Richland County Bar Association

Annual Ethics CLE Seminar

Friday, October 26, 2018

University of South Carolina School of Law

Course # 188363

Richland County Bar Association – Annual Ethics CLE
Friday, October 26, 2018

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AGENDA

8:00 – 8:30 am	Registration
8:30 – 8:45 am	Introduction Judge H. Bruce Williams
8:45 – 9:30 am	Updates on Ethics Opinions from 2017 – 2018 Michael J. Virzi, Esq.
9:30 – 10:15 am	Keeping Client Information Confidential in a Digital World Childs Cantey Thrasher, Esq. & Willis Cantey, Cantey Tech
10:15 – 10:20 am	South Carolina Bar Foundation Megan Sweeney Seiner, J.D., Executive Director
10:20 – 10:30 am	Break
10:30 – 11:00 am	Ethics in Mediation Ernie Lawhorne
11:00 – 12:00 pm	My Third Life: A Lawyer Looks Back on Depression Graham L. Newman, Esq.

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Speaker Biographies

Judge H. Bruce Williams was born in Columbia, South Carolina in 1956. He attended public schools in Columbia and received a bachelor's degree in English and Government in 1978 from Wofford College. While at Wofford, Judge Williams served as President of the Student Body and the student representative to the Board of Trustees. He was selected to the Blue Key Honor Society and the Senior Order of Gnomes. In 1982, he graduated from the University of South Carolina School of Law. After graduation from law school, Judge Williams was in private practice until 1995. During that time, he served as a part-time Associate Town Judge in Irmo, South Carolina for four years. In addition, he served two terms on the Board of the South Carolina Trial Lawyers Association for the Family Law Section.

Judge Williams was elected to the Fifth Judicial District Family Court in 1995. During his tenure as a family court judge, Judge Williams served as president of the South Carolina Conference of Family Court Judges as well as secretary-treasurer. He has presided over the Richland County Juvenile Drug Court since its inception in January 1997. In 1998 at the Governor's Conference on Youth Crime, he was awarded the Program Achievement Award for Juvenile Drug Court. Judge Williams also served as President of the Columbia Kiwanis Club. While a member of the Kiwanis Club, he volunteered as the advisor for the Columbia High School Key Club (1983 - 1995). In November 2011, the Columbia Urban League presented Judge Williams with the distinguished Ethel M. Bolden Community Service Award.

He received the Richland County Bar Association Matthew J. Perry Civility Award in November 2012. Since 2012, Judge Williams has been an adjunct professor at the USC School of Law. In addition, he has served as faculty for numerous judicial and bar sponsored continuing legal education seminars and programs. Judge Williams was elected to the South Carolina Court of Appeals in May 2004. He is a member of the South Carolina Bar and is admitted to practice in all South Carolina courts as well as the U.S. District Court for South Carolina. He and his wife reside in Columbia and have two daughters. He enjoys golfing, cooking, and experiencing great barbeque from around the country.

Michael Virzi teaches Legal Writing and Professional Responsibility at the University of South Carolina School of Law, where he has also taught Fundamentals of Law Practice and Professionalism and Advanced Legal Writing. He has a solo practice in Columbia, focusing on lawyer ethics, discipline, and malpractice for the past sixteen years. Prior to that, Michael served for three years as an Assistant Disciplinary Counsel in the South Carolina Supreme Court's Office of Disciplinary Counsel. He is currently the Chair of the Bar's Professional Responsibility Committee and a Past Chair of the Ethics Advisory Committees. Michael is also the Ethics Chair for the South Carolina Association for Justice and is a frequent CLE speaker and law school guest lecturer on the topics of ethics, malpractice, and lawyer discipline.

He is a member of the ABA Center for Professional Responsibility, the Association of Professional Responsibility Lawyers, the South Carolina Association of Ethics Counsel, and Phi Delta Phi. He graduated *cum laude* from the University of South Carolina School of Law in 2000, after which he practiced primarily business litigation for several years before joining the Office of Disciplinary Counsel.

Childs Thrasher opened the Law Office of Childs Cantey Thrasher, LLC in November 2017, where she focuses on business and commercial disputes and contracts, as well as environmental law. Prior to hanging out her own shingle, Childs was Of Counsel with a regional law firm after serving as an Assistant Attorney General for the State of South Carolina. A graduate of Washington and Lee University and USC School of Law, Childs has extensive experience litigating matters before state and federal courts and currently serves as a Commissioner on the South Carolina Ethics Commission as appointed by Governor Henry McMaster.

Willis Cantey is President and Co-Founder of Cantey Tech Consulting, an IT solutions and consulting firm located in Charleston, South Carolina. A graduate of the University of the South at Sewanee and the Masters of International Business Program at USC, Wills has worked in technology for more than 20 years and founded Cantey Tech Consulting in 2007. Cantey Tech provides IT solutions and consulting to clients in a myriad of industries including Construction, Healthcare, Legal, Manufacturing, Investing, Information Technology, Pharmaceutical, Professional Services, Railways, Real Estate, Retail, Restaurants, Utilities, Educational Institutions, and Government Entities.

Megan Seiner is the Executive Director of the South Carolina Bar Foundation. She is originally from New Jersey and received her JD from Rutgers University Law School. Megan practiced law for the U.S. Patent and Trademark Office and the Federal Emergency Management Agency (FEMA) before relocating to SC. She worked for USC School of Law in the Offices of Career Services, Student Affairs, and served as the Director of Externships and Special Academic Programs before joining the Bar Foundation in 2016.

Ernie Lawhorne is a 1979 graduate of the University of South Carolina School of Law and initially clerked for Circuit Court Judge James B. Stephen. Thereafter he returned to Columbia and practiced law for 35 years at Ellis, Lawhorne & Sims, which recently merged with the southeast law firm of Adams & Reese. While initially engaged in handling all types of civil litigation, he eventually focused his legal practice in the area of workers compensation.

Ernie was AV rated by Martindale-Hubbell most of his career, was voted among the Midlands best attorneys and was recognized as a South Carolina Super Lawyer. After retiring from the litigation practice 5 years ago, he is now a certified mediator and devotes his entire time to mediating cases.

Graham Newman is an attorney with Chappell, Smith & Arden, P.A. and practices in the areas of class actions and mass torts. Graham's work has focused on commercial class actions, contractual litigation, insurance bad faith, and products liability in both state and federal court. In addition to practicing law, Graham teaches an undergraduate legal course through the University of South Carolina Honors College and serves on several boards and committees dedicated to the improvement of the judicial system. He is a graduate of the University of South Carolina (B.A. in History and English) and the University of South Carolina School of Law. He is most proud, however, of being the dad of his eight year-old son, John Walter.

2018 Ethics Year-in-Review

By Michael Virzi

for the RCBA's Free Ethics Seminar

Friday, Oct. 26, 2018

I. Civil Cases

Sentry Select v. Maybank, 2018 WL 2423694
(S.C. Sup. Ct. May 30, 2018)*
* Petition for Rehearing granted Aug. 9, 2018

There is no "tripartite relationship" between attorney, insurer & insured in SC. Only the insured is the client. However, an insured may have a malpractice claim against counsel it hired for its insured, subject to 3 limitations:

1. the insurer can only recover for a breach of a duty owed to the insured;
2. the insurer may have a claim only where the interests of the insurer and the insured are not in conflict ("if the interests … are the slightest bit in conflict … there can be no liability"); and
3. the insurer must prove the breach of duty by clear and convincing evidence.

