



We're All in This Together: Risk Management Considerations for Law Firm Staff

ALA Right Now: A Virtual Conference
December 8, 2020

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Program Agenda



- The Aon Claims Experience
- Supervision Challenges
- Confidentiality and the Attorney-Client Privilege
- Social Media Issues
- Well-Being in the Legal Profession
- Conflict of Interest Trouble Spots
- Reporting Rogues

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LPL Claims Against Aon Law Firms (2004-2018)



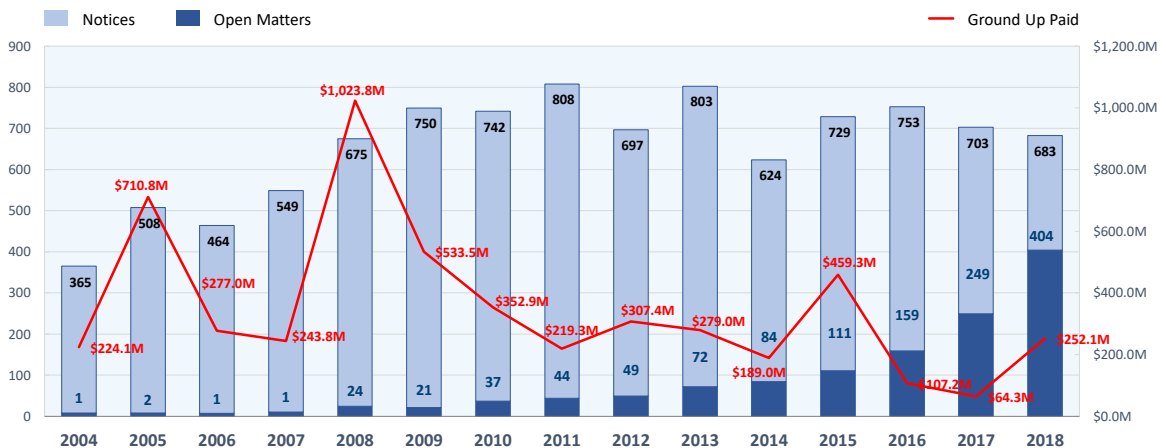
- 9,854 notifications
- 1,534 settlements or judgments paid
- \$3,681,713,515 indemnity payments made
- \$1,561,745,506 defense costs paid
- \$5,243,459,021 total ground up payments

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Ground Up Payments



2004-2018 Lawyers Professional Liability Claims Summary



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Practice Area



Area of Practice	Notice Count	% of Total Notices	GU Matters	% of GU Matters	GU Paid	% of GU Paid	Median GU Paid
Administrative Law	104	1.06%	28	1.07%	\$30.4M	0.58%	\$105.0k
Banking	167	1.70%	36	1.37%	\$39.2M	0.75%	\$187.5k
Bankruptcy	316	3.22%	81	3.08%	\$55.6M	1.07%	\$220.0k
Bond	83	0.85%	26	0.99%	\$12.9M	0.25%	\$180.5k
Corporate / Transactional	1845	18.81%	553	21.06%	\$2,036.6M	39.03%	\$295.8k
Employee Benefits & ERISA	87	0.89%	25	0.95%	\$75.7M	1.45%	\$242.3k
Employment & Labor	557	5.68%	121	4.61%	\$55.8M	1.07%	\$79.3k
Energy (e.g., oil and gas)	33	0.34%	8	0.30%	\$35.2M	0.68%	\$1,848.1k
Environmental	44	0.45%	14	0.53%	\$29.1M	0.56%	\$397.7k
Family Law	213	2.17%	47	1.79%	\$16.6M	0.32%	\$71.8k
Governmental Affairs / Lobbying	57	0.58%	30	1.14%	\$84.9M	1.63%	\$550.0k
Health Care	84	0.86%	26	0.99%	\$10.1M	0.19%	\$104.9k
Intellectual Property	902	9.20%	126	4.80%	\$141.8M	2.72%	\$222.5k
Litigation (Commercial)	2305	23.50%	652	24.83%	\$679.1M	13.01%	\$91.5k
Litigation (Criminal)	117	1.19%	19	0.72%	\$25.9M	0.50%	\$141.5k
Litigation (IP)	239	2.44%	65	2.48%	\$147.2M	2.82%	\$190.6k
Litigation (Personal Injury)	406	4.14%	110	4.19%	\$35.9M	0.69%	\$55.5k
Real Estate	1003	10.23%	276	10.51%	\$467.1M	8.95%	\$132.7k
Securities	261	2.66%	86	3.27%	\$707.7M	13.56%	\$702.2k
Tax	234	2.39%	84	3.20%	\$234.5M	4.49%	\$325.0k
Trusts & Estates	750	7.65%	213	8.11%	\$297.2M	5.69%	\$152.0k
	9,807		2,626		\$5,218.4M		\$156.3k

