

**NEW JERSEY STATE BAR
ASSOCIATION**



**PUTTING LAWYERS FIRST TASK FORCE:
An Excerpt of the Report and Recommendations on
Improving the Legal Profession for Lawyers**

March 2023

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¹ The PLF Task Force would like to thank Kellyn Celi, Intern (graduate of Montclair State University) and Samantha S. Hing, Rutgers Law School-Newark, J.D. Candidate, 2023 for their assistance with the research for this project.

² Sadly, our dear colleague and friend, Edward S. Snyder, Esq., one of the very best family law litigators in New Jersey passed away on February 3, 2023, shortly before this report was finalized. He will be greatly missed.

INTRODUCTION

By **JERALYN L. LAWRENCE**
NJSBA President

The ability to advocate and to bring about change is infectious. The power to identify issues within the practice, to work collaboratively with all stakeholders and to present real solutions that are then acted upon and results achieved is incredibly rewarding. I thoroughly enjoy being part of a team that works hard to address issues that affect our lives and the comprehensive report by the PLF Task Force, led by Co-Chairs Robin C. Bogan, Esq. and Matheu D. Nunn, Esq., is a true testament to the power of collaboration and teamwork.

Ours is a hard and demanding profession. We have all read the statistics about the incredible number of attorneys who are depressed and anxious and too many of us have friends and colleagues who face these very real challenges every day. While we are all aware of the national headlines of the decline in attorney's health and well-being, our investigation has confirmed that New Jersey lawyers are also suffering. We are a profession in crisis. Our attorney health and wellness working group conducted a survey where 1643 lawyers responded. What that survey found was astonishing, scary and sad and the alarm bells are sounding.

Desmond Tutu once said: “we need to stop just pulling people out of the river. We need to go upstream and find out why they are falling in.”

At the beginning of my Presidency, I formed the Putting Lawyers First Task Force and presented this team of incredibly talented lawyers with the task of looking upstream to find out: Why are we falling in the river? What is the cause or the root of our stress? What can we do about this?

At a conference I attended, Chief Justice Rabner spoke of a book where people had grown comfortable living in an old, neglected house. If there was a leak in the roof, a bucket was placed under it or if there was a creaky floor, it was just stepped over. The Chief challenged the attendees to look deeper at the leaks and creaks and to be open to the possibility of change. I would ask the readers of this report to do the same when we look to areas that are making lawyers fall in the river of despair and to be open to real and meaningful change.

We know that the evolution of the business and practice of law and the ever-increasing demands from our clients will not slow down. Issues that are impacting attorney's physical and mental health and well-being need to be addressed -- ethics grievances and investigations, fee arbitrations, malpractice claims, not being paid in cases, not being relieved as counsel, dealing with negative, false and defamatory online reviews. These issues are some of the reasons lawyers are falling in.

“Putting Lawyers First” was an intentional name for this very important task force. Lawyers hardly ever, if ever, put themselves first. The court comes first, the client comes first, their firm comes first, their family comes first. Never us. We need to make sure we are also looking out for ourselves. While that may be difficult for us to do as we raise our families, run our practices and lead our lives, this is exactly the kind of mission we can embrace on behalf of the profession.

The Putting Lawyers First Task Force created working groups to investigate: attorney health and well-being, the ethics and fee arbitration process, malpractice, on-line reviews, getting relieved as counsel, getting paid in cases, and challenges for solo practitioners and those new to the profession. Each working group analyzed the positives, studied areas for improvement and made valuable recommendations for meaningful change. The goal of this report is to make an attorney's life in the profession better and to provide the tools needed to survive and thrive in the ever-changing legal landscape.

First, change starts with us. Please consider doing your part to make this profession better. We all have difficulties and stress – even if it doesn't appear that we do. It is imperative that we treat each other the way we want to be treated. That we are kind and that we are compassionate and show grace. It is critical to our collective health and wellness that we be good adversaries – good colleagues – and good to each other.

We are always under enormous pressure and always will be, but it will help the profession to take our needs seriously and find ways to make this practice better.

When the NJSBA mobilizes and puts its weight behind a challenge, it can be an impressive force. There is much work to do, and the work of the Putting Lawyers First Task Force sets forth a roadmap to lead our profession in a much better and healthier direction.

It has been a privilege and pleasure to form this Task Force and assemble it with the most dedicated and brilliant lawyers, all of whom are deeply and passionately committed to finding creative and constructive ways of Putting Lawyers First.

MESSAGE FROM THE CO-CHAIRS

Strategic planning is vital for any business, non-profit organization, or law firm to ensure its success and longevity. In fact, it is recommended that a strategic plan is developed every three to five years for an entity to assess its current Strengths, Weaknesses, Opportunities and Threats. This is called a “SWOT” analysis. Many law firms across New Jersey routinely engage in this forward-thinking process. Law firms who implement a strategic plan are positioned to make deliberate decisions that are tailored to achieve their firm's long-term goals and vision.

Nationally, there is evidence to support a conclusion that attorneys are suffering due to a variety of factors, including mental illness, substance use, financial stress—and in many instances a combination of all three. It is a logical conclusion that if attorneys are not operating at their best, the legal system cannot function at its best. The public's access to justice and to our judicial system depends on attorneys and judges, court staff, sheriff officers, and all of the people that are involved in making our system run effectively and efficiently. A deficit in the performance of any one of those groups detrimentally impacts the legal system as a whole. In turn, the public suffers.