The "dual-client" or "tripartite" model is the majority rule around the country, but the modern trend is toward the one-client model.

The court declined to answer the second certified question—whether an insured's malpractice claim against its attorney can be assigned to the insurer.

II. Rule Changes

Rule 2(g) of RLDE amended to include debarment of out-of-state lawyers and prohibit a debarred lawyer from advertising or soliciting in South Carolina.

III. Rule Change Proposals

In August, the Court sought input on a proposed change to RPC & SCRCivP re unbundled services, from the Access to Justice Commission.

- The Change to RPC 1.2 would add that an attorney may make a "limited scope appearance" if permitted by court rules and agreed to in a writing signed by the client.
- The 3 alternative changes to Rule 11 regarding ghostwriting would allow either:
  - Ghostwriting with no disclosure
  - Ghostwriting with disclosure "prepared with assistance of counsel"
  - Ghostwriting with disclosure of the assisting attorney's name

Written comments came back overwhelmingly in favor of no required disclosure.

IV. Ethics Advisory Opinions

SC Bar EAO 18-05

May a lawyer accept an earnest money deposit through PayPal, and if so, when must the lawyer transfer the money out of PayPal?

Yes, but it's risky. Any account receiving client or third-party funds must be treated as a trust account. Therefore, a PayPal account can't contain any of the lawyer's own funds except as Rule 1.15(b) allows for service charges, and the lawyer must comply with the recordkeeping requirements of Rules 1.15 & 417 for the PayPal account.

Lastly, although the money is provided to the lawyer through an online account, it cannot stay there because it must be moved into an IOLTA account pursuant to Rule 412 if the funds are nominal or short-term, which earnest money typically is.

The timing of the transfer out of PayPal and into IOLTA is governed by the "good funds" rule, which says that electronic payments must be "verified and documented." PayPal, Venmo, Zelle, and other "online banks" each have their own terms of service potentially allowing for reversal of payments on a more extended timeline than regulations allow for traditional bank account deposits. In the case of such a reversal (after the has disbursed from the online bank into an IOLTA account) is that the lawyer has 5 business days under Rule 1.15(f)(2) to replace the funds.

SC Bar EAO 18-01

May a lawyer act as an insurance agent, selling automobile insurance for insurance carriers against whom he may submit claims on behalf of law firm clients as long as he does not submit claims against a policy he sold?

Yes, if the lawyer ensures that (1) he does not perform legal work as an insurance agent, and (2) his representation of clients against insurance carriers with which he works as an agent is not materially limited by his responsibilities as an agent.

Because the lawyer won't file claims against any policies he sold, a concurrent conflict likely won't arise, but if it does, the lawyer may represent the client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation and each client gives informed consent, confirmed in writing.

SC Bar EAO 18-02

May a lawyer refer personal injury clients to a chiropractor in exchange for the chiropractor paying a portion of the cost of the lawyer's commercials, as long as the referral is in each client's best interest, the lawyer informs each client of the relationship and of the fact that they are free to seek treatment elsewhere?

Yes. The payments create a substantial risk of a material limitation on the lawyer's representation because her desire for the financial assistance could influence her decision to refer clients. That risk is a consentable conflict under Rule 1.7, but with each client's informed consent confirmed in writing, the lawyer may enter into the referral agreement. Also, it may not be exclusive; the lawyer must be free to exercise independent judgment in referring clients elsewhere when it is in their best interest.

SC Bar EAO 18-04

Factual Background: Lawyer A sends an email to Lawyer B and copies several people, including Lawyer A's client. Lawyer A has not previously consented to Lawyer B contacting Lawyer A's client and does not expressly do so in the email.

Question: If Lawyer B receives an email from Lawyer A on which Lawyer A's client is copied, may the lawyer "reply to all" – copying Lawyer A's client with the response – without the express consent of Lawyer A?

Summary: Copying an opposing party on an email or letter is communication for purposes of Rule 4.2, SCRPC. Absent the consent of Lawyer A, Lawyer B may not communicate with Lawyer A's client about the subject of the representation either directly or by copying Lawyer A's client in an email sent in response to Lawyer A's email on which the client was copied. The mere fact that a lawyer copies his own client on an email does not, without more, constitute implied consent to a "reply to all" responsive email.

Discussion: Rule 4.2, SCRPC, provides that,

> [i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The purpose of Rule 4.2 is to ensure "the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client lawyer relationship and the uncounseled disclosure of information relating to the representation." Rule 4.2, Comment 1. [1] For that reason, the protection afforded by the Rule cannot be waived by the client. Rule 4.2, Comment [3] ("The Rule applies even though to represented person initiates or consents to the communication.").

In two prior opinions, this Committee has concluded that copying a represented party on correspondence to the party's lawyer is communication subject to Rule 4.2 for which – in the absence of authorization by law or court order – the party's lawyer must give prior consent. [2]

In S.C. Bar Eth. Adv. Op. 91-02, this Committee was asked if a prosecutor copying criminal defendants on court appearance notifications (i.e., trial date, roll call, etc.) and consequences for failure to appear would violate Rule 4.2. Unless the lawyer for the opposing party consented to the communication or the communication was authorized by law, the Committee opined the notification would violate Rule 4.2. In S.C. Eth. Adv. Op. 93-16, the Committee was asked two questions about communication with a represented person, one of which was whether a plaintiff's lawyer can copy a represented defendant on any settlement proposals sent to the defendant's lawyer. Looking to the language of Rule 4.2 and noting the absence of any South Carolina law that would allow for the contemplated communication, the Committee concluded that "Rule 4.2 proscribes all communication with a represented party; thus, precluding copying the represented party on written letters directed to that party's attorney. The lawyer may contact the represented party only if that party's attorney so consents." S.C. Eth. Adv. Op. 93-16 at 2.

In the same way that sending a letter is prohibited, copying an opposing party on an email is prohibited by Rule 4.2 absent consent of opposing counsel. The question then becomes whether consent, for purposes of communication under Rule 4.2, must be express or may be implied. [3] The Rule itself provides no answer; however, the Restatement (Third) of the Law Governing Lawyers provides that a lawyer's consent to communication with the lawyer's client may be implied.

> An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests.

Rest. (Third) of the Law Governing Lawyers §99 cmt. J (2000). Likewise, in CA Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181, the Committee found that the state's no-contact rule was silent on the matter, but that implied consent was recognized in other legal contexts and was suggested by two other California ethics opinions. It concluded that consent under that state's no-contact rule need not be express, but may be implied by the facts and circumstances surrounding the communication with the represented person. The Committee set out nine factors to be considered: (1) whether the communication is in the presence of the other lawyer; (2) prior course of conduct; (3) the nature of the matters; (4) how the communication is initiated and by whom; (5) the formality of the communication; (6) the extent to which the communication might interfere with the lawyer-client relationship; (7) whether there exists a common interest or joint

defense privilege between the parties; (8) whether the other lawyer will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and (9) the instructions of the represented party's lawyer. *Id.* at 5-7.

Three bar advisory committees have addressed the question posed here. First, the North Carolina Bar considered whether consent to communication under that state's no-contact rule may be implied in the context of an email sent to opposing counsel by a lawyer who copied his own client. Noting that North Carolina's Rule 4.2 [4] does not specify that consent must be expressly given, the Committee opined that consent may be implied under the totality of the circumstances.

