

Agenda

Supreme Court’s Advisory Committee on the Rules of Professional Conduct

April 11, 2023

4:00 to 5:00 p.m.

Via [Zoom](#)

Welcome and approval of minutes.	Tab 1	Simón Cantarero, Chair, presiding
Discussion: <u>Rule 1.1</u> . Competence. Adding a well-being component.	Tab 2	Judge Gardner (subcommittee chair), Judge Oliver, Joni Jones, Martha Knudsen, and Nancy Sylvester
<p>Projects in the pipeline:</p> <ul style="list-style-type: none"> • <u>Rule 7.1</u>: out for comment until April 9, 2023: subcommittee report at May meeting. • Attorney referral fees: Rules 1.0, 5.4(b), 5.8: subcommittee report at May meeting. • Rule 8.4(c): The universe of investigative activities attorneys may undertake. Resubmitted rule to the Supreme Court for comment recirculation. • Rule 8.3 (reporting misconduct in fee dispute resolution): Comments sent to Supreme Court along with amendments to Fee Dispute Rules. • Rule 1.2 (cannabis advising): Submitted research to Supreme Court on other states’ approaches to lawyers and cannabis. • Rules 8.4 and 14-301: Assigned to Judicial Council’s Fairness and Accountability Committee (historical memo attached to August materials). 		--

Meetings are in-person at the Utah Law and Justice Center and are generally held on the 1st Tuesday of the month from 4 to 6 p.m.

2023 Meeting Schedule: ●January 3●February 7●March 7●April 11●May 9●June 6●August 1●
●September 5●October 3● November 7●December 5●

<http://www.utcourts.gov/committees/RulesPC/>

Tab 1



Utah Supreme Court's Advisory Committee on the Rules of Professional Conduct

[Draft] Meeting Minutes

March 7, 2023

Utah Law and Justice Center & Zoom

16:00 Mountain Time

Cory Talbot, Vice Chair, presiding.

Attendees:

Cory Talbot, Vice Chair
Billy Walker
Hon. James Gardner
Joni J. Jones
Jurhee Rice
Julie J. Nelson
Mark Hales
Phillip Lowry
Gary Sackett
Ian Quiel
Hon. Mike Edwards
Hon. Amy Oliver
Robert Gibbons
Adam Bondy
Christine Greenwood (ex officio)

Staff:

Nancy Sylvester
Scotti Hill

Guests:

Martha Knudsen

Excused:

J. Simon Cantarero, Chair
Alyson McAllister
Austin Riter
Dane Thorley
Hon. M. Alex Natt, Recording
Secretary
Hon. Trent Nelson

1. Welcome and approval of the February 7, 2023, meeting minutes (Chair Cantarero)

Vice Chair Talbot recognized the existence of a quorum and called the meeting to order at 4:10 pm.

Vice Chair Talbot asked the committee if everyone had an opportunity to review the minutes from the February 7, 2023, meeting. Judge Oliver moved to approve the minutes; Robert Gibbons seconded. The Motion passed by acclamation.

2. Projects in the Pipeline (Vice Chair Talbot)

Vice Chair Talbot updated the committee on Rule 11-107 (Open and Public Meetings), a new rule that discusses open and public committee meetings and creates more uniformity. This rule emphasizes the fact that the advisory rules committees are all open and public, which allows interested individuals to attend and weigh in. Billy Walker inquired as to whether the OPC Oversight Committee was exempted from this rule and Ms. Sylvester observed that it was not exempted but had the ability to go into executive session, unlike rules committees. She also observed that this new rule shouldn't change the Rules of Professional Conduct Committee's processes much at all, apart from the ability of guests to stay for the whole meeting, including deliberations on rule language.

3. Rule 7.1 (Alyson McAllister, Joni Jones, Nick Stiles, Billy Walker, Mark Hales, Nancy Sylvester)

Ms. Sylvester reported that Rule 7.1 is out for comment until April 9, 2023. It was amended in response to a petition from the Utah Association for Justice (UAJ) and expedited to accommodate the legislative session. Its principal signatory was a state senator. Ms. Sylvester reported that there are many comments in opposition thus far and a subcommittee would need to be convened to review the comments to the rule. The amendments add paragraph (c) to outline a prohibition on direct solicitation of potential clients. This amendment took language from previous Rule 7.3. Mr. Walker reported that the former rule was not as specific in listing the types of direct solicitation that were prohibited. Overall, the rule is close to what Rule contained before.

Subcommittee: Robert Gibbons (chair), Mark Hales, Julie Nelson, Billy Walker, and Scotti Hill.

