

Counselor-at-Law: Ethical Considerations for Lawyers Whose Clients Have Increased Stress and Mental Health Challenges

Nicole Frank, Senior Assistant Director

Nicole.Frank@courts.state.mn.us

(651) 296-3952

Joseph Ambroson, Assistant Director

Joseph.Ambroson@courts.state.mn.us

(651) 296-2462

Being an attorney is stressful normally



- ▶ Deadlines
- ▶ Business
- ▶ Other attorneys
- ▶ And now Covid

- ▶ Client behavior

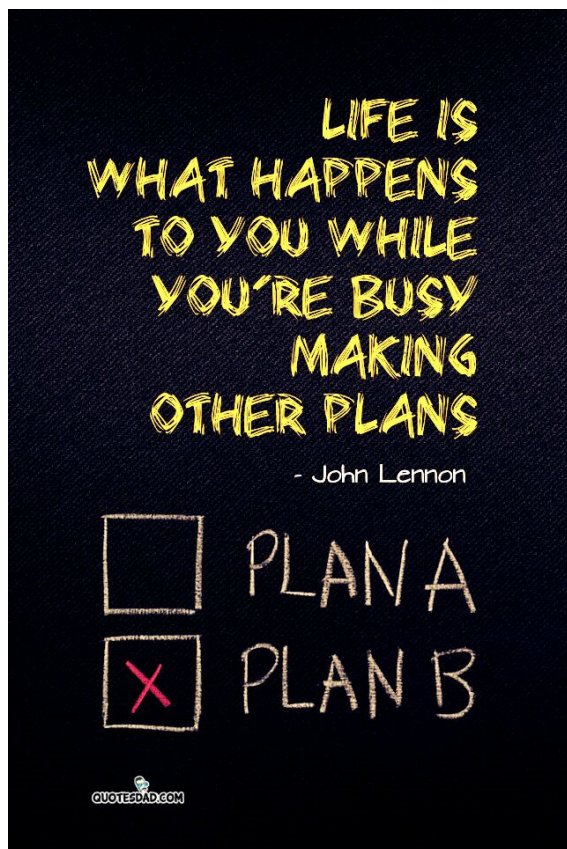
How do you know a client has
mental health challenges?

Signs of Depression

- ▶ Lack of interest in normally pleasurable activities.
- ▶ Person notices changes in ability to concentrate, remember and decide
- ▶ Those who are subjected to greater degrees of implicit bias have higher rates of depression.
- ▶ Depression is a predictor for suicide

Other mental health issues

- ▶ Anxiety Disorder
- ▶ Bipolar Disorder
- ▶ Obsessive Compulsive Disorder
- ▶ ADHD
- ▶ Post Traumatic Stress Disorder
- ▶ Alzheimer's Disease
- ▶ Cognitive impairment following stroke, or other health issue



COVID-19 Impact

- Impact on Families
- Health Impact
- Behavior Changes
- Changes in Operating Procedures
- Changes in Clients' Demand for Legal Services
- Broader Economic Impact

Employment impact of pandemic

Clients undergoing job changes

- ▶ Involuntary change resulting From unexpected job loss
- ▶ Voluntary change resulting from changes in job condition or personal reasons
- ▶ Re-prioritization

Changes in clients' income, financial stress

Stigma explored

- ▶ Potential barriers to seeking help include:
 - ▶ “not wanting others to find out they needed help”
 - ▶ “concerns regarding privacy or confidentiality”
- ▶ Fear of negative repercussions
- ▶ Stigma refers to a feeling of disgrace or fear

Impact of clients' mental health issues on lawyer-client relationship

- ▶ Reduced communications
- ▶ Delayed communication
- ▶ Difficulty making decisions
- ▶ Pessimism/Cynicism
- ▶ Irritability
- ▶ Verbal assaults
- ▶ Dares or willfulness
- ▶ Threats
- ▶ Engaging in dangerous or risky behavior
- ▶ Compulsive behavior

How can we deal with clients who are going through a mental health situation?

