



2019 Warren E. Burger Prize
Lawyer Wellbeing as a Crisis of the Profession*
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I. Introduction

The legal profession is in the throes of a mental health crisis. State bars across the country continue to be rocked by the tragic loss of their lawyers to suicide and accidental drug overdose. Recent studies have also shed further light on the severity and scale of lawyers' long-recognized struggles with depression, anxiety, substance abuse, and other indicators of psychological distress.¹

The human cost of the crisis for lawyers and their loved ones cannot be overstated; without question, the premature loss of members of the bar to death and chronic disease is tragic for the affected lawyers and those who care for them. The grim data on the mental wellbeing of lawyers is also concerning given the dual role that lawyers are entrusted to play in protecting their clients' interests and in ensuring and strengthening the rule of law. Lawyers' degraded mental health fundamentally undermines their ability to deliver on those commitments. The American Bar Association's National Task Force on Lawyer Well-Being put it simply in its 2017 report: "To be a good lawyer, one has to be a healthy lawyer."²

But at what point, and in what sense, do preventable tragedies and risks to the quality of legal advocacy translate into a profession-wide crisis? At a high level, there are at least two possible approaches to answering this question.

The predominant one—what might be termed the consequentialist approach—is to stress the effects of poor health for legal practice.³ This approach is exemplified by the Task Force report, which, besides expressing humanitarian concern about the toll that poor mental health takes on lawyers' lives and careers, emphasizes the negative consequences of lawyers' poor health for clients, employers, and society as primary "reasons to take action."⁴ The report makes two main observations. First, the report asserts that as an economic matter, lawyer health is a form of human capital and a critical ingredient in competitive performance that affects the organizational success of public and private entities.⁵ Impaired cognitive function means impaired lawyer performance, which, in turn, undermines the productivity and profitability of the enterprise. Second, lawyer wellbeing affects lawyer performance. Mental health problems compromise lawyers' ability to provide representation with competence and diligence.⁶ The report argues that these economic and professional costs—in addition to humanitarian interests—demand a dedicated response from the profession. This line of argument is an important one. The commitments of lawyers and the sustainability of the legal profession are conventionally defined in terms of the obligations that lawyers owe to others—to clients, the courts, and the public; underscoring

¹ See Section II.A.

² AM. BAR ASS'N NAT'L TASK FORCE ON LAWYER WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 1 (2017), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf> (hereinafter NAT'L TASK FORCE ON LAWYER WELL-BEING 2017 REPORT) (Letter from Bree Buchanan & James C. Buchanan, Chairs, National Task Force on Lawyer Well-Being (Aug. 14, 2017)).

³ See, e.g., Daniel S. Bowling, III, *Lawyers and Their Elusive Pursuit of Happiness: Does It Matter?*, 7 DUKE F. FOR L. & SOCIAL CHANGE 37, 45 (2015) ("[A] happy lawyer is a better lawyer and a more effective, ethical advocate for her clients."); Peter H. Huang & Rick Swedloff, *Authentic Happiness & Meaning at Law Firms*, 58 SYRACUSE L. REV. 335, 336–38 (2008) (explaining that law firms should care about their associates' unhappiness because it causes unproductivity, high attrition, and lesser performance; that law schools should care because healthier lawyers are better alumni; and that policymakers and society should care because unhappy lawyers "implicate at least a temporary misallocation of human capital and scarce legal education resources").

⁴ NAT'L TASK FORCE ON LAWYER WELL-BEING 2017 REPORT, *supra* note 2, at 8.

⁵ *Id.*

⁶ *Id.* at 8–9.

the serious consequences of lawyer distress helps establish self-care as a necessary predicate for ensuring lawyers are able to meet those obligations.

This Essay, however, posits that another approach—what we term an intrinsicist approach—allows us to develop these insights beyond the consequences of poor mental health for the wellbeing of the individual lawyer or the quality of client representation. This approach emphasizes instead the relationship between lawyer wellbeing and modern legal practice and illustrates how the conditions that give rise to poor mental health square with the values and priorities of the legal profession. Based on emerging research about the unfulfilled psychological needs that give rise to lawyer distress, we conclude that the suffering lawyer can be understood as a canary in the coalmine of the legal profession. That is, those conditions identified by myriad studies as key contributors to individual lawyer distress also signal the deterioration of both our conception of the lawyer as a professional and our ideals of the law as a profession.