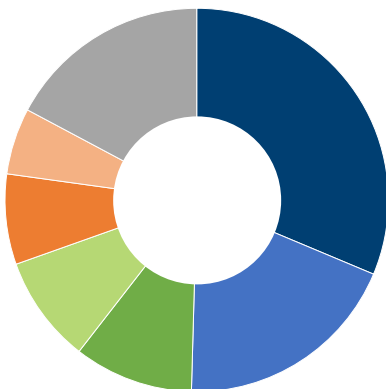
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Practice Area | Notice Count (2004-2018)



2004-2018 Lawyers Professional Liability Claims Summary



- Commercial Litigation..... **24%**
- Corporate / Transactional..... **19%**
- Real Estate..... **10%**
- Intellectual Property..... **9%**
- Trusts & Estates..... **8%**
- Employment & Labor..... **6%**
- Other..... **24%**

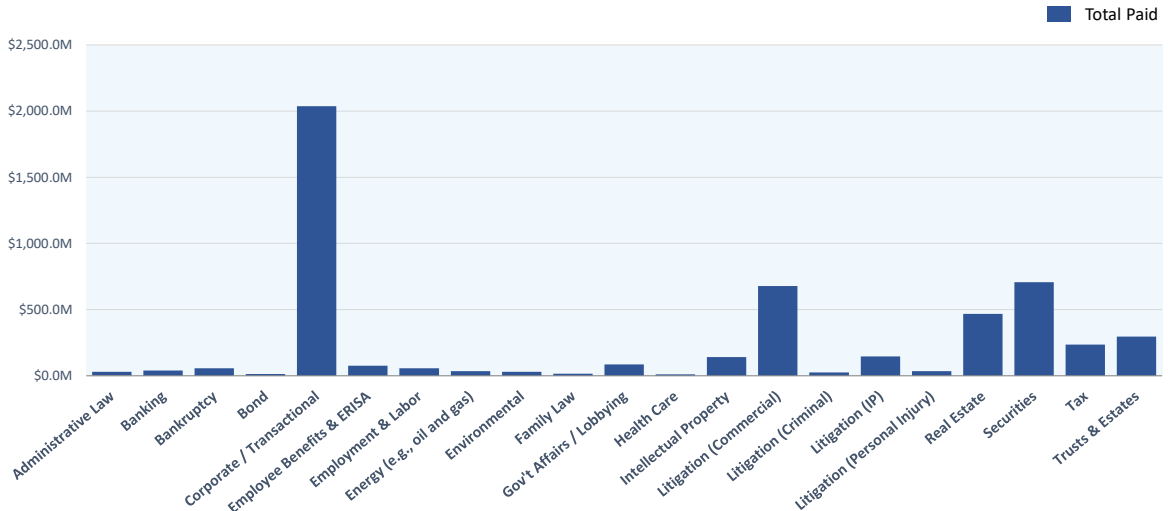
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Total Ground Up Paid by Area of Practice