Guidance from **Rule 1.14(a)**:

“When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, **as far as reasonably possible, maintain a normal client-lawyer relationship with the client.**”

Scenario #1

You get an email from a client who is upset about a few things.

1. He cannot believe you agreed to a continuance request from the other attorney. How could you do that without consulting him?
2. He is also cannot understand why you haven't filed the motion he has requested.

He closes his email by suggesting you get more aggressive. His email has a lot of words in all capital letters.

Scenario #1 – Rules Implicated

You get an email from a client who is upset about a few things.

1. He cannot believe you agreed to a continuance request from the other attorney. How could you do that without consulting him?

► **Rule 1.2(a)**

“ . . . a lawyer shall abide by a client’s decisions concerning the **objectives** of representation and, as required by Rule 1.4, shall consult with the client as to the **means** by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. . . ”

Scenario #1 – Rules Implicated

► Rule 1.2(a), Comment 2 –

“. . .a lawyer and a client may disagree about the means to be used to accomplish the client’s objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to **technical, legal, and tactical matters**. Conversely, lawyers usually defer to the client regarding such questions as the **expense** to be incurred and **concern for third persons** who might be adversely affected. . . this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. . . Conversely, the client may resolve the disagreement by discharging the lawyer. . .”

Scenario #1 – Rules Implicated

2. He is also cannot understand why you haven't filed the motion he has requested.

► Rule 3.1

“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for a defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”

Comment 1 – Duty to use legal system for fullest benefit of client's cause v. duty not to abuse the legal procedure.

Questions?



Scenario #2

You sit down at your desk, open your computer and there are six emails from your client, C. Taking a breath, you check your voicemails and see C has also left 4 voicemail messages. Each of the messages (voice and electronic) ask you to call C. back as soon as possible.

Scenario #2—Rules Implicated

Rule 1.4(a)(4)

A lawyer shall “promptly comply with **reasonable** requests for information.”

Rule 1.3

“A lawyer shall act with reasonable diligence and promptness in representing a client.”

Questions?



Scenario #3

Your family law client is insisting on withholding the children from the other parent. There is a court order that spells out a parenting time schedule that your client does not think is fair. You have given him advice that this is not going to be helpful to his case and even told him you will withdraw if he does not return the children.

Scenario #3—Rules Implicated

Rule 1.16(a)

“Except as stated in paragraph (c), a lawyer **shall not** represent a client or, where representation has commenced, **shall withdraw** from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or
- (3) the lawyer is discharged.”

Scenario #3—Rules Implicated

Rule 1.16(b)

“Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer’s services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.”

Scenario #3—Rules Implicated

Rule 1.16(d)

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to **protect a client’s interests**, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred.”

Scenario #3—Rules Implicated

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And Rule 1.16(g)

“A lawyer shall not condition the return of client papers and property on payment of the lawyer’s fee or the cost of copying the files or papers.”

Questions?



Scenario #4

You have a tense meeting with your client. Unfortunately, you have to tell them about a setback in your case. You have noticed that recently your client has seemed depressed. She seems disheveled and unfocused as you give her advice. As she is leaving your office, she makes an off-handed comment that maybe she would be better off dead. You are not sure whether to take her seriously or not.

Scenario #4—Rules Implicated

Rule 2.1

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”

Questions?



How to discuss a client's mental health without impairing the relationship

Possible approaches:

- ▶ State your concern honestly and candidly but emphasize that it comes from a place of concern
- ▶ Introduce your concern by citing a specific statement or action
- ▶ Avoid generalizations
- ▶ If the client reacts strongly, assure the client that you don't have to discuss it if they don't want to but you are available if that changes
- ▶ Mention that you can direct them to resources if they don't want to discuss it with you
- ▶ Consider whether the client may benefit from social services
- ▶ Take suicide statements or references to death seriously and bring them up in the moment.