The Essay proceeds as follows. In Part II, we provide an overview of the wellbeing crisis and the response. We then propose reenvisioning individual lawyer distress as a crisis of the profession itself, drawing on emerging empirical studies from the field of Self-Determination Theory that show that this distress stems from the denial of lawyers' basic psychological needs. Part III, the heart of the Essay, explains how this research provides a lens through which to perceive lawyer suffering in the context of professional identity—and in particular, how debilitating self-doubt, lack of autonomy, and diminished connectedness to others relate to core controversies that have unfolded within the profession over the decades, such as diminished training opportunities for young lawyers as trials disappear and the burdens of discovery multiply, the decline in lawyers' public commitments within an increasingly commercialized profession, and the deterioration of civility and professional decorum in legal practice. In Part IV, we build on the lessons of Self-Determination Theory and the perspective they provide on aspects of legal practice to offer some ideas for reform. We suggest that with participation by a range of stakeholders in the legal profession—who are invested in its wellbeing and are well-positioned to join in remedial efforts—real progress can be made through a proactive, values-oriented approach to improving lawyer wellbeing. Part V concludes with a brief summary.

View through the lens of Self-Determination Theory, the particular facets of lawyer suffering reveal wellness as an issue that sits at the intersection of other fault lines within the profession. Fully addressing lawyer wellbeing thus requires holistic reconsideration of the opportunities, expectations, and values that shape modern legal practice.

...

III. Professional Wellbeing as Rooted in Legal Practice

C. Relatedness in the Context of Diminished Civility

Relatedness is described in the SDT literature as “the desire to feel connected to others,”¹³⁶ “the need to belong,”¹³⁷ and the “need [] for frequent, nonaversive interactions within an ongoing relational bond.”¹³⁸ SDT theory posits that this feeling of relatedness is necessary to function optimally; lack of attachments to others is linked to ill effects on health and wellbeing.¹³⁹ Krieger and Sheldon have considered the effects of both personal and professional contributors to experiences of relatedness. For example, greater satisfaction of the relatedness need accounted for much of the increased wellbeing of married subjects relative to lawyers without partners.¹⁴⁰ Provision of understanding, respect, and choices in the workplace—as opposed to top-down control—also appeared to increase lawyers’ experiences of relatedness (as well as their experiences of autonomy and competence), and served as a strong predictor of lawyer wellbeing.¹⁴¹

The data on lawyers’ need for relatedness to others confirms what we know from personal experience: relationships are crucial to lawyers’ mental health, as they are to most human beings.¹⁴² In recent years, this basic point has begun to generate explicit interest in the issue of lawyer wellbeing from within the movement to improve civility within the profession.¹⁴³ The connection is intuitive, and well-supported by the data. The breakdown of professional decorum and the deterioration of lawyers’ mental and physical health have been traced to common sources of stress and pressure.¹⁴⁴ There is also a causal dynamic at play: an uncivil work environment can be expected to harm lawyers’ wellbeing,¹⁴⁵ and conversely, unwellness may negatively affect lawyers’ conduct in a way that contributes to an uncivil environment.¹⁴⁶ Though we are certainly not the first to point to the overlap between civility in

¹³⁶ Edward L. Deci & Richard M. Ryan, *The “What” and “Why” of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 PSYCHOL. INQUIRY 227, 231 (2000).

¹³⁷ See, e.g., Jennifer G. La Guardia & Heather Patrick, *Self-Determination Theory as a Fundamental Theory of Close Relationships*, 49 CAN. PSYCH. 201 (2008).

¹³⁸ Roy F. Baumeister & Mark R. Leary, *The Need To Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 497 (1995).

¹³⁹ *Id.*

¹⁴⁰ Krieger & Sheldon, *supra* note 63, at 615–16.

¹⁴¹ *Id.* at 618.

¹⁴² *Id.* at 621 (“The tenets of SDT established by decades of research in the general population appeared to apply without qualification to this large sample of legal professionals”).

¹⁴³ See Cynthia L. Alexander & G. Andrew H. Benjamin, *Civility is Good for Your Health*, WASHINGTON STATE BAR NEWS (Apr. 2011) (“Civility, then, is a value that benefits not only the community at large, but also each of us as individuals. Each time we treat an opposing counsel, a witness, an employee, or a stranger with courtesy and respect, we contribute to the cultivation of a culture of civility and we contribute to our own health and wellbeing.”).

¹⁴⁴ See, e.g., Seligman et al., *supra* note 42, at 35; Michael H. Hoeflich, *Legal Ethics and Depression*, J. KAN. B. ASS’N, at 33, 35 (Sept. 2005).

¹⁴⁵ NAT’L TASK FORCE ON LAWYER WELL-BEING 2017 REPORT, *supra* note 2, at 54 (citing studies tying incivility in the workplace to employee unwellness).