Our charge from NJSBA President Jeralyn Lawrence was to examine the problem through the prism of Desmond Tutu's “river” quote—to uncover why attorneys are in crisis. Accordingly, we realized that we needed to investigate whether attorney health and well-being in New Jersey was actually on the decline and, if so, why? Based on the results of our investigation we further

determined that we needed to provide an action plan designed to preserve attorney health and well-being.

The “Putting Lawyers First Task Force” applied the same strategic planning/ SWOT approach that other companies and organizations use to fortify their businesses to examine this complex problem. We established six working groups in the areas of: 1) Attorney Health and Well-Being; 2) Ethics Committee and Fee Arbitration; 3) Malpractice; 4) On-line Reviews; 5) Solo Practitioners, Small firms and Newly Admitted Attorneys; and 6) Attorneys Being Relieved as Counsel & Getting Paid. We then collected data using uniform surveys and questionnaires. Most importantly, this report sets forth recommendations as a roadmap for positive change to tackle problems that were identified.

As you read this report, we hope you will find it to be moving, eye-opening, but most importantly, *motivating*. The data confirms that New Jersey attorneys are experiencing a decline in health and well-being in comparison to other professionals. Of the attorneys surveyed, 28% are looking to leave our profession. The most sobering statistic in our view were the number of our colleagues who had contemplated suicide in the two weeks prior to taking the survey. The data alone should be an impetus for taking steps necessary to temper or eliminate stressors that cause a detrimental impact on attorneys’ health and well-being. The report also highlights areas that need to be further investigated.

Lastly, we thank our working group chairs and members, especially Bonnie C. Frost, Esq., Maritza Rodríguez, Esq., and Amy Wechsler, Esq. for their tireless efforts, dedication, and drive toward this initiative. We appreciate the hard work that Sylvia Breitowich, Esq., and Alison Sutak, Esq. put into the section on removing the mental health question from the Character and Fitness application. We thank Jennifer Fortunato, Esq. and Linda Rehrer, Esq. for their substantial efforts. We thank Jeralyn L. Lawrence, Esq. for her vision and passion for the legal profession. We thank the NJSBA Officers and Board of Trustees for entrusting us with the responsibility of this important work. We encourage NJSBA to use this report as a catalyst to make necessary improvements in our profession –the health and success of New Jersey attorneys depends on it.

Robin C. Bogan, Esq., and Matheu D. Nunn, Esq.

ATTORNEY WELL-BEING

Survey Results Are a Call to Action

Occupational hazards and wellness issues affecting lawyers have escalated in an alarming way on a national level. The Working Group on Attorney Health and Well-Being (Well-Being Working Group) of the New Jersey State Bar Association’s Putting Lawyers First Task Force directed a spotlight on the deterioration in attorney wellness, which our profession can no longer ignore. At the recommendation of the Working Group, the NJSBA engaged Matt Thiese, Ph.D, MSPH of the Rocky Mountain Center for Occupational and Environmental Health at the University of Utah, to conduct a well-being survey. Together with Dr. These, the Well-Being Working Group developed a questionnaire (“Questionnaire”) consisting of 90 questions to which 1,643 New Jersey lawyers responded in November 2022.

The results of that survey revealed that New Jersey is no exception to the national crisis. Indeed, the survey yielded a tremendous amount of data and analysis across the unique issues affecting the practice of law in New Jersey. Survey respondents reported levels of burnout, depression, suicidal ideation, substance use disorders, anxiety, and thoughts of leaving the profession multiple times higher than in other working populations. These lawyers reported burnout at nearly two times the level of any other working population³, suicidal ideations at three times the rate of other working populations⁴, problem drinking at six times the rate of working populations⁵, anxiety at five times the rate of normal working populations⁶ and depression at three-and-a-half times the rate reported for other working populations.⁷

The survey revealed that while 51% of New Jersey lawyers feel enthusiastic about being a lawyer often, very often or always:

- 68% reported feeling anxious in the past two weeks;
- 56% reported a high prevalence of alcohol misuse;
- 49% of lawyers reported moderate to high levels of burnout;
- 49% reported feelings of isolation;
- 23% reported a high prevalence of depressive symptoms;
- 28% of attorneys considered leaving the profession as a result of mental health, burnout or stress; and
- 10% reported thoughts of suicidal ideation.

The survey presented the following additional striking statistics:

- Most of the respondents (51%) have been in practice for over 20 years.

³Tait D. Shanafelt et al., *Changes in Burnout and satisfaction with work-life integration in physicians and the general US working population between 2011 and 2020*, 97 MAYO CLINIC PROCEEDINGS 491 (2022).

⁴ Beth Han et al., *Suicidal ideation, suicide attempt, and occupations among employed adults aged 18-64years in the United States*, 66 COMPREHENSIVE PSYCHIATRY 176 (2016)

⁵ Donna M. Bush & Rachel N. Lipari, *Substance Use and Substance Use Disorder by Industry*, CBHSQ REPORT (Apr. 15, 2016), ncbi.nlm.nih.gov/books/NBK343542/pdf/Bookshelf_NBK343542.pdf.

⁶ *2021 National Health Interview Survey*, CENTERS FOR DISEASE CONTROL AND PREVENTION, cdc.gov/nchs/nhis/2021nhis.htm (last visited Feb. 6, 2023).

