

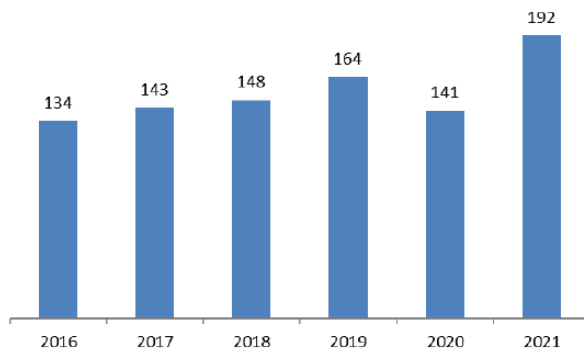
MENTAL HEALTH IN THE LEGAL PROFESSION

Anthony M. Kennedy Inn of Court
Team 2 Presentation
October 18, 2022

Lawyer Assistance Program (LAP) 2021 Annual Report

- The number of new intakes totaled 192, an increase of 36 percent compared to the 141 new intakes in 2020. This is the largest one-year percentage increase in the LAP's history.
- There was an average of 165 active participants enrolled in the LAP over the course of 2021.
- Of the 174 cases closed, 34 percent were closed with participants meeting their stated program goals, 9 percent were not admitted, and only one participant was terminated from the LAP in 2021.
- Almost half (46 percent) of participants presented with concerns about both a substance use and a mental health problem at the time of intake. Twenty-two percent of participants presented with symptoms of a substance use disorder and 32 percent enrolled for solely mental health concerns.
- The LAP offers free, one-hour presentations for law schools, law firms, bar associations, government agencies, and other organizations.

LAP Intakes: 2016–2021



Mandatory LAP and Voluntary LAP Intakes: 2020 – 2021



Lawyer Assistance Program 2021 Annual Report

<https://www.calbar.ca.gov/Portals/0/documents/reports/2022/2021-Lawyer-Assistance-Program-Annual-Report.pdf>

The State Bar of California's LAP does not provide legal advice, but can discuss the problem, provide a free and confidential professional mental health assessment, and provide direction to the caller as to available services. LAP also offers professional monitoring to satisfy specific monitoring or verification requirements. A Support Lawyer Assistance Program is also offered for lawyers who are interested in weekly group meetings and the support of a qualified medical professional. See

<http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program>;
<https://www.calbar.ca.gov/Attorneys/For-Attorneys/Lawyer-Assistance-Program>

California Rules of Professional Responsibility

“Lawyers, judges and law students are faced with an increasingly competitive and stressful profession. Studies show that substance use, addiction and mental disorders, including depression and thoughts of suicide—often unrecognized—are at shockingly high rates. As a consequence the National Task Force on Lawyer Well-being, under the aegis of CoLAP (the ABA Commission on Lawyer Assistance programs) has been formed to promote nationwide awareness, recognition and treatment. This Task Force deserves the strong support of every lawyer and bar association.”¹

I. Competence and Diligence

A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence or diligence. Rule 1.1(a).

“Competence” means to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of the service in question. Rule 1.1(b).²

Rule 1.0.1(h) defines “reasonably” when used in relation to conduct by a lawyer as the conduct of a reasonably prudent and competent lawyer.

Competence specifically includes both mental and emotional components. Rule 1.1(a)(ii). “Thus, if Attorney’s mental or emotional state prevents her from performing an objective evaluation of her client’s legal position, providing unbiased advice to her client, or performing her legal representation according to her client’s directions, then Attorney would violate the duty of competence.” Cal. State Bar Formal Opn. No. 2003-162 at p. 3 (citing *Blanton v. Womancare* (1985) 38 Cal.3d 396, 407-408; *Considine v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 765; Cal. State Bar Formal Opn. No. 198477; and Los Angeles County Bar Assn. Formal Opn. No. 504 (2001)).

Whether the lawyer’s performance is due to impairment or personal problems, however, it does not excuse failing to meet obligations to the client. “[E]ven in the face of serious personal problems, an attorney has a professional responsibility to fulfill his duties to his clients or to make appropriate arrangements to protect his clients’ interests.” *Smith v. State Bar* (1985) 38 Cal.3d 525, 540; *Gary v. State Bar* (1988) 44 Cal.3d 820, 824 – alcohol problem; *Snyder v. State Bar* (1976) 18 Cal.3d 286, 293 – mental and emotional strain. However, serious personal problems, including marital difficulties or financial pressures, can interfere with the attorney’s performance of his or her professional responsibilities and result in a violation of the lawyer’s duty of competence under rule 1.1, and could mandate withdrawal under rule 1.16(a)(3).

¹ David R. Brink (American Bar Association President 1981-82) passed away in July 2017 at the age of 97. He tirelessly supported the work of lawyer assistance programs across the nation, and was a beacon of hope in the legal profession for those seeking recovery.

² ABA Model Rule 1.3, Comment [5], which was not adopted by California, states that attorney competence includes anticipating events or circumstances that may adversely affect client representation. By planning ahead for the orderly disposition of his or her law practice, an attorney can ensure that clients will continue to be represented without significant interruption in the event the attorney dies or becomes incapacitated.