4. Rule 8.4(c) (Joni Jones)

Ms. Jones reported that Rule 8.4(c) would allow for an exception – to the dishonesty, untrustworthy standard-- for lawyers who are engaged in investigative activities. Ms. Sylvester reported that there was a question from Justice Petersen regarding what undercover activities were recognized by established law and as contemplated by this rule amendment. Ms. Jones went through her research, the list of which was already placed in a comment (“Examples covered by this rule are governmental ‘sting’ operations; use of testers in fair-housing cases to determine whether landlords or real estate agents discriminate against protected classes of applicants; and gathering evidence of copyright violations.”).

The Committee members discussed whether the scope of this rule should be limited to lawyers supervising other lawyers. Gary Sackett discussed the relevant Utah Ethics Advisory Opinion he authored that discussed this issue, noting that this should be applied both to lawyers engaging in the behavior themselves and in a supervisory capacity. The comments cite such specific examples. Colorado limits its rule to government lawyers supervising.

The Committee has already voted on this, so it will return to the court with Ms. Jones’s research and a request that the rule be recirculated for public comment.

5. Rule 5.4(b) (Scotti Hill)

Scotti Hill, Utah State Bar Ethics Counsel, penned a memorandum posing the following issues relevant to referral fees:

- a) Lawyers commonly conflate “legal fees” with “referral fees” and this should prompt an amendment to Rule 1.0 and 5.4.
- b) Rule 5.4(b) seemingly allows for non-lawyers to pay referral fees to lawyers. This was once prohibited by Rule 7.3’s prohibition on non-lawyers “giving something of value” for a legal referral. Was this the Committee’s intention? A reasonable reading would conclude that non-lawyers are permitted to provide referral fees. There is a concern that this runs afoul of Utah Code 76-10-3201 (anti-kickback statute).
- c) The issue of whether lawyers can share “bare referral fees” with other lawyers is not addressed by the Supreme Court press release on this issue in 2020.

The Committee previously drafted a standalone Rule 5.8 (referral fees) as well as an accompanying definition of “referral fees” in Rule 1.0. Ms. Sylvester observed that the Court declined to adopt this rule because of the need to analyze whether referral fees in any form are permitted by the anti-kickback statute. She proposed

convening a subcommittee to consider these issues and amending the rule language accordingly.

Subcommittee: Alyson McAllister (chair), Scotti Hill, Billy Walker, and Ian Quiel.

6. Rule 1.1 (Martha Knudsen, Nancy Sylvester, and Scotti Hill)

Martha Knudsen, Executive Director of the Utah State Bar's Wellbeing Committee presented a potential amendment to Rule 1.1 that would address well-being. She reported that the ABA had proposed – but not yet adopted – a comment to the rule that contained permissive, rather than mandatory language tying lawyer well-being to competence.

The impetus for this amendment was a study about the well-being of lawyers that revealed startling results: lawyers are far less well than other professionals. The national Conference of Chief Justices challenged each state to address these issues. Chief Justice Durrant assigned Justice Petersen to the task, which resulted in the creation of Utah's well-being committee.

Ms. Knudsen relayed that the rate of suicidal ideations is higher in Utah than in other jurisdictions. The ABA and various jurisdictions have grappled with the question of how to de-stigmatize mental health. California, New Mexico, and Vermont have already amended each of their Rule 1.1 on this issue.

Judge Oliver asked if the proposed comment language would impose additional requirements and burdens on lawyers who are already struggling. The committee discussed that the language was permissive (“may”) rather than mandatory (“must” or “shall”). The comment language also discussed “resources supporting lawyer well-being,” adding a clause that these resources were available through the Utah State Bar.” This language allows for lawyers to reach out on their own instead of imposing additional or regulatory requirements on the lawyer. Ms. Knudsen noted that the amendment is set to be voted on by the ABA in August but could already be used as a model for Utah.

Mr. Sackett mused on the usefulness of the language when it was buried in a comment. Knudsen replied that it sets a standard and acknowledges the importance of mental health. The amendment is meant to explain the nexus between well-being and competence, which will help in education efforts. The committee determined that a subcommittee should study this out and propose a final version for vote at the April meeting.

Subcommittee: Judge Gardner (chair), Judge Oliver, Martha Knudsen, Nancy Sylvester, and Joni Jones.

7. Scheduling discussion.

The committee moved the next two Committee meetings to April 11th and May 9th.

8. Adjournment.

The meeting adjourned at 5:19pm. The next meeting will be held on April 11, 2023.

Tab 2

1 **Rule 1.1. Competence.**

2 A lawyer shall provide competent representation to a client. Competent representation
3 requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary
4 for the representation, and, for licensed paralegal practitioners, a determination of
5 whether a matter should be referred to a lawyer licensed to provide legal services
6 without restrictions or limitations.