> However, *the fact that a lawyer copies his own client on an electronic communication does not, in and of itself, constitute implied consent to a "reply to all" responsive electronic communication*. Other factors need to be considered before a lawyer can reasonably rely on implied consent. These factors include, but are not limited to: (1) how the communication is initiated; (2) the nature of the matter (transactional or adversarial); (3) the prior course of conduct of the lawyers and their clients; and (4) the extent to which the communication might interfere with the client-lawyer relationship. These factors need to be considered in conjunction with the purposes behind Rule 4.2.

N.C. State Bar Formal Eth. Op. 2012-7 at 1 (emphasis added).

Also, in Ass'n of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1 at 5-6, the Committee concluded that the state's no-contact rule allowed for implied consent for a "reply to all" email communication on which represented parties have been copied where the represented person's lawyer has taken some action manifesting her consent. While not attempting to provide an exhaustive list of factors, it noted that two important considerations are (1) how the group communication was initiated; and (2) whether the communication occurs in an adversarial setting. Finally, earlier this year, in Alaska Bar Ass'n Eth. Op. 2018-1, the Committee concluded that a lawyer who responds to an e-mail where the opposing lawyer has copied his client has a duty to obtain consent prior to copying the represented client on any responsive email by inquiring whether the opposing party should be included in a reply. That Committee recommended that lawyers cc clients only "regarding scheduling or other purely administrative matters." *Id.*

South Carolina's Rule 4.2 does not specify that consent must be express, leading to the conclusion that it may be implied. However, this Committee agrees with the North Carolina, Alaska, and New York City Bar Committees that, while consent may be implied, the mere fact that an attorney has copied his client on an email sent to opposing counsel does not, by itself, constitute implied consent to a response sent to both the opposing lawyer and the opposing client. That is not to say that consent to a "reply all" email may never be implied. The particular circumstances surrounding an email communication could amount to implied consent to a "reply all" from opposing counsel. This Committee agrees with the other jurisdictions' reasoning that whether the matter is adversarial is an important factor. Additionally, if the email is about scheduling under circumstances where the client's availability is at issue along with counsel's; if email conversations among counsel and sophisticated clients together are the normal course of dealing; or if the lawyer who initially cc'd the client expressly invites a "reply all" response, then the receiving lawyer might reasonably understand that consent under Rule 4.2 is implied.

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[1] Although not before the Committee, the practice of copying one's client – by either "cc" or "bcc"- when emailing with opposing counsel poses some risks. With a "cc", a lawyer is disclosing his client's email address, and with both "cc" and "bcc", the lawyer risks having the client "reply to all" and potentially disclose confidential or other information. *See*, *e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1076 at ¶¶10 – 13. It is also not uncommon for a recipient of a group email to "reply to all" unintentionally or without knowing the identity of each recipient, which in this context might expose the client to what were intended to be lawyer-to-lawyer communications. For these reasons, it is generally unwise to "cc" a client on email communications to opposing counsel.

[2] Advisory committees in other jurisdictions have reached the same conclusion. *See*, *e.g.*, Utah St. Bar Eth. Op. 15-02 (reviewing opinions from other jurisdictions concluding Rule 4.2 is violated by copying a represented person on correspondence or e-mail related to the subject of the representation); Ass'n of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1 (in the absence of some law authorizing the communication, a lawyer cannot simultaneously send a letter or email to a represented person about the subject of the representation without the consent of the represented person's lawyer). These opinions are consistent with opinions issued by courts. *See*, *e.g.*, *In re Uttermohlen*, 768 N.E.2d 449 (Ind. 2002) (lawyer violated the no-contact rule by sending a letter to represented person with a copy to the person's lawyer without the lawyer's prior consent).

[3] This Committee has previously discussed whether consent may be implied for purposes of other Rules. *See*, *e.g.*, S.C. Bar Eth. Adv. Comm. Op. 92-35 (consent may be implied for purposes of Rule 1.6); S.C. Bar Eth. Adv. Comm. Op. 89-03 (same).

[4] North Carolina's Rule 4.2 is similar, but not identical to the South Carolina Rule. The primary difference is that the North Carolina Rule contains exceptions for when a lawyer, who is representing a client who has a dispute with a government agency or body, may communicate about the subject of the representation with the elected officials who have authority over the government agency or body and who are represented by counsel in the matter.

V. Disciplinary Opinions

In re Taylor (Nov. 2017)

Public reprimand for paying Sheriff $68,500 for referring a PI case.

In re Lord (Nov. 2017)

Public reprimand for:

- Solo using "attorneys at law" on letterhead
- 1-800-FIX-TICKET
- "court records" is too vague to satisfy 7.3(g)
- "unique insight into traffic laws" on website
- AVVO disclaimers re past results & testimonials not clear and conspicuous
- Public response to negative online review

In re Schiller (Nov. 2017)

South Carolina Lawyer not licensed in North Carolina but working on a N.C. injury case for a N.C. client was publicly reprimanded for:

- not including in fee agreement whether fee would be calculated before or after deducting expenses
- allowing paralegal to falsely witness and notarize a settlement agreement
- waiting 3 months to withdraw after being fired

Decided under S.C. Rule 8.5 & N.C. Rules 1.5, 4.1, 5.3 & 8.4 because the "predominant effect" of the conduct was in N.C.

In re Owen (Jan. 2018)

Public reprimand for not copying an opposing party on third-party subpoenas.

In re Cooper (Mar. 2018)

Public reprimand for conflicts of interest:

- Lawyer represented two former step-daughters where one stole the other's identity & wrote fraudulent checks; lawyer got one acquitted by helping the other confess.
- A second lawyer in her firm (both independent contractors) then represented a third sister in seeking custody of the incarcerated sister's child, unaware of the conflict because the first two sister's names weren't in the firm's conflict checking system.

In re Swan (Mar. 2018)

Public reprimand for a couple things, including providing financial assistance to a client "in connection with" litigation:

- paid the client's bond
- let her stay at his house for 2-3 nights
- gave her clothes
- gave her money for a new driver's license, car insurance, and a cell phone

Keeping Client Information Confidential in a Digital World

CHILDS THRASHER
Law Office of Childs Cantey Thrasher, LLC

WILLIS CANTEY
Cantey Tech Consulting

Obligation to keep client information confidential comes from …

- Lawyer's Oath (SC App Court Rule 402: Admission to Practice Law)

  "To my clients, I pledge faithfulness, competence, diligence, good judgment and prompt communication . . . I will respect and preserve inviolate the confidences of my clients . . ."

- SC Rules of Professional Conduct (SC App Court Rule 407)

  - 1.1 Competence
  - 1.6 Current Clients
  - 1.9 Duties to Former Clients
  - 1.18 Duties to Prospective Clients

SC Rules of Professional Conduct

- SC Appellate Court Rule 407
- https://www.sccourts.org/courtReg/index.cfm

SC Rules of Professional Conduct

"In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client …" "a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private." – SCRPC Preamble

Rule 1.1 : Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment :

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.6 : Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless:

1. the client gives informed consent;
2. the disclosure is impliedly authorized in order to carry out the representation; or
3. the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act;
(2) to prevent reasonably certain death or substantial bodily harm;
(3) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(5) to secure legal advice about the lawyer's compliance with these Rules;
(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(7) to comply with other law or a court order; or
(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Rule 1.9 : Duties to Former Clients

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

1.18 : Duties to Prospective Client

(a) A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Ethics Advisory Opinions

Arizona

- Ethical Rule's 1.6 and 1.1 require that an attorney act competently to safeguard client information and confidences.
- It is not unethical to store such electronic information on computer systems whether or not those same systems are used to connect to the internet.
- To comply with these ethical rules, an attorney or law firm is obligated to take competent and reasonable steps to assure that the client's confidences are not disclosed to third parties through theft or inadvertence. I
- An attorney or law firm is obligated to take reasonable and competent steps to assure that the client's electronic information is not lost or destroyed.