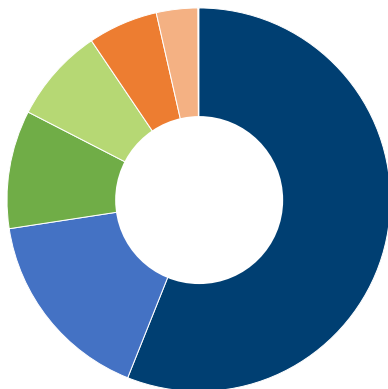
2004-2018 Lawyers Professional Liability Claims Summary



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Cause of Loss | Notice Count (2004-2018)



● Mistakes.....	56%
● Fraud and Misrepresentation.....	17%
● Dishonest Clients.....	10%
● Conflicts of Interest.....	8%
● Malicious Prosecution.....	6%
● Dishonest Lawyer.....	3%
● Impaired Lawyer.....	0%

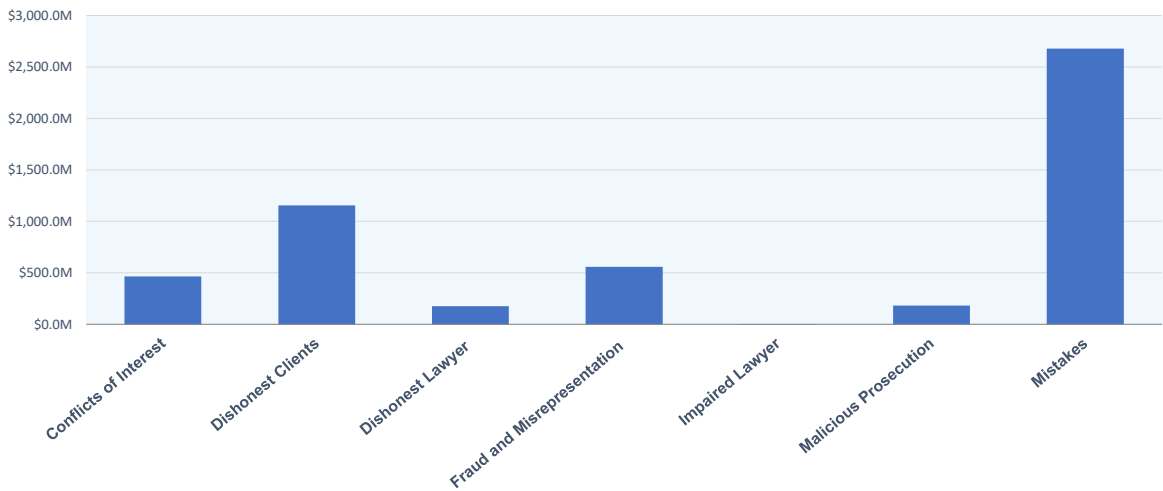
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Total Ground Up Paid – Conduct Causing the Loss



2004-2018 Lawyers Professional Liability Claims Summary



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Supervision Challenges



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Lawyers' Supervisory Duties Over Staff



- Staff members are not subject to discipline for violating the professional conduct rules applicable to lawyers.
- Rather, the rules require lawyers who have direct supervisory authority over a staff member to ensure that the staff member's conduct is compatible with the lawyers' professional obligations.
- A lawyer's genuine belief in a staff member's competence, honesty, and trustworthiness does not justify a lawyer's failure to supervise the staff member's conduct.
- In short, while law firm staff must conform their behavior to the same ethical obligations as lawyers, it is lawyers' ongoing obligation to inform, educate, and supervise them.

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Supervision: Remote and Required



- Any lawyer with direct supervisory authority over other lawyers and nonlegal staff must make reasonable efforts to ensure that those individuals act in conformity with the Rules of Professional Conduct. Model Rule 5.1(b) and 5.3(b).
- Titles do not define supervisory authority: very junior attorneys can have direct supervisory authority over other attorneys and nonlegal staff; partners can be subject to supervision by other partners or attorneys.
- Supervision is required regardless of whether lawyers can bill for the associated time.