7 **Comment**

8 **Legal Knowledge and Skill**

9 [1] In determining whether a lawyer employs the requisite knowledge and skill in a
10 particular matter, relevant factors include the relative complexity and specialized
11 nature of the matter, the lawyer's general experience, the lawyer's training and
12 experience in the field in question, the preparation and study the lawyer is able to give
13 the matter and whether it is feasible to refer the matter to, or associate or consult with, a
14 lawyer of established competence in the field in question. In many instances, the
15 required proficiency is that of a general practitioner. Expertise in a particular field of
16 law may be required in some circumstances.

17 [2] A lawyer need not necessarily have special training or prior experience to handle
18 legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer
19 can be as competent as a practitioner with long experience. Some important legal skills,
20 such as the analysis of precedent, the evaluation of evidence and legal drafting, are
21 required in all legal problems. Perhaps the most fundamental legal skill consists of
22 determining what kind of legal problems a situation may involve, a skill that
23 necessarily transcends any particular specialized knowledge. A lawyer can provide
24 adequate representation in a wholly novel field through necessary study. Competent
25 representation can also be provided through the association of a lawyer of established
26 competence in the field in question.

27 [3] In an emergency a lawyer may give advice or assistance in a matter in which the
28 lawyer does not have the skill ordinarily required where referral to or consultation or
29 association with another lawyer would be impractical. Even in an emergency, however,
30 assistance should be limited to that reasonably necessary in the circumstances, for ill-
31 considered action under emergency conditions can jeopardize the client's interest.

32 [4] A lawyer may accept representation where the requisite level of competence can be
33 achieved by reasonable preparation. This applies as well to a lawyer who is appointed
34 as counsel for an unrepresented person. See also Rule 6.2.

35 **Thoroughness and Preparation**

36 [5] Competent handling of a particular matter includes inquiry into and analysis of the
37 factual and legal elements of the problem and use of methods and procedures meeting
38 the standards of competent practitioners. It also includes adequate preparation. The
39 required attention and preparation are determined in part by what is at stake; major
40 litigation and complex transactions ordinarily require more extensive treatment than
41 matters of lesser complexity and consequence. An agreement between the lawyer and
42 the client regarding the scope of the representation may limit the matters for which the
43 lawyer is responsible. See Rule 1.2(c).

44 **Retaining or Contracting With Other Lawyers**

45 [6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own
46 firm to provide or assist in the provision of legal services to a client, the lawyer should
47 ordinarily obtain informed consent from the client and must reasonably believe that the
48 other lawyers' services will contribute to the competent and ethical representation of the
49 client. The reasonableness of the decision to retain or contract with other lawyers
50 outside the lawyer's own firm will depend upon the circumstances, including the
51 education, experience and reputation of the nonfirm lawyers; the nature of the services
52 assigned to the nonfirm lawyers; and the legal protections, professional conduct rules,
53 and ethical environments of the jurisdictions in which the services will be performed,
54 particularly relating to confidential information.

55 [7] When lawyers from more than one law firm are providing legal services to the client
56 on a particular matter, the lawyers ordinarily should consult with each other and the
57 client about the scope of their respective representations and the allocation of
58 responsibility among them. See Rule 1.2. When making allocations of responsibility in a
59 matter pending before a tribunal, lawyers and parties may have additional obligations
60 that are a matter of law beyond the scope of these Rules.

61 **Maintaining Competence**

62 [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
63 changes in the law and its practice, including the benefits and risks associated with
64 relevant technology, engage in continuing study and education and comply with all
65 continuing legal education requirements to which the lawyer is subject.

66 [9] Lawyers should be aware that their mental, emotional, and physical well-being may
67 impact their ability to represent clients and, as such, is an important aspect of
68 maintaining competence to practice law. Resources supporting lawyer well-being are
69 available through the Utah State Bar. Other rules that may be relevant to well-being
70 include those addressing declining or terminating representation, supervisory duties,
71 reporting obligations, and professionalism and civility. See Rules 1.16(a)(2), 5.1, 5.2, 5.3,
72 and 8.3, and Rule 14-301 of the Rules Governing the Utah State Bar.

73 [~~8a~~9a] This rule differs from the ABA Model Rule.

AMERICAN BAR ASSOCIATION

**COMMISSION ON LAWYER ASSISTANCE PROGRAMS
STANDING COMMITTEE ON PROFESSIONALISM
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL
RESPONSIBILITY
ABA COORDINATING GROUP ON PRACTICE FORWARD**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association adopts Comment [9] to Model Rule of Professional Conduct 1.1 as follows:

Model 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

[9] Lawyers should be aware that their mental, emotional, and physical well-being may impact their ability to represent clients and, as such, is an important aspect of maintaining competence to practice law. Resources supporting lawyer well-being are available at: [inset name of the jurisdiction's lawyer assistance program]. Other Rules that may be relevant include those addressing declining or terminating representation, supervisory duties and reporting obligations. See Rules 1.16(a)(2), 5.1, 5.2, 5.3 and 8.3.