⁷ Ronald C. Kessler et al, *The prevalence and correlates of workplace depression in the national comorbidity survey replication*, 50 J. OF OCCUPATIONAL & ENVIRONMENTAL MED. 381 (2008)

- Respondents were most often from small firms with two-10 lawyers (34%) or solo practitioners (18%).
- Most lawyers who responded work in a private law office (75%), while other responses were from attorneys working in government (12%), public interest (4%) and in-house counsel, with retired judge, law clerk, college or law professor, or retired attorney making up the remaining respondents (9%).
- Most of the respondents (51%) reported feeling enthusiastic about being a lawyer often, very often or always.
- Among practicing attorneys, in-house counsel, prosecutors, public defenders, and public interest lawyers were the most enthusiastic about the profession. Associates were the least enthusiastic about practicing in the profession.
- Factors that contribute towards burnout, anxiety and depression include:
 - Lack of boundaries for “down time” or “never off;”
 - Lawyers do not really or do not feel comfortable taking time off to address well-being (39%);
 - Lawyers who were not comfortable taking time off to address well-being were 10 times as likely to report burnout than those who felt they usually were comfortable taking time off;
 - Lawyers who reported being younger than 34 years of age were four times as likely to report depression than a lawyer over the age of 65;
 - Lawyers who reported having 0-3 years of practice experience were six times as likely to report depression than those with 40 years of practice experience; and
 - Overall, 23% of respondents reported the highest prevalence of depressive symptoms.
- The top reasons respondents sought mental health assistance but did not obtain it, included:
 - High costs,
 - Lack of availability of providers covered by insurance, and
 - Not wanting to be seen as vulnerable.
- Almost 74% of respondents reported working on weekends, with 51% responding that their employers expect them to be available outside of normal business hours either frequently or always; 29% stated that these expectations interfere with their personal lives frequently or always.
- Lawyers who reported feeling they did not have sufficient support staff were two-and-a-half times as likely to report considering leaving the profession than lawyers who felt that they did have sufficient support staff.
- There was a strong relationship between secondary trauma and public defenders. Public defenders are six times more likely to have secondary trauma as compared to equity partners/shareholders in law firms.
- Some of the initiatives requested by the respondents to help improve physical/ mental health included:
 - Discounted online or in-person fitness programs/gyms;

- Free or inexpensive continuing legal education (CLE) seminars on physical or mental health;
 - Mentoring, peer counseling or support groups;
 - CLEs on managing money and handling debts;
 - Offering group health insurance; and
 - Offering business coaching.
- 67% of respondents believe that CLE programs on mental health and substance abuse in the legal profession are important and 48% believe attorney well-being CLE should be part of the mandatory reporting cycle.

Burnout

Nearly half (49%) of all participating lawyers reported moderate to high levels of burnout. These levels of burnout are nearly twice as high as reports in other working populations. The prevalence of burnout in 2017 among the US working population was 28%⁸ and in 2020 it was 25%.⁹

Burnout was associated with personal and occupational factors such as: age, whether you felt you had enough support staff, isolation, hours worked on the weekends, hours worked outside of normal business hours, the expectation felt by lawyers to be available outside of normal business hours, the amount of vacation time taken and whether an attorney took time off for well-being.

Age: Lawyers between 35-50 years of age were six times as likely to report burnout than those over 65. Lawyers who were younger than 34 years of age were four times more likely to report burnout than those over 65.

Support Staff: Lawyers who felt they did not have sufficient staff were three times more likely to report burnout than those who did.

Isolation: Lawyers reporting that they almost always felt isolated were four times as likely to report burnout than those that hardly ever felt isolated.

Hours Worked on Weekends: Lawyers who worked seven or more days on the weekends per month were six times as likely to report burnout than those who worked less than one day.

- 74% of respondents reported working on weekends;
- 45% of respondents reported working three or more days on the weekends per month.

Expectation to Be Available Outside of Normal Business Hours: Lawyers who felt that expectations to be available outside of normal business hours always interfered with their personal life were 16 times as likely to report burnout than those who felt the expectation never interfered with their personal life.

- 52% of respondents believed their employers expected them to be available outside of normal business hours either frequently or always.

⁸Tait D. Shanafelt et al., *Changes in Burnout and Satisfaction With Work-Life Integration in Physicians and the General US Working Population Between 2011 and 2017*, 94 MAYO CLINIC PROCEEDINGS 1681 (2019).

⁹ Shanafelt et al., *supra* note 5.

- 29% reported that their employer’s expectation of them to be available outside of normal business hours interferes with their personal lives frequently or always and 53% reported this interferes occasionally.

Hours Worked Outside of Normal Business Hours: Lawyers who worked an average of 15-20 additional hours outside of normal business hours during the week were eight times as likely to report burnout than those who reported rarely or never working outside of normal business hours.

- 72% of respondents reported answering emails outside of normal business hours during the week either frequently or always (every day);
- 39% of respondents reported taking calls from clients outside of normal business hours.

Vacation Time: Lawyers who reported taking five days or less of vacation time were four times as likely to report burnout than those with more than 20 days.

Taking Time Off to Address Well-Being: The survey reported that 39% of New Jersey lawyers do not feel comfortable taking time off to address well-being. Lawyers who responded that they were not comfortable taking time off to address well-being were 10 times as likely to report burnout than those who felt comfortable taking time off to address well-being.

Depression

The survey indicated that 23% of New Jersey lawyers reported the highest prevalence of depressive symptoms, approximately three-and-a-half times higher than other working populations.¹⁰ Depression was associated with personal and occupational factors such as: age, years practicing, position, whether you felt you had enough support staff, isolation, hours worked on the weekend, vacation time, and taking time off for well-being.

Age: Lawyers who reported being between 18-34 years of age were four times as likely to report depression than lawyers who were over 65 years of age.