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Virtual Supervision



Set **ground rules for communication routines**, including which medium to use for each kind of communication or collaboration



Describe assignments and timelines with **clarity** and detail how they fit in the overall strategy



Hold regularly scheduled **team video conference meetings** and even more frequent (but shorter duration) **one-on-one calls** with each team member



Review time entries to monitor team members' **performance and productivity** – ensure the right tasks are being done at the right time by the right people

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Tips to Avoid or Mitigate Mistakes



- “Mistakes” account for 56% of all Aon client notifications to insurers
- Extra pairs of eyes
- Proofread on paper
- Docketing and calendaring
- Checklists

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Confidentiality and the Attorney-Client Privilege



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Confidentiality In a Nutshell



- Appreciate your broad obligation to maintain the confidentiality of all information relating to a client's representation.
- This includes any information that a client divulges, or even the fact that someone is a client.
- It does not matter that the information is available in the public domain.
- It does not matter that you are speaking to one of your closest friends or relatives.
- There are exceptions to the duty of confidentiality, including when the client has expressly or impliedly consented to the disclosure.
- Your duty of confidentiality continues after the matter is closed, and continues after you leave the firm.

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Confidentiality Tips



- Don't discuss business outside the office.
- Never discuss a case with another client.
- Refer all media inquiries to the lead lawyer on the matter.
- Be wary when visitors want to use an attorney's office to work or make calls. Make sure no files or documents are in sight.
- Take care with e-mail. Address it properly. Beware the auto complete function for addressees. Be sure to attach the right documents.
- Watch out for the "reply to all" button. It is the Devil's handiwork.
- Be careful when disposing of confidential papers, including drafts or duplicates. Use shredders or other secure disposal methods.

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The Privilege in a Nutshell



- The attorney-client privilege protects confidential communications made for the purpose of obtaining or providing legal assistance.
- The privilege covers not only confidential communications from the client to the lawyer, but also confidential communications from the lawyer to the client.
- The privilege attaches to initial consultations between lawyers and prospective clients, even if the client does not ultimately retain the attorney.
- The privilege generally extends to staff members who assist lawyers in rendering legal services (i.e., paralegals, legal assistants, file clerks, office managers, and similar law-office staff members).
 - Thus, for example, the privilege will cover direct communications between a client and a paralegal assisting a lawyer in representing the client.

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Waiving the Privilege



- The attorney-client privilege is fragile, and easily lost.
- Law firm staff members play a key role in avoiding waiver by assuring that privileged information is not intentionally or inadvertently shared with those outside the attorney-client privilege.
- Clients' agents, family members, etc., are generally outside the privilege.
 - For instance, one court found that Martha Stewart waived the attorney-client privilege by forwarding a privileged e-mail (which she had sent to her lawyer) to her daughter Alexis.

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Lessons From E-mail Blasts And Drafts

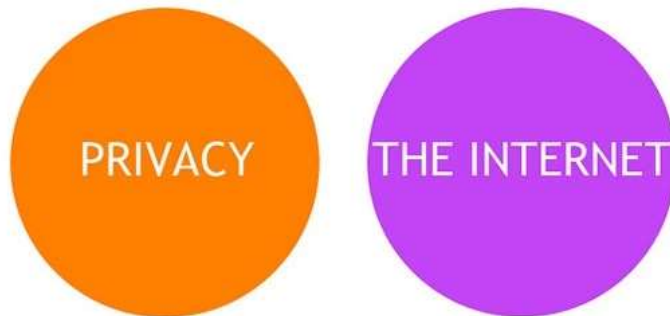


- Clearly state that communication is for legal advice
- Include or refer to facts provided by client
- Don't mix legal and business advice
- Use "privileged" label appropriately
- Clients should email lawyers directly (not cc)
- Copy non-lawyers only with a good legal reason
- Respond to – don't ignore – client email
- Assume that emails and drafts to multiple recipients **will not** be protected by privilege or work product

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Social Media Issues



A HELPFUL VENN DIAGRAM

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Tweeting Off Tune



Atty Scolded For '#Killinnazis' Exits Pa. Xarelto Cases

By Dan Fickel

Share via: [icons]

12/20/18 (February 5, 2018, 3:53 PM EDT) -- A Florida attorney who was linked by a Philadelphia judge last month for posting extremist photos on social media with the inflammatory hashtag "#Killinnazis" will not be involved in an upcoming trial over injuries allegedly caused by Bayer AG's blood thinner Xarelto, according to an order disclosed Friday.