Other areas not covered by the rules

- ▶ When is a normal lawyer-client relationship no longer possible due to a client's mental health issues?
- ▶ Is a client's mental health struggle situational or chronic?
- ▶ Does the client conceal mental health struggles by seeming overly put-together?
- ▶ How can you ensure the trust between lawyer and client is strong if a client withholds information due to shame or embarrassment
- ▶ How much information do you seek from a client who appears private but whose behavior concerns you?
- ▶ When do you determine that disclosure of confidential information is "necessary to prevent reasonably certain death or substantial bodily harm" per Rule 1.6(b)(6), Minnesota Rules of Professional Conduct?

Office Statistics

- ▶ 2020 Complaints - 930; 2019 Complaints - 1003
- ▶ Active lawyers in MN – 25,877 (30,153 licensed) (steady)
- ▶ 2020 Public Discipline—33 lawyers
 - ▶ 3 Disbarred
 - ▶ 24 Suspended
 - ▶ 5 Publically Reprimanded/Probation
 - ▶ 1 Reprimanded
 - ▶ Private Discipline:
 - 20 Private Probations
 - 82 Admonitions (down from 107 in 2019)
 - ▶ 5 lawyers transferred to disability status in lieu of discipline

Office Statistics (cont'd)

- ▶ 2020 Dismissals
- ▶ 436 Summarily Dismissed (Determination that Discipline is Not Warranted Without Investigation)
- ▶ 217 Determination that Discipline is Not Warranted (after investigation)
- ▶ Who filed Complaints?
 - ▶ Clients (392)
 - ▶ Adverse Parties (194)
 - ▶ Opposing Counsel (24)
 - ▶ Director Initiated (22)—primarily through trust account overdraft program
 - ▶ Judges, other interested parties (remainder)

Office Statistics (cont'd)

- ▶ Most Frequent Areas of Law Involved
 - ▶ Criminal (204)
 - ▶ Family Law (120)
 - ▶ General Litigation (171) (number up over 2019)
 - ▶ Probate (87) (Real estate not far behind)
- ▶ Most Frequent Areas of Violations
 - ▶ Rule 1.3—Lack of Diligence
 - ▶ Rule 1.4 - Failure to Communicate
 - ▶ Rule 1.15—Safekeeping property (usually fee agreement mistakes)

Lawyer Well-Being & Ethics

- ▶ New report—National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being, Practical Recommendations for Positive Change* (August 2017)
- ▶ Specific recommendations for legal employers
 - ▶ Form a Lawyer Well-being Committee or appoint a well-being advocate
 - ▶ Assess Lawyers' Well-being (including stressors such as secondary trauma and workload)
 - ▶ Establish policies and practices to support well-being including confidential reporting procedures
 - ▶ Monitor for signs of work addiction and poor self-care
 - ▶ Actively combat social isolation and encourage interconnectivity
 - ▶ Provide training and education on well-being including during new lawyer orientation
 - ▶ Emphasize service-centered mission versus competition
 - ▶ Create standards, align incentives and give feedback on wellness efforts.
 - ▶ Duty of Competence—to include lawyer well-being (Rule 1.1)—action for regulators

Context

- ▶ During 2020: 99 open disciplinary probations—22 cases included a disability related condition, either mental health (20) and/or substance use (9) (some with both)
- ▶ The ABA/Hazelden study indicates that one-fifth of U.S. attorneys may suffer from some level of problematic drinking, and a significant percentage of study participants reported mental health concerns.
- ▶ Study participants advised that barriers to seeking treatment included (1) not wanting others to find out they needed help; and (2) concerns regarding confidentiality or privacy (and relatedly, their license).
- ▶ **Lawyer assistance programs like Lawyers Concerned for Lawyers are not required to report misconduct disclosed to them by an attorney seeking assistance. Rule 8.3(c), MRPC.**
- ▶ Please do not let concerns for your license interfere with seeking help from a lawyer assistance program.
- ▶ Lawyers Concerned for Lawyers: 651-646-5590 or help@mnlcl.org
- ▶ 24-hr crisis line: 612-332-4805