Years Practicing: Lawyers who reported having less than three years of practice were six times as likely to report depression than those with over 40 years of practice. Lawyers who reported having 10-15 years of practice were six times as likely to report depression than those with over 40 years of practice.

Position:

- Lawyers who identified as associates were three times as likely to report depression than lawyers identifying as equity partner/shareholder;
- Lawyers who identified as in-house counsel were two times as likely to report depression than lawyers identifying as equity partner/shareholder;
- Lawyers who identified as non-equity partner were two times as likely to report depression than lawyers identifying as equity partner/shareholder.

¹⁰ This survey used the Patient Health Questionnaire 9, which assesses depressive symptoms over the past two weeks.

- Lawyers who identified as solo practitioner were two times as likely to report depression than lawyers identifying as equity partner/shareholder.

Support Staff: Lawyers who reported that they felt they did not have sufficient support staff were three times as likely to report depression than those who felt they did.

Isolation: Lawyers reporting that they felt isolated almost always were 10 times as likely to report depression than lawyers who hardly ever felt isolated at work. Similarly, lawyers who reported feeling isolated some of the time at work were three times as likely to report depression than lawyers who hardly ever felt isolated at work.

Time Worked on the Weekend:

- Lawyers who work 6-10 hours on the weekend were more likely to report depression as compared with lawyers who work one-to-five hours on the weekend.
- Lawyers who reported working 15-20 additional hours on average per week were six times as likely to report depression than lawyers who reported rarely or never working additional hours.
- Lawyers who rarely work or never work on the weekend were less likely to report depression as compared with lawyers who work one-to-five hours on the weekend.

Vacation Time: Lawyers who reported taking five or less days of vacation were six times as likely to report depression than those with more than 20 days of vacation.

Taking Time Off to Address Well-Being: Lawyers who reported not being comfortable taking time off to address well-being were 18 times as likely to report depression than those who were usually comfortable.

Suicidal Thoughts

Suicidal thoughts were related to personal and occupational factors such as: age, whether a person has used professional mental health treatment in the past, and enthusiasm about the profession. When asked if they experienced suicidal ideation, 10% of New Jersey lawyers responded yes, which is between two-and-a-half and three times higher than other working populations.¹¹

Age: Lawyers younger than 34 years of age were four times as likely to report suicidal ideation than lawyers who were over 65 years of age.

¹¹ Suicidal ideation was assessed using a single question from the Patient Health Questionnaire 9, reporting thoughts of self-harm in the past two weeks. National Survey on Drug Use and Health reported suicidal ideation among adults in the US as 4.3% (2015-2019). Asha Z. Ivey-Stephenson et al., *Suicidal Thoughts and Behaviors Among Adults Aged ≥ 18 Years—United States, 2015–2019*, 71 MMWR SURVEILLANCE SUMMARIES 1 (2022).

Professional Mental Health Services in the Past: Lawyers who had never used professional mental health counseling services were five times as likely to report suicidal ideation as lawyers who were currently using professional mental health counseling services.

Enthusiasm About the Profession: Lawyers who reported almost never feeling enthusiastic about being a lawyer were seven times as likely to report suicidal ideation than lawyers who reported always being enthusiastic.

Problem Drinking

Problem drinking was related to personal and occupational factors such as: age, experience, level of litigation practice, billable hour requirement. A high prevalence of alcohol misuse, 56%, was reported among New Jersey lawyers, which is approximately four times higher than a reported sample of full-time workers.¹²

Age: Lawyers younger than 34 years of age were more likely to report problem drinking as compared to those ages 35-50.

Experience: Lawyers who had less than 10 years of experience were two times more likely to have problem drinking as compared to those who had been practicing 20-40 years.

Litigation: Lawyers whose practice involved more than 25% of litigation were two times more likely to have problem drinking than lawyers whose practice involved less than 25%.

Billable Hour Requirement: Lawyers who had a billable hour requirement of 1850-2000 hours were about two times as likely to have problem drinking as opposed to those whose billable hour requirement was less than 1850.

Isolation

Nearly half of the participating lawyers (49%) reported feelings of isolation. Isolation was closely tied to burnout, depression, and personal and occupational factors such as: enthusiasm about the profession.

Burnout: Lawyers reporting that they felt isolated almost always were four times as likely to report burnout than those that hardly ever felt isolated.

Depression: Lawyers who reported almost always feeling isolated at work were 10 times as likely to report depression than lawyers who hardly ever felt isolated at work. Similarly, lawyers who reported feeling isolated some of the time at work were three times as likely to report depression than lawyers who hardly ever felt isolated at work.

Enthusiasm about the Profession: Lawyers who reported almost always feeling isolated at work were six times as likely to consider leaving the profession than lawyers who hardly ever felt

¹² Bush & Lipari, *supra* note 7.

isolated at work. Similarly, lawyers who reported feeling isolated some of the time at work were two times as likely to consider leaving the profession than lawyers who hardly ever felt isolated at work.

Anxiety

Anxiety was linked to personal and occupational factors such as: age, years practicing, position, feelings of isolation, hours worked outside of normal business hours, expectation to be available outside of normal business hours, taking time off to address well-being, and enthusiasm about the profession. Slightly more than two-thirds (68%) of New Jersey lawyers reported feeling anxiety in the past two weeks. This is approximately five times higher than the most recent 2021 National Health Interview Survey published by the National Health Center for Statistics of the Center for Disease Control.¹³

Age: Lawyers who were younger than 34 years of age were six times as likely to report anxiety than lawyers who were over 65 years of age.