How A Mysterious Tweet Exposed JK Rowling As The Author Of 'The Cuckoo's Calling'

2018-08-07 10:10:11 by [author] Published in [category]



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Look Before You Tweet



- In 2012, the Kansas Supreme Court held an oral argument for a disciplinary proceeding regarding former Kansas Attorney General Phill Kline.
- Sarah Peterson Herr, a research attorney with the Kansas Court of Appeals, attended the oral argument.
- As the hearing progressed, Herr sent out a series of tweets through her personal Twitter account:
 - “Holy balls, There are literally 15 cops here for the Phil [sic] Kline case today. Thus I actually wore my badge.”
 - “You can watch that naughty naughty boy, Mr. Kilein [sic], live!”
 - “Why is Phil Klein [sic] smiling? There is nothing to smile about, douchebag [sic].”
 - “I predict that he will be disbarred for a period not less than 7 years.”

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Herr's Public Apology



- “I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also communicating with the public at large, which was not appropriate for someone who works for the court system.”
- “I apologize that because the comments were made on Twitter – and thus public – that they were perceived as a reflection on the Kansas courts.”
- Less than a week after the tweets, the Kansas judicial branch terminated Herr.



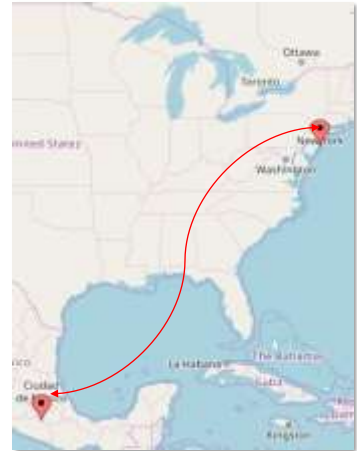
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The Power of Instagram



- A lawyer informed a federal judge that she missed a filing deadline because she was “forced to leave the country due to a family emergency in Mexico City.”
- Opposing counsel, however, presented pictures from the lawyer’s public Instagram account showing that the lawyer was celebrating Thanksgiving in New York City the day after missing the deadline.
- Finding that the lawyer’s actions constituted bad faith, the judge imposed a \$10,000 sanction. The lawyer subsequently withdrew as counsel of record.



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A Client’s Facebook Posting Blunder



- Patrick Snay, once the headmaster at Gulliver Schools, sued his former employer for age discrimination and retaliation.
- The parties settled for \$150,000 and agreed to a confidentiality provision prohibiting Snay from discussing the case or settlement with anyone except “his attorneys or other professional advisors or spouse.”
- Just four days later, the school notified Snay that he had materially breached the provision based on this post from his college-age daughter’s Facebook page:

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The Result



**“Mama and Papa Snay won the case against Gulliver.
Gulliver is now officially paying for my vacation to Europe this summer.
SUCK IT.”**

- The post went out to about 1200 of the daughter’s Facebook friends, many of whom were either current or past Gulliver students.
- The Court ruled that Snay could not enforce the settlement agreement.

Gulliver Sch., Inc. v. Snay,
127 So.3d 1045 (Fla. Dist. Ct. App. 2014).

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If You Have a Social Media Presence (or Blog) . . .



- **It lasts forever.** Information you share on-line may be seen by wide and unexpected or unintended audiences, may exist in perpetuity, may be impossible to retrieve or eradicate, and may be forwarded or shared endlessly.
- **It can be imputed to the firm, regardless of your intent.** Posting some types of information on-line may be misleading (even if unintentionally), and may jeopardize your image or reputation and, by extension, the firm’s image and reputation.
- **It must not reveal confidential client information.** And think hard before revealing any information at all relating to a client’s representation.
- **You should know how your clients feel about issues on which you blog.** Beware of positional or issue conflicts.
- **You should be careful.** Avoid text that could be considered defamatory. Qualify statements appropriately.