Advisory Opinion Service

- ▶ Available to licensed MN attorneys
- ▶ OLPR attorneys will provide no cost verbal opinion on application of specific facts to rules; every day an attorney is assigned to A/O tasks and spends much of the day returning calls; will receive answer the same day or next day
- ▶ Confidential; non-binding on third parties
- ▶ No opinion will be offered on (1) conduct of third parties, (2) where conduct has already occurred, and (3) OLPR does not approve lawyer advertising, but will advise rules relating to same
- ▶ In 2020, the OLPR provided 1700 opinions.
- ▶ Options: Submit a written request on line (preferred where facts are complicated or detailed); call 651-296-3952 or toll-free 1-800-657-3601 and ask for the A/O attorney
- ▶ Website: <http://lprb.mncourts.gov>

Miscellaneous Information

- ▶ Consider volunteering!
- ▶ **DEC volunteer**
 - ▶ 1 or 2 investigations a year (attend screening meetings)
 - ▶ Learn the rules
 - ▶ Receive training and provide an important service to the profession
- ▶ **Probation Supervisor**
- ▶ **Recruit** public members as DEC volunteers
 - ▶ 20% requirement

Professional Firm First & Annual Reports

- ▶ A legal entity organized for pecuniary profit may not engage in the practice of law unless it is organized under the MN Professional Firms Act (Chapter 319B).
- ▶ After registering with the MN Secretary of State, the firm must file a First Report with the Office of Lawyers Professional Responsibility.
- ▶ Reports are available by calling the office or on the website:
<http://lprb.mncourts.gov/LawyerResources/Pages/ProfessionalFirms>
- ▶ Reports must be completed and returned with the firm's organizational documents filed with the Secretary of State and a \$100 filing fee.
- ▶ Each year the firm is active with the Secretary of State an Annual Report is required regardless of whether or not the firm provided legal services during the reporting year.
- ▶ Reports are mailed out at the end of November each year.
- ▶ Reports must be completed and returned with any amendments filed that year and a \$25 filing fee.
- ▶ Check your firm's status. If you have questions please call the OLPR at 651-296-3952. *See also* Bench & Bar Article (November 2017)

Additional Resources

- ▶ Wealth of Resources on Website, <http://lprb.mncourts.gov>
- ▶ Index and text of Bench and Bar articles and MN Lawyer ethics columns by Office, sorted by Rule, Subject and Year (no precedential value but useful guidance)
- ▶ Current Rules (MRPC and RLPR) and Board Opinions
- ▶ Suspended and Disbarred Lawyer List
- ▶ Attorney Search containing all public discipline, with links to Court opinions and petitions for discipline
- ▶ Trust Account Information and Resources, including FAQs
- ▶ Professional Firm Filing Requirements
- ▶ Cross Border (Multijurisdictional Practice) Information
- ▶ Annual Reports of OLPR, including historical reports
- ▶ Announcements and News
- ▶ Board and Office Directory
- ▶ Complaint forms in English, Hmong, Russian, Somali, and Spanish

Client Security Fund

- ▶ Available to compensate clients who have been victims of dishonest conduct by an attorney that results in a direct loss.
- ▶ Loss must arise from an attorney-client relationship
- ▶ Must be caused by dishonest conduct of attorney
- ▶ Direct loss is compensable; consequential damages are not
- ▶ Has approved for payment over \$8.6 million over life of the fund (32 years) relating to 691 claims against 192 lawyers
- ▶ Currently fully-funded and no part of registration fee goes to Fund
- ▶ www.csb.mncourts.gov

Closing

- ▶ Feedback—how can the OLPR help you in your practice?
- ▶ Questions?
- ▶ Thank You!