Years Practicing: Lawyers who practiced less than seven years reported the highest levels of anxiety:

- Lawyers who reported practicing for less than three years were seven times as likely to report anxiety than lawyers who have been practicing for over 40 years.
- Lawyers who reported practicing for three-to-seven years were nine times as likely to report anxiety than lawyers who have been practicing for over 40 years.

Position: Associates were three times as likely to report anxiety than equity partner/shareholders.

Isolation: Lawyers who reported almost always feeling isolated at work were six times as likely to report anxiety than lawyers who hardly ever felt isolated. Similarly, lawyers who reported feeling isolated some of the time at work were three times as likely to report anxiety than lawyers who hardly ever felt isolated at work.

Additional Hours Worked Outside of Normal Business Hours: Lawyers who reported working 15-20 additional hours on average per week were four times as likely to report anxiety than lawyers who reported rarely or never working additional hours.

Expectation to Be Available Outside of Normal Business Hours: Lawyers who reported that employer expectations to be available outside of business hours always interfered with personal life were 10 times as likely to report anxiety than lawyers who reported that employer expectations never interfered. Similarly, lawyers who reported that employer expectations to be available outside of business hours frequently interfered with personal life were seven times as likely to report anxiety than lawyers who reported that employer expectations never interfered.

Taking Time Off to Address Well-Being: Lawyers who reported not being comfortable taking time off to address well-being were seven times as likely to report anxiety than those who were usually comfortable. Similarly, lawyers who responded that they were not really or sometimes comfortable

¹³ 2021 National Health Interview Survey, *supra* note 8.

were four times and three times as likely to report anxiety than lawyers who were usually comfortable, respectively.

Enthusiasm About the Profession: Lawyers who reported rarely being enthusiastic about being a lawyer were 17 times as likely to report anxiety than lawyers who reported always being enthusiastic about the profession.

Well-Being and Diverse Attorneys

The survey only focused on six areas: Burnout, Depression, Suicidal Ideation, Problem Drinking, Feeling Isolated, and Anxiety. The Working Group recommends commissioning a further report analyzing all relationships for future review and study. At the time of this report, a brief review of well-being measures across race showed that there were statistically significant relationships between lawyers reporting their credentials being questioned across both measures of race and gender. Females were more than twice as likely as males to have their credentials questioned. Breaking the figures down by race, 41% of African Americans and 30% of Hispanics reported credential questioning, while this was reported only by 17% of whites. A report analyzing the relationships between all well-being measures and its impact on diverse attorneys would be particularly important.

One of the causes of mental health disorders in marginalized individuals may be experiences with microaggressions. Studies suggest that microaggressions may lead to mental health struggles and substance abuse.¹⁴ Microaggressions correlate with alcohol abuse and greater anxiety.¹⁵ People who regularly experience microaggressions may also experience confusion, anger, anxiety, helplessness, hopelessness, frustration, paranoia and fear, which lead to negative coping mechanisms such as denial, withdrawal and substance abuse.¹⁶

According to a 2018 study by LeanIn.org, 64% of women have experienced microaggressions. Of those women surveyed, 71% of lesbian women reported experiencing microaggressions in the workplace.¹⁷ Similarly, gay men are far more likely to hear demeaning remarks about themselves or others like them and to feel discouraged from talking about their personal lives at work.¹⁸ Of lawyers surveyed in a 2006 American Bar Association study, 49% of women of color, 47% of white women and 34% of men of color reported experiencing demeaning comments or harassment.¹⁹

¹⁴ See generally Arthur W. Blume et al., *The relationship of microaggressions with alcohol use and anxiety among ethnic minority college students in a historically white institution*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 45 (2012).

¹⁵ *Id.*

¹⁶ See generally Lucas Torres & Joelle T. Taknint, *Ethnic microaggressions, traumatic stress symptoms, and Latino depression: A moderated mediational model*, 62 J. COUNSELING PSYCH. 393 (2015).

¹⁷ 2018 Women in the Workplace Key Findings, LEANIN.ORG, leanin.org/women-in-the-workplace/2018/women-get-less-support-less-access-at-work (last visited Feb. 2, 2023).

¹⁸ *Id.*

¹⁹ Janet E. Gans Epner, *Visible invisibility: Women of color in law firms*, AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION (2006), judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/panel_1-visible_invisibility_women_of_color_in_law_firms.pdf.

An individual from a diverse background is likely experiencing microaggressions and inequities on a regular basis. Therefore, the Working Group recommends working with affinity bars to review the survey data and collect ongoing data as to the relationships between well-being measures and their impact on diverse attorneys.

Role of Judiciary

Survey respondents overwhelmingly thought that the Judiciary plays a role with respect to lawyer wellness. More than three-quarters (78%) of respondents believe the Judiciary has an impact on attorney well-being, specifically noting the following efforts that might help address lawyer mental health and well-being:

- 51% - Continue virtual appearances post-Covid;
- 48% - Grant timely adjournment requests more liberally;
- 46% - Reduce emphasis on administrative goals;
- 45% - Improve judicial temperament;
- 30% - Promote uniformity;
- 28% - Training for judges to spot stress issues among attorneys;
- 25% - Encourage judicial participation in local bar association events; and
- 23% - Increase judicial training re implicit bias and diversity.