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The Streisand Effect



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Responding to Negative Social Media Reviews



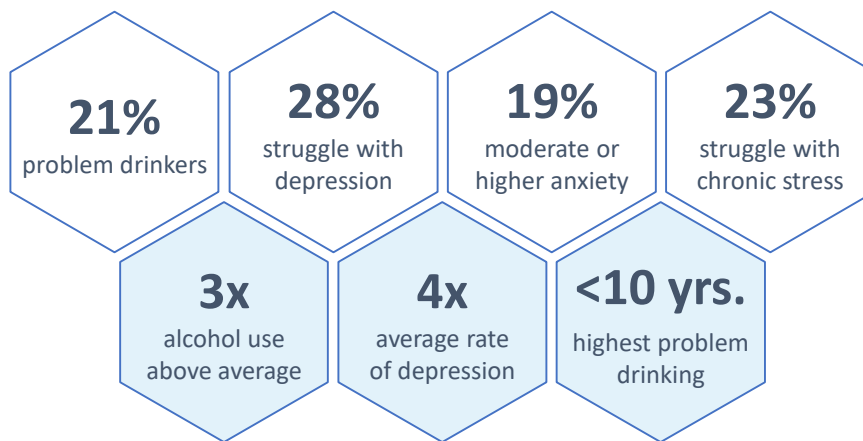
A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

PA Bar Formal Op. 2014-200, Lawyer's Response to Client's Negative Online Review (Jul. 4, 2014)

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Wellbeing in the Legal Profession



Source: February 2016 ABA/Hazelden Betty Ford Foundation Study

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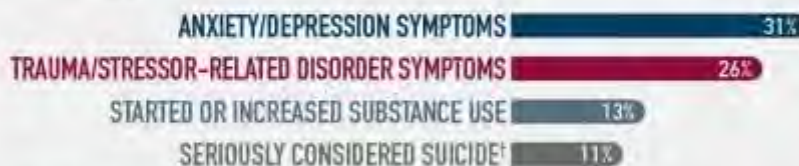
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The Pandemic's Toll on Mental Health



Figure. Mental Health Symptoms During COVID

During late June, 40% of US adults reported struggling with mental health or substance use*



*Based on a survey of US adults aged ≥18 years during June 24-30, 2020

†In the 30 days prior to survey

SOURCE: CDC.gov

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Steps Towards Well-Being



Firm Culture



- Set the tone
- Enforce policies consistently
- Make supervision meaningful
- Recognize good behavior
- Respond to concerns promptly

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Training & Education



- Recent Studies
- Warning Signs
 - Read the MAP
 - Why signs are missed
- Ethical Obligations

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Policies & Procedures



- Designate trusted advisor to receive reports of suspected impairment
- Pledge reports are confidential, unless disclosure is needed
- Guarantee good faith reporting cannot be grounds for discipline
- Stress it is never appropriate to protect an impaired lawyer
- Provide contact to lawyers' assistance program
- Provide regular policy reminders

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Response Plan



- Convince the employee to seek assistance or treatment
- Take reasonable steps to protect the involved clients' interests and ensure the impaired lawyer's compliance with his or her ethical obligations
- Consult an employment attorney

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Warning Signs of Impairment – Read the Map



Mood
Apppearance
Performance

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Specific Warning Signs of Impairment



1. Gradual deterioration of personal appearance
2. Unpredictable emotional reactions, rapid mood swings, overreacts to events, distorts truth, shifts blame to others, or easily becomes irritable or impatient
3. Exhibits sudden weight loss or gain, or loss of appetite
4. Feelings of sadness, hopelessness, worthlessness, inappropriate guilt, or recurrent thoughts of death or suicide
5. Excessive anxiety, worry, or restlessness
6. Muscle tension, back pain, headaches, nausea, or vague medical problems
7. Fatigue, loss of energy, or lack of interest in once pleasurable activities
8. Insomnia or sleeping too much
9. Appears under the influence (slurred speech, unsteady feet, bloodshot eyes, or smells of alcohol)
10. Regularly misses or appears late for meetings or court related proceedings
11. Drastic changes in billable hours compared to past performance (sharp decline or "living at the office")
12. Routinely arrives late and/or leaves early
13. Regularly returns late or fails to return from lunch
14. Frequent days off, unexplained absences, or unable to be located
15. Gradual decline in overall quality of work

