harmed by lawyer malfeasance.

Thankfully, our leadership is now openly addressing these questions, because they pertain to all of us in our on-going efforts to improve the caliber of not only our profession, but also our professional lives.