A Call to Action

The Colorado Supreme Court’s Task Force on Lawyer Well-Being summed up lawyer stress as follows:

“Anyone who practices law knows that life in this profession is stressful. Let’s face it: billable hours, client demands, deadlines, long hours, and pervasive conflict make our jobs hard. And the same work ethic that enabled us to survive law school and weather the bar exam can cause us to drive ourselves into the ground, particularly when the culture of our profession tends to reward and glorify workaholism and demand perfection. The stresses of the profession are taking a toll on our well-being. Left unaddressed, that toll has consequences for us, our clients, our communities, and the future of our profession”²⁰

Attorney well-being is important to people in the profession and the clients they serve. This report is not intended to be the finish line for this work, but a starting point for further well-being initiatives. Much work is needed to create a healthier legal profession. Further analysis and responsibility are needed to determine what we can do as individuals to improve well-being but also what employers, bar organizations, and the judiciary can do to support well-being.

²⁰ Monica M. Marquez & Jonathan White, *Call to Action: The Colorado Supreme Court’s Task Force on Lawyer Well-Being*, 96 DENV. L. REV. 247, 248 (2018).

RECOMMENDATIONS:

1. ***Centralize and Coordinate Well-Being Efforts.*** Initial efforts as well as on-going analysis, planning and implementation will require coordination. These efforts, in turn, require on-going commitments from a centralized source working with representatives from all stakeholders.
 - a. Establish an on-going Task Force on Lawyer and Judicial Well-Being under the Administrative Office of the Courts.
 - i. Dedicate staff within the Judiciary to plan and coordinate initiatives, develop educational materials;²¹
 - ii. Membership should be a cross-section of different practice groups, Judiciary leaders, NJLAP representatives; NJSBA representatives; NJAJ representatives; specialty/affinity bar representatives; young lawyers, law school representatives; mental health and diversity experts; and Office of Attorney Ethics representatives;²²
2. ***Further Survey Analysis.*** As noted, the survey yielded a great deal of information, however it only focused on six areas. The working group supports future efforts to conduct additional analyses of survey data.
3. ***Begin a Statewide Conversation About Attorney Well-Being.*** Promoting wellness involves personal, cultural and systemic changes to address stigma and attitudes and to encourage well-being.
 - a. Identify ways in which stigma inhibits lawyers, law school students and judges from seeking help;
 - b. Support and encourage efforts to build educational programs that focus on stigma-reduction, including testimonial videos and articles which are known to be an effective vehicle for such efforts;
 - c. Speak more openly about mental health at state, county and specialty/affinity bar association meetings;
 - d. Include well-being agenda items in bar association section meetings;
 - e. Host well-being CLEs at the NJSBA Annual Meeting and Mid-Year Meeting;
 - f. Begin a dialogue about suicide prevention;
 - g. Promote the creation of well-being committees/initiatives for law firms;
 - h. Develop roadmap/manual for law firms on promoting lawyer well-being;²³
 - i. Encourage firms, bar associations, law schools, the Judiciary and NJLAP to plan events and participate in the annual national Well-Being Week in Law initiative the first week in May;

²¹ Massachusetts established a Supreme Judicial Court Standing Committee on Lawyer Well-being which is staffed by a full-time director who is employed by the judiciary.

²² The Utah Task Force on Lawyer and Judge Well-Being is co-chaired by a Utah Supreme Court Justice and the Utah State Bar President.

²³ Anne M. Brafford, *Well-Being Toolkit for Lawyers and Legal Employers*, AMERICAN BAR ASSOCIATION (July 2018), lawyerwell-being.net/wp-content/uploads/2020/02/Toolkit-Full_Final_July-30-2018.pdf.

- j. Establish a monthly theme for wellness (e.g. financial wellness, occupational wellness, spiritual wellness, etc.) and devote 30-60 seconds at the start of each NJICLE seminar to a wellness tip in keeping with the monthly theme;
 - k. Create an NJSBA blog that addresses attorney wellness;
 - l. Emphasize and promote the current NJSBA mentorship program and the importance of mentorship in support of well-being;²⁴ and
 - m. Eliminate Question 12B on the Character and Fitness Application (see additional information in the next section).
4. ***Outreach and Education.*** Identifying needs and educating lawyers, judges and law school students about stress, pitfalls and available resources to address problems and foster wellness.
- a. Develop resources and efforts for outreach and education targeting prevention/early intervention to young lawyers;
 - b. Meet with affinity bars to continue the discussion and get ongoing data as this survey did not go in-depth on correlations between race and gender regarding well-being measures;
 - c. Presentations to local and specialty bar associations, such as inviting experts to discuss the connection between attorney wellness and professional resilience/performance.
 - d. Invite lawyers who have experienced crisis, gotten help and are practicing successfully to speak at events;
 - e. Marketing – include announcements/ads in all New Jersey Law Journal issues, in NJSBA section publications (e.g., New Jersey Family Lawyer), county bar publications; include information with annual registration forms; with certification/re-certification applications;
 - f. Coordinate efforts by NJLAP, bar associations and other stakeholders to expand outreach;
 - g. Publicize NJLAP and other hotlines/resources on a frequent, consistent and on-going basis;
 - h. Place NJLAP tables conspicuously at bar events;
 - i. Include a weekly attorney wellness column in the New Jersey Law Journal;
 - j. Create a solo and small-firm outreach committee;
 - k. Develop outreach programs for attorneys who have been formally disciplined with the goal of rehabilitation; and
 - l. Develop and conduct extensive legal community education programs on the results of the survey and implications for different subgroups.
5. ***Law Firms.*** The well-being of law firm employees, including partners, associates and support staff is vital to effective representation of clients and the long-term success of the firm.
- a. Conduct an internal wellness self-assessment;

²⁴ Mentorship fosters inclusiveness and respectful engagement. It can aid career progression, especially for women and diverse professionals. Coaching which is different from mentoring is also critical to enhancing the legal profession. Jayne Reardon, *Can Improving Attorney Well-Being Solve Law's Diversity Problem*, 2CIVILITY (July 11, 2018), 2civility.org/attorney-well-being-solve-diversity-problem/.