Arizona continued…

- In order to do that, an attorney must be competent to evaluate the nature of the potential threat to client electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end.
- An attorney who lacks or cannot reasonably obtain that competence is ethically required to retain an expert consultant who does have such competence.

Opinion 05-04 (7/05) by The State Bar of Arizona's Committee on the Rules of Professional Conduct

Massachusetts

- A law firm may provide a third-party software vendor with access to confidential client information stored on the firm's computer system for the purpose of allowing the vendor to support and maintain a computer software application utilized by the law firm.
- However, the law firm must "make reasonable efforts to ensure" that the conduct of the software vendor (or any other independent service provider that the firm utilizes) "is compatible with the professional obligations of the lawyer[s]," including the obligation to protect confidential client information reflected in Rule 1.6(a).

Opinion 2005-4 (3/3/05) The Massachusetts Bar Association Committee on Professional Ethics

Nevada

- The lawyer's duty to protect client confidentiality . . . is not absolute.
- In order to comply with the rule, the lawyer must act competently and reasonably to safeguard confidential client information and communications from inadvertent and unauthorized disclosure.
- If the lawyer acts competently and reasonably to ensure the confidentiality of the information, then he or she does not violate SCR 156 simply by contracting with a third party to store the information, even if an unauthorized or inadvertent disclosure should occur

Formal Opinion No. 33 (02/9/06) State Bar of Nevada Standing Committee on Ethics and Professional Responsibility

New Jersey

The touchstone in using "reasonable care" against unauthorized disclosure is that:

(1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and

(2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data.

If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then "reasonable care" will have been exercised.

*Where a document is transmitted by email over the Internet, the lawyer should password a confidential document . . . since it is not possible to secure the Internet itself against third party access.

Opinion 701 (4/10/06) Advisory Committee on Professional Ethics

SC Rules of Professional Conduct: Scope

- The Rules of Professional Conduct are rules of reason.

E-Waste and Disposal

What reasonable steps can lawyers take to protect digital client data?

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Rule 21
Standards of Conduct, Decertification and Discipline of Neutrals

(a) Standards of Conduct for Mediators. Any person serving as a mediator, whether certified or not, shall comply with the Standards of Conduct for Mediators, which is attached as Appendix B to these rules.

(b) Standards of Conduct for Arbitrators. Any person serving as an arbitrator, whether certified or not, shall comply with the Code of Ethics for Arbitrators, which is attached as Appendix A to these rules.

(c) Decertification of Neutrals. Certification under Rule 19 may be revoked at any time if it is shown that the neutral no longer meets the requirements to be certified under Rule 19 or that the neutral has failed to faithfully observe these rules, the ethical standards of Rules 21(a) or (b), or has engaged in any conduct showing an unfitness to serve as a neutral.

(d) Discipline of Neutrals.A neutral who violates these rules, the ethical standards of Rules 21(a) or (b), or who has engaged in any conduct showing an unfitness to serve as a neutral may, in addition to decertification under Rule 21(c), be subject to discipline by the Supreme Court. This discipline may include any sanction the Supreme Court determines is appropriate, to include an order publicly reprimanding the neutral for the conduct, an order barring the neutral from serving as a neutral in any court of this State for a definite or indefinite period of time, an order requiring the neutral to complete additional training, and/or the assessment of a fine. The fact that discipline is taken against an attorney under this Rule shall not preclude action against the attorney under Rule 413, SCACR, if the conduct is misconduct under that rule. The fact that discipline is taken under this Rule against a licensed professional shall not preclude action against the professional under the rules or statutes governing that profession, if the conduct is misconduct under that rule or statute.

(e) Processing Complaints of Misconduct by Neutrals. Persons alleging that a neutral has engaged in misconduct may file a complaint with the Board of Arbitrator and Mediator Certification. Misconduct includes any conduct or other circumstances that would warrant decertification or discipline under Rule 21(c) or (d). Complaints of misconduct shall be investigated by the Board and, upon a finding of probable cause, forwarded to the Commission on Alternate Dispute Resolution for a hearing before a Hearing Panel consisting of three (3) members of the Commission. Subject to the requirements of Rule 422(d), SCACR, the Commission shall promulgate regulations governing the processing of these complaints.

Last amended by Order dated June 3, 2015.

APPENDIX B

Standards of Conduct for Mediators [1]

I. Self-Determination: **A Mediator Shall Recognize that Mediation Is Based on the Principle of Self-Determination by the Parties.**

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.

COMMENTS:

* The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given an opportunity to consider all proposed options.

* A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

II. Impartiality: **A Mediator Shall Conduct the Mediation in an Impartial Manner.**

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

COMMENTS:

* A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.

* When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.

* A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

III. Conflicts of Interest: **A Mediator Shall Disclose All Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator Shall Decline to Mediate Unless All Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest Also Governs Conduct that Occurs During and After the Mediation.**

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all

* The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.

* If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.

* In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.

* Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.

* Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

VI. Quality of the Process: **A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.**

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

COMMENTS:

* A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

* Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.

* The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs significantly from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice.

* Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

IX. Obligations to the Mediation Process. **Mediators have a duty to improve the practice of mediation.**

COMMENTS:

*Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

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[1] These standards are taken from the Standards of Conduct for Mediators promulgated by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

Reflections on Lawyers and Depression

Graham L. Newman, Esq.

I was first diagnosed with depression eight years ago. Ironically, this came at a highly successful period in both my personal and professional lives. Very quickly, however, my struggle with depression escalated to the point where it threatened my very life itself.

Luckily, I'm here to tell the tale of the next several years in which I was forced to learn first-hand what a tricky (and dangerous) illness depression can be, particularly for those of us in the legal profession. These just a few lessons that I've learned. I hope you'll find them helpful whether you are someone struggling with the diagnosis or know someone who is—and that pretty much includes all of us.

I. What is Depression?

a. A Tale of Two Realities

To truly understand clinical depression, you must first come to grips with the fact that you will never truly understand the sickness unless you have actually suffered from it. Depression is not sadness. It is not grief caused by a traumatic event, such as a death or an injury. People suffering from depression do not have problems. *In the minds of people suffering from depression, they are the problem.*

Depression is a sickness with mind-bending qualities that cause those who suffer from it to perceive reality very differently from those who do not, particularly when it comes to questions of self-worth. An extraordinarily successful, wealthy, and well-liked person who suffers from depression can easily twist their self-perception into that of a half-witted, wasteful person dependent upon the approval of others. The disconnect between clinically depressed perception and non-depressed perception is the root cause of why those suffering think their family and friends "just don't understand." And they don't.

Thus, in order for all of us—both suffering and not suffering—to understand depression's implications, we must comprehend the realities that we do not see. If you do not suffer from depression, you will not cure your friend's depression by attempting to solve problems external to themselves or by offering encouragement and compliments. Their "problems" exist within their self-perception, and they will reject your pointing to "the good things in life" as a reason to be happy. If you do suffer from depression, your friends and family will not understand your self-hatred because they do not see in you the twisted figure that your mind perceives. And you will resent their attempts to reassure you of your worth as a human being as a complete misunderstanding of the truth. You will feel as if you are, truly, alone in the Valley of the Shadow of Death.