REPORT

I. Introduction

Since its founding, the American Bar Association (ABA) has served its members, the profession, and the public. Recent studies, surveys, and research have unequivocally shown that, members of the legal community exhibit elevated rates of substance use disorder and other mental health issues.¹ Mental health conditions and substance use disorders can lead to both dysfunction in the personal lives of legal professionals and can contribute to professional issues, including disciplinary complaints, malpractice claims and the betrayal of trust the public places in the legal profession. Complicating matters, members of the legal profession have been reluctant to seek help. That knowledge, combined with the experience of losing many members of the profession to those conditions,² has made it abundantly clear that raising awareness about the importance of legal professionals' well-being and the nexus between lawyer well-being and lawyer competence has become an essential issue of our time.

Model Rule 1.1 of the ABA Model Rules of Professional Conduct requires lawyers to provide competent representation. "Maintaining Competence" is one of the subjects explained in the Comments of Model Rule 1.1. Adding a new Comment [9] addressing lawyer well-being, as proposed in this Resolution, elevates the importance of self-care and raises lawyer awareness about the nexus between maintaining well-being and meeting ethical obligations, including the duty of maintaining competence.

The proposed amendment, adding Comment [9] to Rule 1.1 of the ABA Model Rules of Professional Conduct, is consistent with policy previously adopted by the ABA House of Delegates. It is a logical extension of those policies and the ABA's ongoing support and work to advance the well-being of the legal profession.

¹ See *infra* VI. Studies and Reports Support This Resolution.

² See e.g., Dave Nee In Memoriam, <http://www.daveneefoundation.org/about/memories-of-dave-nee/>; A Death in the Office: Mark Levy's Talent, Resumé & Friends Weren't Enough; https://www.abajournal.com/news/article/a_death_in_the_office_mark_levys_talent_resume_and_friends_werent_enough_wh/; 'Big Law Killed My Husband': An Open Letter From a Sidley Partner's Widow, <https://www.law.com/americanlawyer/2018/11/12/big-law-killed-my-husband-an-open-letter-from-a-sidley-partners-widow/?slreturn=20210413200239>; Statement of Congressman Jamie Raskin and Sarah Bloom Raskin on the Remarkable Life of Tommy Raskin, <https://repraskin.medium.com/statement-of-congressman-jamie-raskin-and-sarah-bloom-raskin-on-the-remarkable-life-of-tommy-raskin-f93b0bb5d184>.

II. The Proposal

This Resolution proposes that the ABA adopt new Comment [9] to Rule 1.1 of the ABA Model Rule of Professional Conduct:

[9] Lawyers should be aware that their mental, emotional, and physical well-being may impact their ability to represent clients and, as such, is an important aspect of maintaining competence to practice law. Resources supporting lawyer well-being are available at: [inset name of the jurisdiction’s lawyer assistance program]. Other Rules that may be relevant include those addressing declining or terminating representation, supervisory duties and reporting obligations. See Rules 1.16(a)(2), 5.1, 5.2, 5.3 and 8.3.

The proposal to add new Comment [9] to Model Rule 1.1 does not add any new obligations on lawyers - instead, it explains the nexus between competence and well-being. For example, Model Rule of Professional Conduct 1.16(a)(2) already requires that when a lawyer’s physical or mental condition “materially impairs the lawyer’s ability to represent the client”, the lawyer must decline the representation or, where representation has commenced, must withdraw from the representation.

Additional professional responsibilities can be found in existing Model Rules 5.1, 5.2, and 5.3, which impose certain responsibilities on lawyers who are partners, managers, supervisors, and subordinates. Model Rule 5.1(a) imposes a duty upon partners and lawyers, with comparable managerial authority, to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Paragraph (b) requires that direct supervisors make reasonable efforts to ensure that their subordinates’ conduct conforms to the Rules. Model Rule 5.3 imposes similar responsibilities regarding nonlawyers employed or retained by or associated with the firm. Model Rule 5.2 provides that a subordinate lawyer is not excused from the duty to act ethically simply because actions are taken at the direction of a supervisory lawyer but will not be subject to discipline for acting under a supervisory lawyer’s “reasonable” resolution of an arguable question of professional duty.

Model Rule 8.3(a) requires an attorney to report to the appropriate professional authority when the attorney knows that, another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.