- b. Encourage organizations and employees to add benefits such as providing for paid time off specifically for mental health-related appointments;
 - c. Encourage usage of paid time off to reduce stigma around taking leave;
 - d. Develop educational programs, as well as procedures and practices that support identification and treatment of mental health and substance use problems;
 - e. Provide up-to-date information on available resources for mental health and addiction issues;
 - f. Reduce focus on alcohol at firm events;
 - g. Encourage firms to adopt a Well-Being Pledge;
 - h. Adopt a “Wellness Toolkit” modeled after the ABA Well-Being Toolkit for Lawyers and Legal Employers,”²⁵ which defines a healthy workplace and provides guidance on creating and maintaining a workplace that fosters wellness;
 - i. Assist solo and small firms to develop succession plans and to work with NJSBA Solo and Small-Firm Section and with the NJSBA’s Lawyers Helping Lawyers to provide CLE and materials for members to develop succession plans²⁶ and plans for when they face a medical crisis or disability to make sure matters are not neglected; and
 - j. Encourage efforts to explore business models that might reduce burnout risk factors, given strong correlations between weekend work, outside hour work, employer expectations for attorney availability at night and weekends, vacation, taking time off to address well-being, and burnout.
6. **Board-approved CLE.** Continuing legal education provides a state-wide forum for providing essential information about wellness issues.
- a. Allow credits for solutions-based well-being programs;
 - b. Include a well-being track at NJSBA Annual and Mid-Year meetings for CLE credits;
 - c. Encourage specialty and affinity bars, as well as NJAJ to include well-being in its programs;
 - d. Consider minimum, annual well-being credit requirements for licensed attorneys;
 - e. Include well-being as a topic in ethics seminars as it relates to professional responsibility;
 - f. Provide free or low-cost CLEs, on such topics as:
 - i. Self-care
 - ii. Meditation
 - iii. Gratitude
 - iv. Emotional well-being
 - v. Physical well-being
 - vi. Social well-being
 - vii. Spiritual well-being
 - viii. Occupational well-being
 - ix. Financial well-being
 - x. Resilience

²⁵ Brafford, *supra* note 41.

²⁶ Of the 355 participants who self-identified as solo practitioners, 71% reported that they do not have a succession plan in the event they are unable to practice.

- xi. Secondary (vicarious) trauma and compassion fatigue
 - xii. Conflict management
 - xiii. Mindfulness
 - xiv. Self-compassion, and
 - xv. Positive lawyering.
- g. Bring in professional speakers when feasible.
7. ***Bench-bar relations.*** The Judiciary has a significant impact on lawyer well-being, and judges and Judiciary employees can benefit from well-being initiatives.
- a. Judiciary buy-in;²⁷
 - b. Conduct a judicial well-being survey;
 - c. Provide well-being programming for judges and staff;
 - d. Educate Judiciary (reduce stigma, spotting trouble; temperament), including training for new judge orientation, Judicial College annual trainings;
 - e. Encourage more involvement of judges in bar association events;
 - f. Address efficiency issues (delays; required appearances when no action will be taken; grant timely reasonable adjournment requests; realistic deadlines);
 - g. Continue virtual appearances for many court events; and
 - h. Encourage attorney and bar leaders to take appropriate opportunities to speak with judges about attorney well-being.
8. ***Law Schools***
- a. Address students at orientation, entry and at each level of law school re: professional responsibility, demands of practice, etc.;
 - b. Presentations and programs in partnership with attorneys (speakers bureau) and other outside speakers regarding well-being;
 - c. Provide information to students about identifying problems and available resources for assistance and treatment; and
 - d. Incorporate wellness into the curriculum, including discussing mental health and substance use in ethics and professional responsibility courses.
9. ***New Jersey Lawyers Assistance Program.*** NJLAP is an important resource in outreach, programs and initiatives related to attorney mental health and well-being. These are recommendations for continuing and expanded programming by NJLAP:
- a. Provide programs that affirmatively address well-being, prevention, and health-promoting functions, as well as services that address dysfunction;
 - b. Collaborate with other stakeholders to develop and deliver seminars, programs and outreach;
 - c. Assess whether current funding and staffing levels adequately provide for outreach, screening, counseling, peer assistance, monitoring, and education;
 - d. Continue to develop and expand resources for attorneys with alcohol and substance use disorders;

²⁷ See *Resolution 6 Recommending Consideration of the Report of the National Task Force on Lawyer Well-Being*, Conf. of Chief Justices (2017), ccj.ncsc.org/__data/assets/pdf_file/0023/23684/08092017-recommending-consideration-report-national-task-force-lawyer-well-being.pdf.

- e. Inventory available suicide prevention, depression, and anxiety-focused resources and educational programming and develop additional resources and outreach in these areas to support serious mental health struggles in the legal community;
- f. Continue to develop peer and facilitated support groups and explore expansion and training of NJLAP's network of prospective peer volunteers;
- g. Consider adding advisors to the NJLAP team to address solo and small-firm practice management concerns, and expand free and confidential practice management-related consultations; and
- h. Involve NJLAP in CLE presentations on well-being and mental health topics.

