

Bar Counsel's Message

by Edward L. Davis



Lawyer Well-Being, Rules of Professional Conduct, and Lawyer Discipline

THE OFFICE OF BAR COUNSEL (OBC) and the Standing Committee on Lawyer Discipline (COLD) have been working on several proposals for the disciplinary procedural rules designed to address the recommendations of the National Task Force on Lawyer Well-Being. Similarly, the Legal Ethics Committee, whose many functions include proposing changes to the Rules of Professional Conduct, has developed some initiatives of its own.

On August 14, 2017, the National Task Force on Lawyer Well-Being issued a report recommending significant changes to the philosophy behind lawyer regulation. The task force, consisting of entities within and outside the American Bar Association, concluded that regulators, through their actions, should meaningfully communicate that lawyer well-being is a priority.

The Lawyer Well-Being Report encourages us to:

“Transform the profession’s perception of regulators from police to partner.” In doing so, it offers several recommendations to ensure that the regulatory process “proactively” fosters a healthy legal community and provides resources to rehabilitate impaired lawyers.

Standing Committee on Lawyer Discipline

On Saturday, February 24, 2018, the Virginia State Bar Council (Council) approved by unanimous vote changes

to the disciplinary procedural rules developed and approved by COLD. Among the changes are clarification that a Disciplinary Record does not include administrative suspensions, such as impairment suspensions. This will remove the stigma of a disciplinary record from impairment, which addresses health concerns as opposed to attorney misconduct. Another rule change approved by Council clarifies that the burden of proof in all proceedings is clear and convincing evidence. Existing rules do not set forth the burden of proof in impairment cases. These changes represent the first of many steps toward implementing measures that emphasize lawyer well-being. On April 16, 2018, the Supreme Court of Virginia approved

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these changes, effective June 15, 2018.

At its meeting on March 7, 2018, COLD approved additional amendments to the procedural rules intended to address lawyer well-being. One proposal would facilitate “retirement with dignity” for a lawyer suffering from irreversible cognitive decline. It would allow transfer to the Retired/Disabled class of membership in lieu of an impairment suspension. The other proposal would allow the OBC to furnish confidential information to an approved Lawyer Assistance

Program in an attempt to accelerate help to lawyers who need it. The proposal is on point with the report of the National Task Force on Lawyer Well-Being, which recommends that when information indicating mental health or substance abuse issues emerges during investigation or prosecution of lawyer regulation matters, confidentiality rules should allow sharing of such information with lawyer assistance programs. On Thursday, June 14, Council approved the proposed amendments by unanimous vote. They are now under consideration at the Supreme Court of Virginia.

Standing Committee on Legal Ethics

Meanwhile, the Standing Committee on Legal Ethics studied the Well-

Being Report’s recommendations concerning lawyer competence and Rule 1.1 of the Rules of Professional Conduct. The report recommends amendments to

Rule 1.1 establishing that well-being goes hand in hand with providing competent representation to clients. Accordingly, the Committee proposed Comment [7] to Rule 1.1, which reads:

[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).

The purpose of the comment is to draw attention to well-being as it relates to competence to practice law. It is not intended to be punitive in nature. Rather, its intent is aspirational, much

like Comment 6 to Rule 1.1, which addresses continuing study and education. The Committee felt that the proposed comment best encompassed the very serious issues raised by the task force. At its meeting on June 14, 2018, Council approved the proposed comment, which is now under consideration at the

Supreme Court of Virginia.

At future meetings, COLD will continue to study the report of the National Task Force on Lawyer Well-Being with a view toward helping lawyers to become lawyers rather than simply creating disciplinary records.

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