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Additional guidance is provided in ABA Formal Opinion 03-429 (June 2003) and ABA Formal Opinion 03-431 (August 2003).³ Opinion 03-429 addresses lawyer impairment issues in the law firm context and identifies the obligations of lawyers in the law firm, including removing the lawyer from representing clients, making required disclosures to clients while balancing against the lawyer's right to privacy, and reporting the lawyer if the firm is aware that the lawyer engaged in dishonest or criminal conduct under Model Rule 8.3(a).⁴ Opinion 03-431 also discusses Model Rule 1.16(a)(2) and offers a different scenario, outlining the obligations of a lawyer who has knowledge that another lawyer suffers from a physical or mental condition that materially impairs that lawyer's ability to represent a client, noting that lawyers' failure to withdraw from representation while suffering from a condition materially impairing their ability to practice would raise a substantial question and may require a reporting under Model Rule 8.3.⁵

III. Proposed New Comment [9] and the Rationale for Adding It

By adopting new Comment [9], the ABA encourages lawyers to prioritize their well-being as part of their duty of competence, promote the importance of self-care and remove the stigma, fear of retribution, and other professional barriers to seeking help.⁶ This Resolution protects all members of the legal profession and the public and ensures a brighter future for our profession.

Studies have shown that legal professionals struggle with anxiety, depression, suicidal thoughts, and problematic substance use disorders at a rate three times higher than that of the general population.⁷ These mental health conditions and substance use disorders can impair an attorney's ability to practice and to adequately and competently represent clients. This, in turn, can lead to disciplinary complaints, discipline, malpractice claims, and the betrayal of trust the public places in the legal profession. It is imperative that each lawyer, judge, and law student recognize the nexus between their health and their professional competence and know how to access care and resources to address any condition that may impair their ability to practice law. They should also feel supported and encouraged to seek such help without fear of harm to their reputation. That is why the Comments to Model Rule 1.1 is the optimal place to address this issue.

New Comment [9] to Model Rule 1.1 of the ABA Model Rules of Professional Conduct does not impose new requirements on the legal profession,

³ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-429 (2003), ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431 (2003).

⁴ Model Rules of Prof'l Conduct R. 8.3(a).

⁵ Model Rules of Prof'l Conduct R. 8.3.

⁶ See discussion of American Bar Association [ABA] Res. 300A *infra*.

⁷ See Patrick Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICT. MED. 46 (2016).

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but instead highlights that mental, physical, and emotional health may impact lawyers' ability to represent clients, and therefore is a component of maintaining requisite competence. Proposed Comment [9] reminds lawyers to consider the effect their well-being - mental, emotional, and physical health - may have on their professional responsibilities including maintaining competence as outlined in Model Rule 1.1.⁸

This proposal to create new Comment [9] to Model Rule of Professional Conduct 1.1 is based on more than five years of ABA policy on lawyer well-being issues. For example, in February 2018, the ABA House adopted Resolution 105, supporting "...the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, judges and law students."⁹ Additionally, Resolution 105 urged "all federal, state, local, territorial, and tribal courts, bar associations, lawyer regulatory entities, institutions of legal education, lawyer assistance programs, professional liability carriers, law firms, and other entities" to "consider the recommendations set out in the report¹⁰, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, published by the ABA and the National Task Force on Lawyer Well-Being ("NTF Report").¹¹ One of the recommendations directed to regulators included revising ABA Model Rule of Professional Conduct 1.1 or its Comment to "more clearly include lawyers' well-being in the definition of competence."¹²

Additionally, Resolution 300A¹³, adopted by the House at the 2021 Midyear Meeting, urged all legal stakeholders to "develop, assemble,

⁸ See also, Model Rule of Professional Conduct 1.16(a)(2), that requires withdrawal when a lawyer's physical and mental health condition materially impairs the lawyer's ability to represent their clients.

⁹ American Bar Association [ABA] Res. 18M105 (2018) (enacted). In February 2017, the ABA House adopted Model Rule for Minimum Continuing Legal Education (MCLE) and Comments. These model rules recommend that, as part of their MCLE requirements, jurisdictions mandate lawyers attend one hour of CLE programming that addresses the prevention, detection, and treatment of mental health or substance use disorders. The report accompanying Resolution 106 on MCLE noted, "Across the country, numerous bar association committees, lawyer assistance programs, and other entities have recognized attorney wellness and well-being as compelling and important issues that affect attorney professionalism, character, competence, and engagement."

¹⁰ The Report of the National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, at p. 26.
<https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>

The recommendations outlined in the National Task Force Report focused on five central themes: (1) identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession; (2) eliminating the stigma associated with help-seeking behaviors; (3) emphasizing that well-being is an indispensable part of a lawyer's duty of competence; (4) educating lawyers, judges, and law students on lawyer well-being issues; and (5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

¹¹ *Id.*

¹² *Id.*

¹³ American Bar Association [ABA] Res. 21M300A (2021) (enacted).

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disseminate, promote, and to collaborate to make resources accessible that advance well-being in the entire legal profession, including but not limited to, educational programming, mental health providers, screening, employee assistance programs, referrals to community support groups and state and local lawyer assistance programs” and “adopt policies that encourage lawyers, judges, and law students to seek out these resources, taking into account the barriers of stigma, retribution, actual or perceived confidentiality challenges, and other negative effects on the reputation of legal professionals.”