¹⁴⁶ Cf. Martha Middleton, *Substance Abuse and Mental Health Issues Are a Growing Problem for the Legal Profession, Say Experts*, AM. BAR ASS’N J. (Dec. 1, 2015, 1:30 AM), http://www.abajournal.com/magazine/article/substance_abuse_and_mental_health_issues_are_a_growing_problem_for_the_legal_profession (“Substance abuse plays a role in 40 percent to 70 percent of all disciplinary proceedings and malpractice actions against lawyers.”); John F. Harkness, *Lawyers Helping Lawyers: A Message of Hope*, 73 FLA. B.J. 10 (Dec. 1999) (reporting that addiction or mental disorder serves as a significant contributing factor in more than half of grievances filed against lawyers).

the profession and lawyer wellbeing,¹⁴⁷ we note there is benefit to recognizing an explicit connection between what are conventionally treated as two distinct realms. Among other things, it expands the civility discussion beyond the usual points of emphasis, such as misconduct between adversaries.

The civility movement is often traced to Chief Justice Burger's 1971 remarks to the American Law Institute in Washington, D.C. There the Chief Justice memorably described civility as "the very glue that keeps an organized society from flying into pieces," and lamented that "lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice."¹⁴⁸ Chief Justice Burger devoted his remarks to the importance of civility in the resolution of litigation,¹⁴⁹ and the civility movement that has flowered in subsequent decades has similarly focused largely (though not exclusively) on interactions between legal adversaries.¹⁵⁰ Justice Sandra Day O'Connor became one of the earliest commentators to specifically accentuate the civility deficits particularly apt to arise out of adversarial contexts as threats to lawyer wellbeing when she warned, two decades ago, that the mental and physical wellness of lawyers is at risk in a world where we treat "litigation as war, argument as battle, or trial as siege."¹⁵¹

The focus on discourtesy between adversaries is an understandable one: many of the most egregious instances of bad behavior in the profession emerge in the context of contentious litigation or negotiations, prompting practitioners to express concern about the lengths to which zealous advocates may go to prevail in a dispute, in contravention of their obligation "zealously to protect and pursue a client's legitimate interests, ...while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."¹⁵² These are also the instances most likely to make their way into the public eye by way of hearing transcripts, deposition videos, or disciplinary proceedings and sanctions.¹⁵³ Codification efforts that have formed an important part of the civility movement also

¹⁴⁷ The American Inns of Court is a clear example of a successful effort to promote civility through an emphasis on relatedness and collegiality. Founded in 1980, the AIC allows its members to forge personal relationships that "enable values of professional civility to be transmitted in ways not otherwise available, particularly in areas characterized by numerous competing attorneys and ever-larger law firms." Brent E. Dickson & Julia Buntun Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531 (1994).

¹⁴⁸ Warren E. Burger, *The Necessity for Civility*, 1 LITIG. 8, 10 (1975); see also Burger, *supra* note 80, at 232 (expressing the worry that "law schools fail to inculcate sufficiently the necessity of high standards of professional ethics, manners and etiquette as things basic to the lawyer's function.").

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER* 66-67 (2010) (tracing lawyer unhappiness to an "adversarial process [that] encourages actions that may be perceived as lies, delays, and mindless posturing to create room for negotiation"); see also, e.g., Seligman et al., *supra* note 42, at 33, 35; Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STETSON L. REV. 253, 253 (1998); Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 950 (1995).

¹⁵¹ Sandra Day O'Connor, *Professionalism*, 78 OR. L. REV. 385, 388 (1999).

¹⁵² See PREAMBLE, *supra* note 121. For instance, in 1991, the Seventh Federal Judicial Circuit conducted a survey of approximately 1,500 attorneys and judges across three states that defined civility as "professional conduct in *litigation proceedings* of judicial personnel and attorneys" (emphasis added). The survey revealed that almost half believed the profession had a civility problem, with responses detailing discovery abuse and other manifestations of a winning-at-all-costs mentality. *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 388-92 (1991).

¹⁵³ No doubt these episodes contribute to the public's poor opinion of lawyers. See Cheryl B. Preston & Hilary Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement*, 48 U. MICH. J. L. REFORM 701, 704 (2015). One of the most infamous examples of uncivil attorney conduct—Exhibit A in the legal incivility literature—is the YouTube video featuring a prominent lawyer who directs profanities and insults at opposing counsel during a deposition and threatens to fight the witness he is deposing. It

reveal a general focus on decorum in the adversarial context. Today, most states have professionalism creeds,¹⁵⁴ including voluntary or mandatory civility rules to supplement existing professional rules that prohibit lawyers from engaging in discourteous conduct toward a tribunal and require lawyers to treat all persons involved in the legal process with courtesy and respect. Many of these creeds are primarily concerned with court practice and hence abuses of the litigation process, including in the course of discovery or motions practice; failure to respect the schedule and commitments of opposing counsel; and poor etiquette in negotiations, depositions, and hearings.¹⁵⁵