But there are two things that we all can, and must, do to stem the epidemic of depression within the legal community. First: learn to recognize the signs of depression within ourselves and others; and second: utilize the resources we have that effectively combat depression.

This is not a game. Depression is deadly. It has killed, disbarred, suspended, and driven to alcoholism, addiction, or divorce countless lawyers in this State. It will kill again. Soon. And it will continue killing lawyers at a rate six times that of the general population until we get serious about ripping the stigma off of depression, understanding the sickness, and doing something about it.

b. The Science of Depression

An in-depth discussion of the science underlying depression is beyond the scope of this presentation (and beyond the areas of expertise of the presenters). But a basic understanding of the mechanics of depression is helpful in comprehending the sickness as a physical, rather than mental, illness. "Depression" is not a specific diagnosis, but rather is a colloquial reference to any number of diagnoses recognized by the DSM-IV. Perhaps the most common diagnosis is "dysthymia." The Mayo Clinic defines this as follows.

> Dysthymia (dis-THIE-me-uh) is a mild but long-term (chronic) form of depression. Symptoms usually last for at least two years, and often for much longer than that. Dysthymia interferes with your ability to function and enjoy life.
>
> With dysthymia, you may lose interest in normal daily activities, feel hopeless, lack productivity, and have low self-esteem and an overall feeling of inadequacy. People with dysthymia are often thought of as being overly critical, constantly complaining and incapable of having fun.

http://www.mayoclinic.org/diseases-conditions/dysthymia/basics/definition/con-20033879 (last visited February 24, 2014) Dysthymia has been linked with biochemical, genetic, and environmental causes.[1]

Depressive disorders, such as Dysthymia, are not limited to merely "feeling bad." They are progressive illnesses that—if left untreated—can permanently damage both your social life and your physical health.

> Depression that does not receive proper diagnosis and effective treatment creates many risks for the sufferer. Social limitations include strain on relationships and social isolation, and there may be ongoing limitations in workplace attendance and productivity.

[1] http://www.mayoclinic.org/diseases-conditions/dysthymia/basics/causes/con-20033879 (last visited February 24, 2014).

> Persistently depressed workers are seven times less productive on the job, and the impact of depression on function at work is substantially higher than its association with missed days.

Zetin, Mark; Hoepner, Cara T.; Kurth, Jennifer, Challenging Depression: The Go-To Guide for Clinicians and Patients. P. 50. W. W. Norton & Company. Kindle Edition. Untreated depression can also have long term effects on brain function.

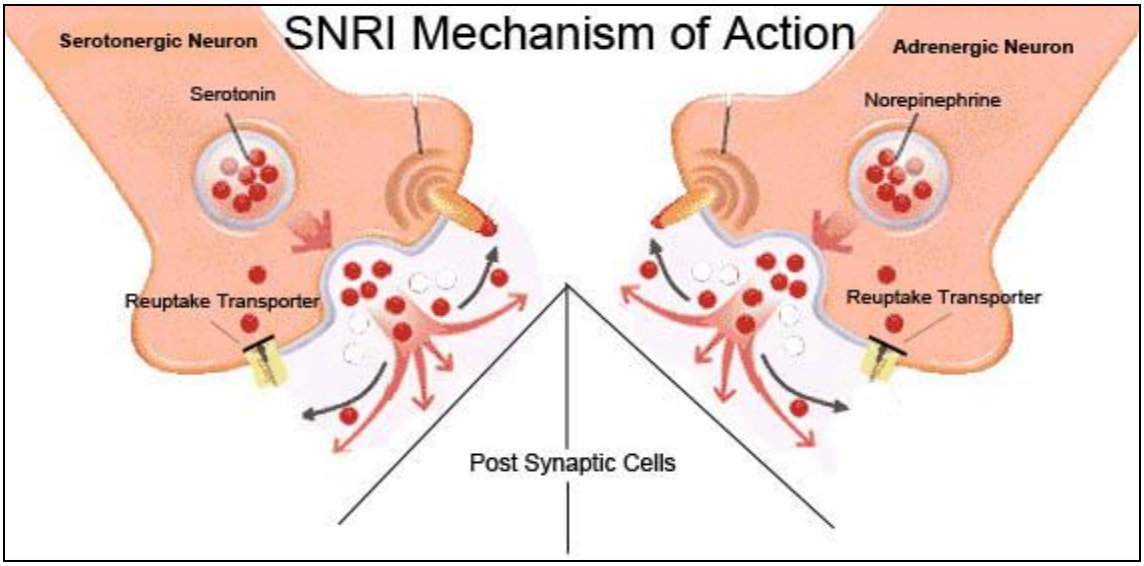
> The newest generation of brain-imaging studies has demonstrated that a key memory-forming area of the brain, the hippocampus, is damaged by prolonged periods of untreated severe depression and actually shrinks in response (Czeh & Lucassen, 2007). Antidepressants, lithium, and the anticonvulsant Depakote appear to be protective and have been shown to cause the brain to synthesize growth factors for these neurons. In other words, it now appears that depression causes brain damage and treatment reverses this. Even more alarming is a Danish study demonstrating that the lifetime number of hospitalizations for major depression or mania that a person has experienced is correlated with the risk of being diagnosed as having dementia (Kessing & Andersen, 2004). These findings have been replicated by other study groups.

Ibid.

Scientific research of depression, its causes, and its proper treatment is relatively new with most of the pharmaceutical treatments for the disorders within the last two decades. Most research points to its cause, however, being a "neurotransmitter deficiency" within the brain.

> Neurotransmitter theories of depression have focused primarily on norepinephrine and serotonin and occasionally on dopamine. The earliest neurotransmitter theory of the cause of depression postulated that there is a deficiency of norepinephrine or serotonin in individuals who became depressed.

Ibid, p. 56. A visual representation of how neurotransmitters work (and how "reuptake" occurs) is shown below.



II. What Warning Signs of Depression Can You See in Yourself?

The self-hating aspect of depression is also self-perpetuating. Once deeply depressed, a person may shrug off the possibility that he or she will need to seek medical help as only further evidence of their "weakness" as a person. The legal profession, which values those who are "tough," also passively (if not actively) discourages lawyers who are suffering from asking for help. Thus a key to combating depression is learning to recognize it within yourself before it becomes all-engrossing.

But here's the trick: no one ever wakes up one morning thinking "man, I feel quite depressed." The sickness is much more stealthy in that it veils itself behind certain "defenses" that we, ourselves, create in order to avoid the feelings of malaise associated with the depression.

> Perhaps the most damaging consequence of being shame-based is that we don't know how depressed and angry we really are. We don't actually feel our unresolved grief. Our false selves and ego defenses keep us from experiencing it. Paradoxically, the very defenses that allowed us to survive our childhood trauma have no become barriers to our growth.

Bradshaw, John, Healing the Shame that Binds You, p. 172. These "defenses" manifest themselves in two general manners: 1) ego defenses; and 2) addictive behaviors.

a. Ego Defenses

The presence of "ego" within attorneys is legendary. But larger-than-life personalities and hard-driving overachievers may also be masking symptoms of underlying depression, simmering just beneath the surface.

> Because the exposure of self to self lies at the heart of neurotic shame, escape from the self is necessary. The escape from self is accomplished by creating a false self. The false self is always more or less than human. The false self may be a perfectionist or a slob, a family Hero or a family Scapegoat. As the false self is formed, the authentic self goes into hiding. Years later the layers of defense and pretense are so intense that one loses all conscious awareness of who one really is.