Other ABA initiatives also support the implementation of new Comment [9] to Model Rule 1.1 of the ABA Model Rules of Professional Conduct. The 2009 ABA Model Rule on Conditional Admission, recognized law students hesitancy to seek needed treatment for fear of having to disclose treatment information on bar applications.¹⁴ ABA House Resolution 102, urged state licensing authorities to eliminate questions about mental health history, diagnosis, or treatment from applications required for admission to the bar character and fitness inquiries.¹⁵ Also, in February 2016, the House of Delegates adopted Model Regulatory Objectives for the Provision of Legal Services as a guide for lawyer regulators to include in their existing lawyer regulatory framework, the objective of, “advancement of appropriate preventive or wellness programs.”¹⁶

Finally, this Resolution advances three of the four ABA Goals.¹⁷ The addition of Comment [9] in Model Rule 1.1, providing that well-being is an important component of a lawyer’s duty of competence furthers the objectives of Goal I to “promote professional growth and quality of life” and Goal II to “promote competence, ethical conduct and professionalism.” In addition, the resolution advances the objectives of Goal III, (eliminate bias and enhance diversity) by advancing inclusion of those who may suffer from mental, emotional, or physical health challenges or impairments.

IV. What This Resolution Is Not

Proposed Comment [9] is intended to educate lawyers about the potential nexus between their health and their conduct. It seeks to encourage lawyers to obtain help when needed before mental health conditions affect their ability to

¹⁴ American Bar Association [ABA] Res. 09M112 (2009) (enacted). The Commentary to the Model Rule on Conditional Admission states that “the Rule focuses on rehabilitation from conduct or behavior or effective treatment of a condition which was associated with a previous lack of fitness.”

¹⁵ American Bar Association [ABA] Res.15A102 (2015) (enacted). The Report accompanying Resolution 102, emphasizes that “questions about mental health history, diagnoses, or treatment are inherently discriminatory, invade privacy, stigmatize and needlessly exclude applicants with disabilities, are ineffective in identifying applicants who are unfit, and discourage some applicants from seeking necessary treatment.”

¹⁶ Report accompanying American Bar Association [ABA] Res. 16M105 (2016) (enacted).

¹⁷ The four Goals of the ABA are to: 1) serve its members; 2) improve the profession; 3) eliminate bias and enhance diversity; and 4) advance the rule of law.

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competently represent a client. This proposal is not intended to expose lawyers to discipline for simply failing to seek help for any health concern, including substance use or mental health disorders. As stated in the Preamble of the Model Rules of Professional Conduct, “[c]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”¹⁸

Rather, the addition of proposed Comment [9] to Model Rule of Professional Conduct 1.1 demonstrates to members of the legal community and the public that the ABA prioritizes well-being in the legal profession and raises lawyers’ awareness about its relationship to the duty of competence. By elevating the awareness and importance of lawyer self-care, the proposed language may provide additional assistance in helping to reduce the stigma associated with seeking help.

The National Task Force Report defines well-being as a continual process of thriving in each dimension of one’s life: Emotional, Occupational, Intellectual, Spiritual, Physical, and Social. Thriving across each of these dimensions is an important component of well-being.

V. The Resolution Is Consistent with Action Taken by the Conference of Chief Justices and Other Jurisdictions

An amendment to address this issue is supported by the Conference of Chief Justices, which in 2017 adopted Resolution 6, supporting “the concept of lawyer well-being as a critical component of lawyer competence.”¹⁹ Following the Conferences’ resolution, four states adopted either a Comment to their version of Model Rule 1.1 noting that a lawyer’s well-being may impact lawyer competence or included a similar statement in their black letter rules.

In October 2018, the Virginia Supreme Court adopted Comment [7] to Virginia Rule of Professional Conduct 1.1. Comment [7] reads:

A lawyer’s mental, emotional, and physical well-being impacts the lawyer’s ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).

In July 2019, the Vermont Supreme Court adopted Comment [9] to Vermont Rule of Professional Conduct 1.1, which reads:

¹⁸ ABA Model Rules of Professional Conduct, Scope [14] and [20-21].

¹⁹ CONFERENCE OF CHIEF JUSTICES, Resolution 6, Recommending Consideration of the Report on Lawyer Well-Being.

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A lawyer’s mental, emotional, and physical well-being may impact the lawyer’s ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical well-being necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).

Notes of the Vermont Professional Responsibility Board explain that the amendment to Rule 1.1 “is intended to address behavioral health issues that adversely affect a lawyer’s fitness to practice,” “urges lawyers to be cognizant of the toll that the profession may take on its members if behavioral health issues are ignored,” and “remind lawyers that their behavioral health may impact clients and the administration of justice, and to encourage lawyers to employ preventive strategies and self-care.”²⁰ Further, the Board emphasized that disciplinary proceedings should not follow from poor health. Enforcement should proceed only in cases of actionable misconduct.”²¹

In 2018, the New Mexico Supreme Court amended New Mexico Rule 16-501, Responsibilities of Partners, Managers, and Supervisory Lawyers, adopting paragraph (D). Paragraph (D) requires that a “partner in a law firm and any lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall take prompt action to address any concern that a lawyer in the law firm is exhibiting signs of a severe impairment of the lawyer’s cognitive function.”