But an emphasis on lawyers' mental health is proving a helpful basis for expanding this lens. This may be because the deficiencies in mutual respect and professional courtesy that give rise to mental health issues in the law are so obviously a broader phenomenon, one that encompasses interactions among colleagues, not merely adversaries.¹⁵⁶ Data on this point abounds within the occupational literature. In an oft cited 1999 study, workplace researchers Lynne Andersson and Christine Pearson defined workplace incivility as "low-intensity deviant behavior with ambiguous intent to harm the target, in violation of workplace norms for mutual respect."¹⁵⁷ As this definition suggests, "[i]ncivility can take much more subtle forms, and it is often prompted by thoughtlessness rather than actual malice."¹⁵⁸ An uncivil work environment, in turn, undermines employee concentration and productivity.¹⁵⁹ Indeed, merely witnessing incivility directed at colleagues can negatively impact employees' work experience. This is expressed in reduced performance, creativity, and citizenship behaviors, an increase in aggressive thoughts, and a decrease in the observers' concern for colleagues' welfare.¹⁶⁰ Andersson and Pearson have also identified what they describe as incivility's "spiraling effect," wherein uncivil conduct triggers reciprocation and escalation between individuals, in addition to eroding norms for civil behavior within the wider organization.¹⁶¹

boasts almost one million views to date. *Texas Style Deposition*, <https://www.youtube.com/watch?v=ZlxmrvbMeKc> (last visited June 1, 2019); see also *Paramount Communications v. QVC Network*, 637 A.2d 34 (Del. 1994) (addressing the attorney's conduct sua sponte because he showed "an astonishing lack of professionalism and civility that is worthy of special note").

¹⁵⁴ Preston & Lawrence, *supra* note 153, at 704. Many of these creeds were established in response to the ABA House of Delegates' 1995 resolution encouraging bar associations and courts to adopt standards of civility, courtesy and conduct.

¹⁵⁵ See, e.g., Standards of Civility for the New York State Unified Court System, 22 NYCRR part 1200 (Apr. 5, 1990), Appendix A; Civility Guidelines, Cal. Attorney Guidelines of Civility & Professionalism § 1 (July 17, 2009); West Virginia Standards of Professional Conduct (January 1, 1997); Utah Standards of Professionalism and Civility (October 16, 2003); Standards of Courtesy and Decorum for the Courts of Wisconsin, 96-03 SCR Chapter 62 (June 4, 1996).

¹⁵⁶ See, e.g., NAT'L TASK FORCE ON LAWYER WELL-BEING 2017 REPORT, *supra* note 2, at 54 ("Even seemingly low-level incivility by leaders can have a big impact on workers' health and motivation.").

¹⁵⁷ Lynne Andersson & Christine M. Pearson, *Tit For Tat? The Spiraling Effect of Incivility in The Workplace*, 24 ACAD. OF MGMT. REV. 452, 457 (1999).

¹⁵⁸ Christine Porath & Christine M. Pearson, *The Price of Incivility*, HARV. BUS. REV. (Jan.-Feb. 2013), <https://hbr.org/2013/01/the-price-of-incivility>.

¹⁵⁹ Christian Pearson et al., *Assessing and Attacking Workplace Incivility*, 29 ORGANIZATIONAL DYNAMICS 123-137 (2000) (in study of 775 workers asked about their experience as targets of uncivil conduct, 28 percent said they "lost work time avoiding the instigator"; 53 percent "lost work time worrying about the incident"; and 37 percent felt "their commitment to the organization declined").

¹⁶⁰ Christine L. Porath & Amir Erez, *Does Rudeness Really Matter? Effects of Rudeness on Task Performance and Helpfulness*, 50 ACAD. OF MGMT. J., 1181 (2007).

¹⁶¹ Andersson & Pearson, *supra* note 158, at 452-471.

That said, incivility has many faces. It can be subtle and inconsiderate—or involve emotional aggression and abject mistreatment. An informal 2016 survey showed that a startling 93 percent of responding lawyers at 124 American law firms have experienced bullying and a lack of respect in the workplace, with respondents citing egregious conduct such as “blocking the advancement of others and acting out” and “failing to share credit and failing to treat staff with respect.”¹⁶² A 2019 survey by the International Bar Association found that bullying behavior and sexual harassment are rife in legal workplaces around the globe. Of approximately 7,000 respondents in 135 countries, half of women and a third of men reported being bullied at work.¹⁶³

Civil litigation should not be an oxymoron. Whatever its form, incivility among lawyers and judges undermines the very premise of our collective identity as professionals committed to ensuring fairness, respect and accountability in the face of injustice and abuse of power.

¹⁶² David J. Parnell & Patrick McKenna, *Bullying, Lack of Respect, Me First, Law Firms Suffer the Behaviour they Tolerate*, LEGAL BUS. WORLD (Oct. 21, 2016), <https://www.legalbusinessworld.com/single-post/2016/10/21/Bullying>.

¹⁶³ Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession*, INT’L BAR ASS’N (2019), <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>.