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Specific Warning Signs of Impairment



16. Unprepared or poorly prepared
17. Improbable excuses for mistakes or poor performance
18. Procrastinates, last-minute requests for extension, or patterns of missed deadlines
19. Poor concentration, inattention, or judgment
20. Confusion, mixing up details of cases, or inexplicable behavior
21. Difficulty remembering details, completing familiar tasks, tracking conversation, or general difficulty with problem solving or recall
22. Neglects email or phone messages; voicemail full
23. Clients complain about performance, accessibility, or lack of communication
24. Financial or credit problems, including writing bad checks, failing to make timely tax filings and payments, judgments or bankruptcy
25. Personal use of trust account funds, or other trust account violations
26. Marital infidelity, legal separation, divorce, or pattern of family crises
27. Withdraws from fellow lawyers, staff, friends, and family
28. Arrests (e.g., DUI, domestic violence), warnings from police, or other legal problems
29. Frequent accidents, injuries, or illness

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Reasons Why Signs Are Often Missed



The Halo Effect

- Our positive impression of a person will affect how we evaluate behaviors or other aspects of their character.

Confirmation Bias

- We look to confirm what we already believe. We often use rationalization or assign a more positive explanation to the warning signs.

Masks and Smokescreens

- Lawyers compensate well or are especially adept at hiding their addiction.

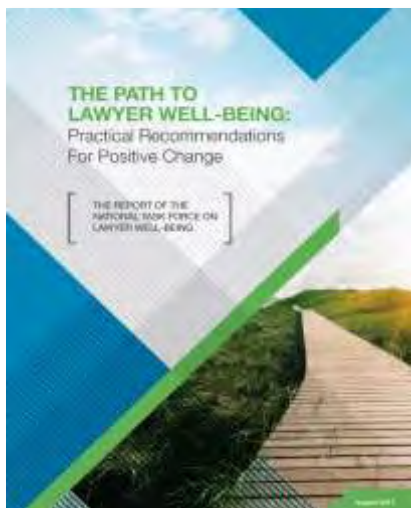
Diffusion of Responsibility

- If you are not close to the individual personally or professionally, you may feel like others probably know more about the situation or that others have probably intervened.

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Well-Being Resources



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Conflict of Interest Trouble Spots



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Recurring Challenges



- Providing incorrect or incomplete information on client intake forms for new matters.
- Failing to send a client's outside counsel guidelines to the firm's designated reviewer.
- Addressing client identity and the scope of representation in the engagement agreement.
- New parties enter the picture, but the lawyer forgets to run new conflicts checks.
- At the conclusion of a representation, making the client a *former* client for conflict purposes.

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More on Conflicts of Interest



- Lawyers owe their clients a duty of loyalty and must exercise independent professional judgment in handling client matters.
- If a lawyer accepts a matter in which you believe your firm has a conflict of interest because of:
 - (1) a prior or existing relationship (whether business or personal) that you have with one of the parties or key participants in the matter;
 - (2) having previously worked on a matter involving one of the parties or key participants at another law firm; or
 - (3) your strongly-held personal views concerning the subject matter of the representation,then you should promptly disclose the conflict of interest to the lawyer or to another lawyer at the firm.
- In the vast majority of cases, the firm will simply screen you from participating in the representation, or from otherwise having access to the client's file on the matter.

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Reporting Rogues



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Watching Over, Watching Out



- Mishandling client funds
 - Misappropriating firm funds
 - Fraudulent billing practices
 - Neglect of deadlines
 - Unreported conflicts of interest
- Vendor fraud
 - Improper disclosure of confidential information
 - Impairment issues
 - Insider trading
 - Moonlighting



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Final Thoughts



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