II. Termination of Representation

A lawyer shall not continue to represent a client if the lawyer: (1) “knows or reasonably should know” that the lawyer’s actions during the representation of a client *will* result in violation the rules or the State Bar Act (rule 1.16(a)(2)); and/or (2) “the lawyer’s mental or physical condition renders it *unreasonably difficult* to carry out the representation effectively.” (Rule 1.16(a)(3), italics added.) Under either of these circumstances, the lawyer must withdraw from representing the client in accordance with rule 1.16(a).

A lawyer may, but is not required to, withdraw from representing a client if the lawyer: (1) believes “the continuation of the representation is *likely* to result in a violation of [the rules] or the State Bar Act” (rule 1.16(b)(9)); and/or (2) “the lawyer’s mental condition renders it *difficult* for the lawyer to carry out the representation effectively” (rule 1.16(b)(8)). (Italics added.) Thus, in situations where a lawyer has a mental condition that actually or potentially impairs the provision of legal services, the distinction between mandatory and permissive withdrawal is whether the impaired lawyer will or is likely to violate the rules or the State Bar Act,³ as well as the degree of difficulty the lawyer faces in continuing the representation.⁴

III. Responsibilities of Other Lawyers

When an impaired lawyer is “unable or unwilling to deal with the consequences of his [or her] impairment,” firm lawyers and the impaired lawyer’s supervisors who know of the impaired lawyer’s conduct have an obligation to take steps to protect the client and ensure that the impaired lawyer complies with the rules and the State Bar Act. ABA Formal Ethics Opn. No. 03429; 19 Law. Man. Prof. Conduct 380 (2003). The other lawyers owe responsibilities to the affected client, the impaired lawyer, and the firm. Although a lawyer’s paramount obligation is to take steps to protect the interests of the client(s), other ethical obligations cannot be ignored. *Id.* at p. 4.

Each lawyer in a firm has an independent ethical obligation to protect the interests of the firm’s clients. Generally, when a client retains a law firm, the client’s relationship extends to all attorneys in the firm.⁵ “Every attorney, including an associate . . . , must exercise professional judgment in the best interest of his clients and must take steps which are necessary to assure competent representation for his client[.]” Los

³ Rule 1.16(a)(2) imposes a duty to withdraw where there is a prospective violation of another rule of professional conduct (e.g., rule against representing conflicting interests) or a provision of the State Bar Act. This rule does not mandate withdrawal for past violations (although past violations may result in disqualification by court order). Withdrawal is mandatory only where continued employment “will result” in ethical violations (i.e., where it is reasonably clear that the rules will be violated). Withdrawal is permissive, not mandatory, where such violations are merely “likely” (rule 1.16(b)(9)). Tuft et. al, Cal. Practice Guide: Professional Responsibility (The Rutter Group 2019) Ch. 10-B.

⁴ An attorney who is physically or mentally unable to serve the client effectively must withdraw. (Rule of Professional Conduct 1.16(a)(3).) These unfortunate situations range from alcohol and drug problems to terminal illnesses.” Younger, *Younger on California Motions* (2d. ed. 2019) § 17:4.

⁵ See Cal. State Bar Formal Opn. No. 2014-190 [accepting “the basic premise that all attorneys in a law firm owe duties – including ethical duties – to each of the firm’s clients. What will differ, however, among attorneys is what steps those attorneys must take to discharge those duties.”] (citing Cal. State Bar Formal Opn. No. 1981-64 [opining that all attorneys employed by a legal services program owe identical professional responsibilities to clients of the program] and several California cases in the legal malpractice context).

Angeles County Bar Assn. Formal. Opn. No. 383 (1979). The duties discussed herein are generally limited to lawyers with knowledge of the impaired lawyer's misconduct, but managerial lawyers are also responsible for ensuring that the firm has policies and procedures in place giving reasonable assurance that all lawyers in the firm comply with the rules and the State Bar Act. An impaired lawyer's failure to fulfill ethical responsibilities and/or take appropriate action to protect a client does not excuse other lawyers who know of the impaired lawyer's conduct and relevant facts from fulfilling their own professional responsibilities, including taking reasonable remedial measures to protect the client.

Multiple factors may affect the duties of lawyers to act in the face of a colleague's impairment, including, but not limited to: the impaired lawyer's actions or inactions; the nature of the client matter; the urgency of the situation; the nature, severity and permanence of the lawyer's impairment; the size of the firm and the resources available; and the role within the firm of each non-impaired lawyer who knows of the impaired lawyer's actions and the relevant circumstances. Those obligations are clearest with respect to subordinate and managerial lawyers with knowledge of the impaired lawyer's conduct.⁶

Reasonable remedial action should be determined on a case-by-case basis, considering the nature and seriousness of the misconduct and the nature and immediacy of its harm. Rule 5.1, Comment [6]. Remedial actions may include notifying another lawyer within the firm who has supervisory or managerial responsibilities, confronting the impaired lawyer, notifying the client, ending impaired lawyer's representation of the client or adjusting the impaired lawyer's responsibilities as appropriate under the rules and the State Bar Act, and referring the client to new counsel to handle the matter. See rules 1.4, 1.4.1, 1.7 and 1.16; and Business and Professions Code sections 6068(m) and 6103.5. The details of these forms of remediation are discussed more fully below.