Ibid, p. 34. Perfectionism and grandiosity are two well-documented "ego defenses" to depression. They are also commonly found within members of the Bar.

i. Perfectionism

Lawyers with depression often suffer from an almost uncontrollable need to be absolutely perfect in every facet of their profession. You may have won nine cases out of ten, but the loss of the tenth case feels like an utter failure.

> Perfectionism flows from the core of toxic shame. A perfectionist has no sense of healthy shame; he has no internal sense of limits. Perfectionists never know how much is good enough.
>
> Perfectionism is learned when one is valued only for doing. When parental acceptance and love are dependent upon performance, perfectionism is created. The performance is always related to what is outside the self. The child is taught to strive onward. There is never a place to rest and have inner joy and satisfaction.

Ibid, p. 120. Our profession is one that seemingly feeds the hunger for perfection that can dominate someone suffering from depression. From Martindale-Hubbell, to Who's Who, to "Super Lawyers," to ABOTA, we literally create awards to give to each other to mark out varying degrees of "perfection." Lawyers pay thousands of dollars to gain a more prominent and visible position in publications that are distributed not to potential clients, but primarily to other lawyers. Those lawyers are buying "perfection."

If simply being a good lawyer for your client is not enough for you, if you feel not a desire, but a need, to continuously adorn your resume with additional "distinctions," your striving for perfection may be a warning sign of emerging depression. Ask yourself why it is not enough that you are a good lawyer. What are you really seeking through your perfectionism? Will you ever make enough money? Will you ever win enough cases? Will you ever receive enough awards?

If the answer is "no," you are setting yourself up for a descent into depression.

ii. Grandiosity

Grandiosity within the legal profession is not limited to the pompous and brash lawyer whose voice seemingly rises above all others in the room.

> The grandiose person is admired everywhere and cannot live without admiration. If his talents fail him, it is catastrophic. He must be perfect, otherwise depression is near. Often the most gifted among us are driven in precisely this manner. Many of the most gifted people suffer from severe depression. It cannot be otherwise because depression is about the lost and abandoned child within. ...There is a complete absence of real emotional understanding or serious appreciation of their own childhood vicissitudes and no conception of their true need--beyond the need for achievement.

Ibid, pp. 70-71. But grandiosity differs from perfectionism in that does not necessarily attach itself to achievable "goals" or items on a resume, but rather to a sort of "star/hero" complex that many lawyers associate with their role in the justice system.

Alice Miller describes the grandiose person as follows.

> They do well, even excellently, in everything they undertake; they are admired and envied; they are successful whenever they care to be—but behind all this lurks depression, a feeling of emptiness and self-alienation, and a sense that their life has no meaning. These dark feelings will come to the fore as soon as the drug of grandiosity fails, as soon as they are not "on top," not definitely the "superstar," or whenever they suddenly get the feelings they have failed to live up to some ideal image or have not measured up to some standard. Then they are plagued by anxiety or deep feelings of guilt and shame.

Miller, Alice, The Drama of the Gifted Child: The Search for the True Self, p. 5.

Rather than seeing themselves as a part of a system of justice, many lawyers—particularly Plaintiff's lawyers and criminal defense lawyers—place the entire burden of justice on their own shoulders. This generates great feelings of pride when clients thank you profusely for a successful result. But, as Miller describes, the "star/hero" complex that lawyers build within themselves is truly a recipe for catastrophic failure. Inevitably, we lose cases. And when we do, the "star/hero" image that we have created crumbles, leaving us questioning our own self-worth.

Lawyers need to be careful to avoid confusing their role in the justice system with the justice system itself. As soon as we begin to develop the grandiose notion that we, ourselves, are

responsible for seeing that justice is done, we assume the role of the "star/hero" that will soon lead to crushing disappointment.

> The grandiose person is never really free: first, because he is excessively dependent on admiration from others, and second, because his self-respect is dependent on the qualities, functions, and achievements that can suddenly fail.

Ibid, p. 36. If you find yourself shackled to this notion of the "star/hero," you may be exhibiting symptoms of depression. If you continue to alleviate the depression by resorting to the admiration and self-respect you receive from playing the "star/hero," you will be unwittingly building the intensity of the feelings of failure and self-hatred when that role inevitably fails.

b. Addictive Behaviors

If you fear that you suffer from depression, you need to analyze your lifestyle for the presence of addiction. "Addiction" extends far beyond the traditional association with alcohol or drugs. Bradshaw defines "addiction" as "any process used to avoid or take away intolerable reality." Bradshaw, John, Healing the Shame that Binds You, p. 128.

> If you're shame-based, you're going to be an addict—no way around it. Addictions form the outer layer of our defenses against toxic shame. … The addiction hides the shame and enhances it, and the shame fuels the addiction.

Ibid, p. 129. For highly successful people, the most common form of addiction probably emerges in behavioral patterns. For a significant number of those suffering from depression, however, substance abuse also plays a role.

i. Behavioral Addictions

Work as an Addiction

"The practice of law is a jealous mistress." We've all heard this phrase and we all know just how true it can be. The practice of law often demands extreme amounts of time. Sixty, seventy, and eighty hour work weeks are not unheard of. But often the practice of law does not demand extreme amounts of time, and yet many of us find ourselves in the office late at night or on the weekends.

If you are working excessive amounts of hours—particularly when it is not necessary to do so—you may be suffering from depression. "Work addiction is a serious addiction. The work addict, who spends thousands of hours at work, can avoid painful feelings of loneliness and depression." Ibid, p. 142. One of the first questions a psychiatrist or counselor will ask you, if you seek help for depression, is "how much are you working?" Work addiction is particularly

sinister in that it masks itself as something good. "If I am working hard, then I am doing a good job for my clients."

But are you really working hard? Or are you finding things to do to avoid going home? Or to avoid dealing with other problems? Or are you seeking a feeling of self-worth by working long hours? If the honest answer to any of these questions is "yes," you may be suffering from depression.

The Internet as an Addiction

The modern legal profession is increasingly computer-based. Add "smart phones" to the mix, and most lawyers are within reach of the Internet twenty-four hours a day. Internet use as a drag on work productivity is well-documented. But excessive internet use can also be indicative of depression.

> Studies suggest that people with psychological problems and social difficulties appear to be drawn to online social interaction. With regard to depression, for example, a national survey of adolescents found that adolescents who reported depressive symptoms were more likely than their nondepressed counterparts to talk with strangers online, use the Internet most frequently for interpersonal communication, and be more self-disclosive online (Ybarra, Alexander, & Mitchell, 2005). The study by van den Eijnden et al. (2008), mentioned earlier, also found that instant messaging use among adolescents predicted increased depression, but lower loneliness, six months later.

Young, Kimberly S., Internet Addiction: A Handbook and Guide to Evaluation and Treatment (Kindle Locations 1177-1182). Wiley. Kindle Edition.

Now this isn't to say that Internet use is inherently bad or that many folks are online at the office out of sheer laziness. But if you are spending significant amounts of time online (at work or at home), ask yourself if you are exhibiting signs of addiction.

> Two important cognitive symptoms of [Internet addiction] are motivation to use the Internet for mood regulation and a cognitive preoccupation with the online world (Caplan, 2003, 2005, 2010; Davis et al., 2002). Mood regulation refers to using the Internet to alleviate a dysphoric affective state such as anxiety, loneliness, or depression. Cognitive preoccupation refers to obsessive thought patterns involving the Internet use (i.e., "I can't stop thinking about going online").

Ibid, Kindle Locations 1376-1381.