Comment [8] to the New Mexico rule explains:

[8] Paragraph D recognizes a law firm’s obligation to address concerns that a lawyer in the firm may be exhibiting signs of severe cognitive impairment. ... If a partner in a law firm or any lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm observes another lawyer in the firm exhibiting signs of a severe cognitive impairment, such as a marked change in (1) the lawyer’s short or long term memory; (2) the ability to properly orient as to time, people, or place; or (3) the ability to engage in deductive or abstract reasoning, steps shall be taken that may include assisting the lawyer who appears to be impaired to seek medical care, reporting the concerns to the New Mexico Judges and Lawyers Assistance Program or to the Office of Disciplinary Counsel, or taking other steps designed to prevent the lawyer whose cognitive abilities appear to be severely impaired from taking substantive actions on behalf of clients.

²⁰ Order Promulgating Amendments to the Comments to Rule 1.1 of the Vermont Rules of Professional Conduct, issued July 9, 2019; effective September 9, 2019. Available [here](#).

²¹ *Id.*

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Finally, California took the approach of including a black letter obligation on this subject. In May 2018, the Supreme Court of California adopted revised California Rule of Professional Conduct 1.1(b) which reads, “For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.” Although the black letter approach is instructive to highlight the importance some state courts have placed on wellness and competence, this resolution is not recommending such an approach in order to encourage those who need help to seek assistance without fearing retribution.

VI. ABA Studies Support the Adoption of the Resolution

The ABA has a long history in advancing research and policy addressing various aspects of well-being among the members of the legal profession and providing assistance and support to lawyers, judges, and law students. The ABA Commission on Lawyer Assistance Programs (ABA CoLAP) was created in 1988 to “assure that every judge, lawyer and law student has access to support and assistance when confronting alcoholism, substance use disorders or mental health issues so that lawyers are able to recover, families are preserved and clients and other members of the public are protected.”²² ABA CoLAP is the only ABA entity whose sole mission is advancing well-being for all stakeholders in the legal profession and offering support, assistance and well-being resources through the work of state and local lawyer assistance programs.²³ Yet many legal professionals who need help or know of colleagues who need help do not access the resources available through state and national bar associations and lawyer assistance programs due to stigma, shame, and fear.

Between 2016 and 2020, ABA CoLAP conducted several research studies on the well-being of lawyers, law students, and judges. ABA CoLAP’s studies, in partnership with Hazelden Betty Ford Foundation, University of St. Thomas School of Law, and The College of Saint Scholastica, demonstrated that lawyers, law students, and judges respectively suffer from elevated rates of depression, anxiety, and stress reactions that are sometimes compounded by substance use disorders and mental health issues.

²² ABA COMMISSION ON LAWYER ASSISTANCE PROGRAMS MISSION STATEMENT, https://www.americanbar.org/groups/lawyer_assistance/about_us/.

²³ As an example, a compendium of well-being resources, including a curated list of Mental Health Resources for the Legal Profession; an ABA Well-Being Toolkit; a Well-Being Template for Legal Employers; a Substance Use and Mental Health Toolkit for Law Students; and a Directory of State and Local Lawyer Assistance Programs can be found at the Commission on Lawyer Assistance Programs website. COMMISSION ON LAWYER ASSISTANCE PROGRAMS, https://www.americanbar.org/groups/lawyer_assistance/ (last visited Jan. 19, 2021).

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According to the 2016 national study of attorneys, 20.6% of respondents struggled with problematic drinking.²⁴ Younger respondents reported significantly higher frequencies of drinking and higher quantities of alcohol were reported. This same research also indicated that 61.1% of the respondents struggled with anxiety, 45.7% struggled with depression, and 11.5% of the respondents reported suicidal thoughts at some point in their career.²⁵ The 2016 study found two barriers to seeking help identified for respondents—not wanting others to find out they needed help (25.7%) and concerns regarding privacy and confidentiality (23.4%).²⁶

Research conducted in the same year showed similar results about law students.²⁷ Approximately one-quarter to one-third of the law student survey respondents reported frequent binge drinking, drug misuse, and/or mental health challenges.²⁸ Moreover, the results indicated that significant majorities of those law students most in need of help were reluctant to seek it.²⁹

A 2020 report on the Commission’s National Judicial Stress and Resiliency Survey revealed that 20% of respondents struggle with depression, 23% of respondents struggle with anxiety, and 2% have experienced suicidal thoughts.³⁰ In addition, 9.5% of respondents reported problematic alcohol use.³¹

In 2017, the National Task Force on Lawyer Well-Being was created. After analyzing the data of the ABA lawyer and law student studies and seeking input from numerous sources, the Task Force issued its Report (“NTF Report”), outlining 44 recommendations directed at various stakeholders within the justice system, including judges, regulators, legal employers, law schools, bar associations, and lawyer professional liability carriers. The recommendations are designed to be transformative when implemented by shifting the legal profession's culture to focus on well-being and strengthen the legal profession to ensure the public has a justice system that is competent, fair, and just.