Judges' Well-Being

- **Meaning and Purpose Are Key Contributors to Well-Being:**
 - Meaningfulness serves as a source of resilience, as captured in the famous Nietzsche quote that, "He who has a why to live can bear almost any how."
- **Meaningful Work (Or Its Absence) Drives Work Engagement (Or Burnout)**
 - Meaningfulness is created (or not) in an ongoing dynamic process. It is not akin to an Easter egg hunt. We are not done once we "find" the prize. Rather, every day, we have interactions and experiences that can shape our experience of meaningfulness. Additionally, cultivating meaningful work is not a solo activity—it is influenced significantly by other people and by our work environments
 - Burnout is not necessarily the consequence of working hard or generic workplace stress. Instead, one scholar has argued that "the root cause of burnout lies in people's need to believe that their lives are meaningful, that the things they do are useful and important."
- **Cultivating Meaningfulness and Well-Being Through Need Satisfaction**

⁶ California did not adopt ABA Model Rule 8.3 or any rule which requires a lawyer to report another lawyer to the State Bar of California if the lawyer knows 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 as a lawyer in other respects. Therefore, California lawyers may, but are not required to, report another lawyer's misconduct to the State Bar of California. San Diego County Bar Assn. Formal Opn. No. 1992-2; Los Angeles County Bar Assn. Formal Opn. No. 440 (1986) [attorney should consider seriousness of other lawyer's offense and potential impact on public and the profession].

(1) Invest attention more deliberately into well-being; (2) Enhance self-congruence through job crafting; (3) Root out incivility; (4) Develop high-quality relationships; (5) Set meaningful goals and track progress; (6) Participate in personal development activities; (7) Cultivate feelings of positive social impact; and (8) Increase benevolence during everyday contacts with beneficiaries.

▪ **Foster A Need-Supporting Workplace Culture Through Positive Leadership**

(1) Become a Transformational Leader; (2) Shape the experience of Meaningful work for others; (3) Foster a sense of belonging; (4) Organize judicial round tables; (5) Highlight moral exemplars; and (6) Be sincere.

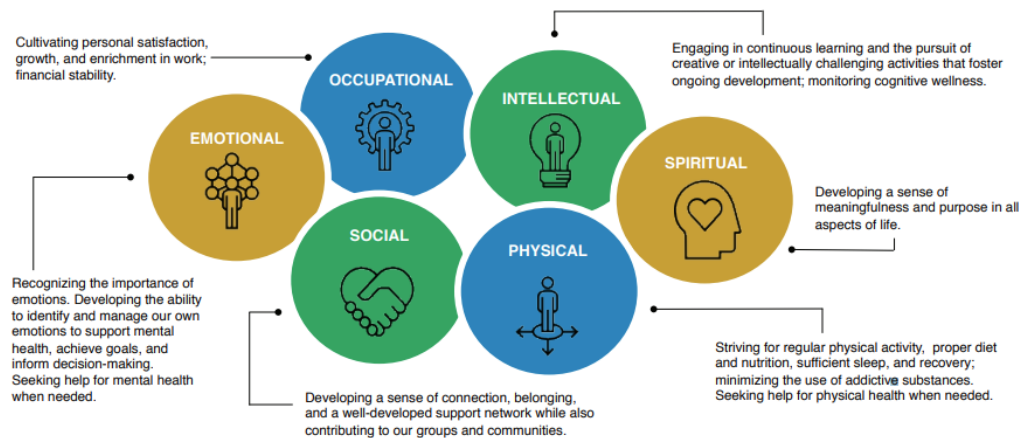
Judge's Well-Being and the Importance of Meaningful Work

<https://amjudges.org/publications/courtrv/cr54-2/CR54-2Brafford.pdf>

Lawyer Well-Being

Defining Lawyer Well-Being

A continuous process in which lawyers strive for thriving in each dimension of their lives:



Additional Resources:

- Lawyer Assistance Program: <https://www.calbar.ca.gov/Attorneys/For-Attorneys/Lawyer-Assistance-Program>
- State Bar of California Ethics Hotline: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Hotline>.
- California Rules of Professional Conduct: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules>
- *Ethical dilemmas emerge when attorneys keep mental health struggles private* <https://www.abajournal.com/news/article/Ethical-dilemmas-emerge-when-attorneys-keep-mental-health-struggles-private>
- *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, the 2017 report of the National Task Force on Lawyer Well-Being. <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>
- *People, Professionals, and Profit Centers: The Connection between Lawyer Well-Being and Employer Values* <https://www.mdpi.com/2076-328X/12/6/177/htm>
- *What's Working Well in Law Firm Well-Being Programs?* https://lawyerwellbeing.net/wp-content/uploads/2021/05/Well-Being-Firm-Profiles_4-2021.pdf
- *State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2021-206* <https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/Formal-Opinion-No-2021-206-Colleague-Impairment.pdf>