Internet addiction can mask depression by either providing that mood regulation you need to avoid feeling depressed or by providing an "alter ego" that you can maintain via online chatting, gaming, or even participating in a professional listserv. If you find yourself spending excessive amounts of time online, ask yourself what the underlying motivation of your online activity is. If you are feeding a need for feelings of self-worth by using the Internet, you may be suffering from depression.

Relationships as an Addiction

> *The wind had blown off, leaving a loud, bright night, with wings beating in the trees and a persistent organ sound as the full bellows of the earth blew the frogs full of life. The silhouette of a moving cat wavered across the moonlight, and turning my head to watch it, I saw that I was not alone—fifty feet away a figure had emerged from the shadow of my neighbor's mansion and was standing with his hands in his pockets regarding the silver pepper of the stars. Something in his leisurely movements and the secure position of his feet upon the law suggested that it was Mr. Gatsby himself, come out to determine what share was his of our local heavens.*
>
> *I decided to call to him. Miss Baker had mentioned him at dinner, and that would do for an introduction. But I didn't call to him, for he gave a sudden intimation that he was content to be alone—he stretched out his arms toward the dark water in a curious way, and, far as I was from him, I could have sworn he was trembling. Involuntarily I glanced seaward—and distinguished nothing except a single green light, minute and far away, that might have been the end of a dock. When I looked once more for Gatsby he had vanished, and I was alone again in the unquiet darkness.*
>
> --*F. Scott Fitzgerald*, The Great Gatsby

Jay Gatsby is the ultimate love addict in American literature. Absolutely infected with the ideal of Daisy Buchanan, he builds his entire life around the notion of winning her heart. He has only one sincere scene in *The Great Gatsby* that is not corrupted by pretense. There we see what Gatsby is, and what love addiction becomes: a man, stranded on a far shore, reaching out to a blinking light which he believes to be his true destiny, but which he knows he can never attain, no matter how hard or desperately he tries. At the end of the book, Gatsby is dead—killed by his addiction to the ideal of Daisy.

Like a modern day Jay Gatsby, those suffering from depression have a tendency to become addicted—even obsessed—with relationships and the love within those relationships.

> Relationships can be tremendously addictive. People go from one bad relationship to another or stay in one that is destructive and life-damaging. The feeling and experience of love is a powerful mood-alterer and can be an addiction.

Bradshaw, John, Healing the Shame that Binds You, p. 141. Lawyers, thankfully, are not immune to the powers of love (though some non-lawyers may contest this assertion). But if you find yourself skipping from relationship to relationship, or consistently struggling in a bad relationship despite the ability to end it, you may be relying upon a love addiction to mask underlying depression.

> Love addiction is a psychological and behavioral disorder in which a person looks to another person to satisfy a hunger for security, sensation, power, identity, belonging, and meaning. It is an unconscious attempt to fix or avoid pain, present or past. Rather than a bonding, it becomes a psychological bondage. In the process, a love addict becomes emotionally and biologically dependent on the love object. The gradual enmeshment with the love object occurs over time and can have a soothing, satiating effect on the brain, not unlike alcohol. Like an addiction to alcohol and other drugs, a dependency on love begins to feel like an unstable state in which a person begins to lose herself to the experience. Love addicts deny parts of themselves to keep people, even toxic people, around and ensure predictability. In their attempt to control a relationship, they slowly go out of control. Physical and emotional problems increase as the disorder continues.
>
> Based on fear, love addiction begins to anticipate hurt, rejection, disappointment, and betrayal. And then, as with a self-fulfilling prophecy, love addicts create that which they fear. Underneath, there is a fantasy hope that the drug of choice—a person—will complete them. A love addict will employ indirect means to get a need met and is willing to use others or allow self to be used in the process.

Schaeffer, Brenda, Is It Love or Is It Addiction: The Book That Changed the Way We Think About Romance and Intimacy (pp. 60-61). Hazelden Publishing. Kindle Edition.

The Advance Sheets are full of stories of lawyers whose lives unraveled while going through a bitter divorce. This is tragic and all too common. If you feel yourself beginning to plunge into a malaise of hopelessness associated with a struggling or ending relationship, that relationship may have been masking underlying depression.

ii. Substance Abuse

> *It was like certain dinners I remember from the war. There was much wine, and ignored tension, and a feeling of things coming that you could not prevent happening. Under the wine I lost the disgusted feeling and was happy. It seemed they were all such nice people.*

--*Ernest Hemingway,* The Sun Also Rises

Substance abuse—primarily drugs and alcohol—is undeniably connected to depression.

> In a very large epidemiologic study, among those suffering from major depressive disorder sometime in their lifetime, 40.3% had an alcohol use disorder, 17.2% had a drug use disorder, and 30% had nicotine dependence (Hasin et al., 2005). Among those with bipolar illness, 42% suffer from alcohol abuse or dependence, and around 60% from all forms of substance abuse (McElroy, 2001). Although many people consider marijuana benign, daily use may lead to a tremendous lack of motivation and drive. It is sad but true that most recreational drugs taken for the brief pleasure they may give also extract a huge price in the depression that follows.

Zetin, Mark; Hoepner, Cara T.; Kurth, Jennifer, Challenging Depression: The Go-To Guide for Clinicians and Patients. (p. 13). W. W. Norton & Company. Kindle Edition. Lawyers are notorious drinkers an alcoholics. And yet seemingly every legal social event is built around alcohol (certainly the vast majority are). The Advance Sheets tell us that addiction to illegal drugs is also a problem in the legal community. Most of these lawyers probably suffered from depression. Use of alcohol and other substances as a "relief" or "escape from the daily grind" is a warning sign of encroaching depression.

You do not have to be an addict or alcoholic to use substances as a coping mechanism for depression. But relying upon substances as a coping mechanism can, indeed, drive you into addiction or alcoholism. William Styron, author of the great novels Sophie's Choice and The Confessions of Nat Turner, described the connection between his drinking and his depression as follows.

> The storm which swept me into a hospital in December began as a cloud no bigger than a wine goblet the previous June. And the cloud—the manifest crisis—involved alcohol, a substance I had been abusing for forty years. … [It was] a friend whose ministrations I sought daily—sought also, I now see, as a means to calm the anxiety and incipient dread that I had hidden away for so long somewhere in the dungeons of my spirit.

--William Styron, Darkness Visible

Notice that Styron says that he "abused" alcohol—not that he was an "alcoholic." In fact, whether you are an "alcoholic" or an "addict" is entirely beside the point. The effects of alcohol and drug use—much more, abuse—on depression are entirely exacerbating.

> [N]o matter which illness occurred first, once depression and substance abuse or medical illness coexist, the causal relationship becomes bidirectional: depression shares physiologic processes with any inflammatory illness, and the psychological effects of depression or disease worsen coping ability and self-care.

Zetin, Mark; Hoepner, Cara T.; Kurth, Jennifer, Challenging Depression: The Go-To Guide for Clinicians and Patients. (p. 11-12). W. W. Norton & Company. Kindle Edition. Furthermore, alcohol use—in particular—hinders the ability of pharmaceuticals to battle the science underlying depression.

> It's generally best to avoid combining antidepressants and alcohol. It may worsen your symptoms, and in some cases it can be dangerous. Here are a few things that might happen if you do mix antidepressants and alcohol:
>
> - You may feel more depressed. Alcohol can worsen depression symptoms. Drinking can counteract the benefits of your antidepressant medication, making your symptoms more difficult to treat. Alcohol may seem to improve your mood in the short term, but its overall effect increases symptoms of depression.

http://www.mayoclinic.org/diseases-conditions/depression/expert-answers/antidepressants-and-alcohol/faq-20058231 (last visited February 7, 2014).