Following the publication of the NTF Report, the ABA Board of Governors, at the request of then President Hilarie Bass, established the ABA Working Group to Advance Well-Being in the Legal Profession. The Working Group’s goal was to address the alarming rates of alcohol and other substance use disorders and mental health issues among lawyers. One of the Working

²⁴ *Id.* et al., *supra* note 1, at 48.

²⁵ *Id.* at 50.

²⁶ *Id.*

²⁷ See Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116 (2016).

²⁸ *Id.*

²⁹ *Id.*

³⁰ See David Swenson, Joan Bibelhausen, Bree Buchanan, David Shaheed & Katheryn Yetter, *Stress and Resiliency in the U.S. Judiciary*, 2020 J. PROF. LAW. 1, (2020).

³¹ *Id.*

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Group’s key deliverables was the ABA Well-Being Campaign.³² The primary vehicle for the Campaign is the ABA Pledge which describes a seven-point framework for legal employers to adopt and prioritize to encourage lawyers and staff to improve their physical, mental, and emotional well-being.³³

In the spring of 2020, at the request of the ABA’s then-President Judy Perry Martinez and the ABA’s then-President-Elect Patricia Lee Refo, the ABA Coordinating Group on Practice Forward (Practice Forward) was established by the ABA Board of Governors to leverage the power of the entire ABA by coordinating pandemic-responsive resources throughout the ABA. The focus is to harness expertise to address potential long-term changes to the practice of law and the judicial system.³⁴ The essential goal is to help members through this fundamental shift so they can better serve their clients.³⁵

Practice Forward launched a survey of ABA members (Practice Forward Survey) in 2021, seeking to understand the increased burden on lawyers caused by the COVID-19 pandemic and the shift to remote work. The survey results revealed that the pandemic has resulted in increased substance abuse and other mental health concerns, which has had a devastating impact on those in the legal profession.³⁶ The data collected also revealed that lawyers surveyed were anxious, stressed, and showing signs of burnout more than they did a year before the pandemic.³⁷ Respondents to the survey reported finding it harder to keep work and home life separate, feeling overwhelmed and stressed, thought their day would never end, and had trouble taking time off from work.³⁸ These feelings were more pronounced for women, lawyers of color, and younger lawyers, particularly those with young children.³⁹ The survey revealed that lawyers want their employers to provide programs and policies around

³² The ABA Well-Being Campaign and Pledge was launched to improve the substance use and mental health landscape of the legal profession with an emphasis on helping legal employers support a healthy work environment. See *ABA Wellbeing Pledge Campaign*, Slide Deck, https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls-colap-working-group-pledge-and-campaign.pdf.

³³ ABA COMMISSION ON LAWYER ASSISTANCE PROGRAMS, WELL-BEING IN THE LEGAL PROFESSION, [.americanbar.org/groups/lawyer_assistance/well-being-in-the-legal-profession/](https://www.americanbar.org/groups/lawyer_assistance/well-being-in-the-legal-profession/) (last visited 14, 2021).

³⁴ ABA PRACTICE FORWARD COORDINATING GROUP JURISDICTIONAL STATEMENT, https://www.americanbar.org/content/dam/aba/administrative/office_president/practice_forward_entity.pdf (last viewed Jan. 20, 2021).

³⁵ *Id.*

³⁶ See Scharf, S., Liebenberg, R., with Gallagher, N. and Peery, D. *Practicing Law In the Pandemic and Moving Forward: Results and Best Practices from a Nationwide Survey of the Legal Profession*, American Bar Association (April 2021) (hereinafter, the “Practice Forward Report”), available at <https://www.americanbar.org/content/dam/aba/administrative/digital-engagement/practice-forward/practice-forward-survey.pdf>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

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wellness, better resources for working parents, and comprehensive plans for family leave and sick leave.⁴⁰

VII. Conclusion

For the foregoing reasons, the ABA should adopt proposed Comment [9] to Model Rule 1.1 of the ABA Model Rules of Professional Conduct.

Respectfully submitted,

Chair _____, Commission on Lawyer Assistance Programs
Chair _____, Standing Committee on Professionalism
Chair _____, Standing Committee on Ethics and Professional Responsibility
Chair _____, ABA Coordinating Group on Practice Forward

⁴⁰ *Id.*