If you use alcohol, drugs, or any other substance (some would say even nicotine or caffeine), ask yourself why. Are you drinking, smoking, or using to cope with something else? Are you drinking, smoking, or using to "unwind" or "de-stress"? If so, your use of those substances may be masking depression. And the reliance on those substances to cope with depression can lead you directly into addiction.

III. What Warning Signs Can You See in Others?

The most dangerous place for someone suffering from depression is between his or her own ears. As we see above, those suffering from depression likely engage in numerous subconscious strategies to mask its symptoms from themselves. Therefore it is absolutely vital that friends, family, and colleagues of those suffering from depression (and some estimate that 30% of attorneys do so) become aware of its external warning signs. Those warning signs include—but are in no way limited to—the following:

- Poor appetite or overeating
- Insomnia or hypersomnia
- Low energy or fatigue
- Poor concentration or difficulty making decisions
- Feelings of hopelessness

Zetin, Mark; Hoepner, Cara T.; Kurth, Jennifer, Challenging Depression: The Go-To Guide for Clinicians and Patients (pp. 27-28). W. W. Norton & Company. Kindle Edition.

Specific to lawyers, there are signs of depression with which we should all be familiar. They include, but again are not limited to, the following:

- Constantly overworking
- Extreme self-imposed pressure
- Heavy dejection or extreme anger at minor setbacks in a case
- Expressions of being hopelessly overwhelmed
- Intensely negative statements about the legal profession

IV. I Think I Have Depression. What Do I Do?

If you think you may be depressed, you absolutely must understand one thing: you will not beat depression alone. Depression is a medical illness. If you were diagnosed with cancer, you would not try to out-will it, out-work it, or drink it away. You would go to a doctor. You must do the same thing for depression. You must seek help from a medical professional.

Start with your family doctor. Most medical doctors are familiar with the general diagnosis and characteristics of depression, can prescribe anti-depressants, and refer you to a specialist if need be. Furthermore, if you are worried about the "stigma" of having depression (something the three of us will hopefully begin changing with this presentation), going to a family doctor can be brushed off as a mere physical rather than treatment related to a depressive condition.

Once you speak with a doctor, you can expect to hear him or her offer two general means of treatment: pharmacological and behavioral.

> Psychiatric illness has a biological component (genetics, hormones, and neurotransmitters) and a psychological component (often related to childhood experiences), and occurs in the social context of the person's current life setting. All aspects must be addressed. As with diabetes or coronary artery disease, both medications and lifestyle changes are required for optimal outcome.

Zetin, Mark; Hoepner, Cara T.; Kurth, Jennifer, Challenging Depression: The Go-To Guide for Clinicians and Patients (p. 2). W. W. Norton & Company. Kindle Edition. There are many different types of anti-depressant medication and, within insurance, they are relatively cheap (an $8 co-pay, for example). Be sure to stay regular with the medication, however, as missing dosages decreases the stability of the drug in your blood stream and invites depressive episodes.

Your doctor will also emphasize the necessity of eating better, working less, and exercising more.

> Exercise has been referred to as the least expensive and most available antidepressant. Regular physical exercise can help people reduce stress, depression, and anxiety and enable them to better cope with adversity (NMHA, 2006). People who have major depression and anxiety disorders are significantly (60%) less likely to relapse if they exercise regularly— and continue exercising over time— than if they take medication alone (NMHA, 2006).

Zetin, Mark; Hoepner, Cara T.; Kurth, Jennifer, Challenging Depression: The Go-To Guide for Clinicians and Patients (p. 497). W. W. Norton & Company. Kindle Edition.

If you are struggling with substance abuse, it is highly important that you attend a meeting of Alcoholics Anonymous or Narcotics Anonymous. **You do not have to be an alcoholic or addict to attend, nor do you have to admit that you are when you do attend.** The websites for each group (aa.org and na.org) provide a wealth of information, including meeting locations and meeting types. Try an "open meeting" first. These meetings are open to the public and many people in those meetings will be folks who want to learn more about alcoholism, addiction, or the AA and NA programs themselves.

The most important thing to remember, if you think you have depression, is that it is a very treatable illness. Depression is not a terminal condition if you seek treatment. If you do not seek treatment, however, it can be.

V. I Think My Friend or Colleague Has Depression. What Do I Do?

There are two major "don'ts" that must be observed by those who believe their friend or colleague may be suffering from depression.

1. **DON'T ASSUME THEY ARE SEEKING HELP**—Most people with depression don't realize it until the illness has fully set in and their lives are spinning out of control. It is more likely you are recognizing the symptoms before they are.

2. **DON'T TELL THEM TO "SUCK IT UP"**—Lawyers suffering from depression likely are already placing an enormous amount of pressure on themselves. Depression is a medical condition that must be treated medically. It is not a "mental weakness." If you ignore the threats that depression poses, you run the risk of increasing the already enormous pressure on the depressed person, and pushing them to the breaking point.

There are several strategies that you, as a lawyer, can use to help your friend or colleague that you think may be suffering from depression.

1. **ENGAGE THE PERSON**—Simply talking to another person forces a depressed person out of his or her on head, which is the most dangerous place they can be. A conversation about anything at all—a case, sports, a new movie—can change the day for someone who is sinking into a depressive episode.

2. **ENCOURAGE THEM TO TAKE PERSONAL TIME**—A psychiatrist will tell someone suffering from depression that they need to be working no more than 45 to 50 hours per week, on average. If "crunch time" necessitates they work more, encourage that person to take time off the following week. If you employ someone that is suffering from depression, you need to be cognizant of this fact.

3. **DON'T LAUGH OFF SELF-DEPRICATING COMMENTS**—Lawyers suffering from depression truly see themselves as inherently flawed individuals. Comments such as "the jury will never believe me" or "I can't believe they let me practice law" are indicative of someone sinking into a depressive spell.

4. **ASK FOR THEIR CELLPHONE NUMBER**—A lawyer suffering from depression is at the most risk for suicide when he or she is alone. If you have a means of contacting that person, you can call them on weekends or at night. Again, simple chit chat for only a few minutes can drag them out of an otherwise dangerous situation.

5. **ENCOURAGE THEM TO SEEK HELP**—If your friend or colleague continues to exhibit the signs of depression, ask them how they feel. Encourage them to see their doctor. "Lawyers Helping Lawyers" is also a resource that will actually finance an initial visit with a medical professional. The toll free number is 866-545-9590.

VI. Resources

Hotlines:

Lawyers Helping Lawyers: 866-545-9590

LifeFocus Counseling Services: 866-726-5252

Websites:

Alcoholics Anonymous: http://www.aa.org

Narcotics Anonymous: http://www.na.org

Mayo Clinic: http://www.mayoclinic.org/diseases-conditions/depression/basics/definition/con-20032977

Books:

Bradshaw, John, Healing the Shame That Binds You

Miller, Alice, The Drama of the Gifted Child: The Search for the True Self

Schaeffer, Brenda, Is It Love or Is It Addiction: The Book That Changed the Way We Think About Romance and Intimacy.

Styron, William, Darkness Visible

Young, Kimberly S., Internet Addiction: A Handbook and Guide to Evaluation and Treatment

Zetin, Mark; Hoepner, Cara T.; Kurth, Jennifer, Challenging Depression: The Go-To Guide for Clinicians and Patients