10. *Partnering with Third Parties*

- a) In addition to providing CLEs promoting physical health, explore ways to offer discounts for on-line or in-person fitness programs/gyms;
- b) Explore ways to offer group health insurance benefits to solo and small firms;
- c) Explore ways to partner with mental health agencies/providers to offer free or low-cost services to attorneys, possibly through grants or other funding.²⁸

CHARACTER AND FITNESS APPLICATION AS AN IMPEDIMENT

The second major task of the Well-Being Working Group was to examine the efficacy and legality of screening bar applicants for mental health conditions or impairments. In particular, the Working Group focused on whether Question 12B of the New Jersey Character and Fitness application served as a deterrent to an applicant seeking mental health assistance.

Question 12B seeks information on conditions or impairments, rather than conduct.²⁹ The text of the question is as follows:

12B. Other Disorders

Do you **CURRENTLY** have any condition or impairment (including but not limited to substance abuse, alcohol abuse, or a mental, emotional or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical and professional manner and in compliance with the Rules of Professional Conduct, the Rules of Court, and applicable case law?

If yes, please describe any ongoing treatment programs you receive to reduce or ameliorate the condition or impairment.³⁰

²⁸ The Utah State Bar Association recently teamed up with third party companies Tava and Unmind to offer their members six free confidential virtual mental health sessions with licensed clinicians See: utahbar.org/tava-and-unmind-well-being-services-now-available-for-utah-state-bar-members/

²⁹ The elimination of 12B has been questioned based on the need for information about substance use disorders. This concern is sufficiently addressed in Question 12A which addresses conduct.

³⁰ See *Character & Fitness Questionnaire*, NEW JERSEY BOARD OF BAR EXAMINERS, njbarexams.org/browseprintform.action?formId=2 (last visited Jan. 17, 2023).

New Jersey is not the first to challenge the efficacy of the question and whether it achieves any valid purpose. Other experts and jurisdictions have found that it does not. In 2017, the National Task Force for Lawyer Well-Being called for changes in bar character and fitness questions.³¹ In February 2018, the ABA passed a resolution in support of the Task Force’s recommendations.³² In February 2019, the Conference of Chief Justices unanimously adopted Resolution 5 “In Regard to the Determination of Fitness to Practice Law” recommending that applications be updated and urging:

“state and territorial bar admission authorities to eliminate from applications required for admission to the bar any questions that ask about mental health history, diagnoses, or treatment and instead use questions that focus solely on conduct or behavior that impairs an applicant’s current ability to practice law in a competent, ethical, and professional manner; BE IT FURTHER RESOLVED that reasonable inquiries concerning an applicant’s mental health history are only appropriate if the applicant has engaged in conduct or behavior and a mental health condition has been offered or shown to be an explanation for such conduct or behavior.”³³

The Institute for Well-Being in Law, comprised of volunteer committees including legal experts and scholars from national and local bar associations, law school deans, chief justices, researchers and well-being directors, recommended the elimination of mental health and substance use questions on the National Conference of Bar Examiners (NCBE) Sample Bar Application.³⁴ Similarly, both New Jersey law schools, Rutgers University³⁵ and Seton Hall University³⁶ publicly support removing 12B from the Character and Fitness application as does the Rutgers Law School Student Bar Association.

There are currently 26 states that have either eliminated, substantially modified or never used mental health status on their bar applications.³⁷ In another eight states, the issue is under discussion.³⁸

³¹ See *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, NATIONAL TASK FORCE ON LAWYER WELL-BEING 1, 27–28 (2017), lawyerwell-being.net/wp-content/uploads/2017/11/Lawyer-Well-being-Report.pdf.

³² See *Policy*, AMERICAN BAR ASSOCIATION COMMISSION ON LAWYER ASSISTANCE PROGRAMS (Jan. 17, 2023), americanbar.org/groups/lawyer_assistance/policy/.

³³ See *In Regard to the Determination of Fitness to Practice Law*, CONF. OF CHIEF JUSTICES (2019), ccj.ncsc.org/__data/assets/pdf_file/0021/23484/02132019-determination-of-fitness-to-practice-law.pdf.

³⁴ *MEMO Re: Recommendations for Elimination of Mental Health & Substance Use Questions on NBCE Sample Bar Applications*, INSTITUTE FOR WELL-BEING IN LAW (Dec. 6, 2022).

³⁵ Letter from Rutgers Law School Administration to Jeralyn L. Lawrence (Jan. 4, 2023). See: tcms.njsba.com/personifybusiness/LinkClick.aspx?fileticket=w0g6oYBPHB8%3d&portalid=0

³⁶ Letter from Seton Hall Law School Administration sent to Jeralyn L. Lawrence on Jan. 27, 2023.

³⁷ The states are Alaska, Arizona, Arkansas, California, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New York, Ohio, Pennsylvania, Tennessee, Texas, Virginia, Washington, Wisconsin and Wyoming.

³⁸ The states are Alabama, Florida, Nebraska, New Jersey, Oregon, Utah, Vermont and West Virginia.

Statistics show a high prevalence of mental health issues and struggles amongst law students that appear to increase after enrollment.³⁹ Students are reluctant to seek treatment for mental health issues as they remain fearful that seeking treatment will affect their admission to the bar.⁴⁰ This fear often results in students not seeking needed treatment to avoid any diagnosis or formal labels that they would be required to reveal on admission applications.⁴¹ For some who experience these issues, lack of treatment can lead students (and thereafter, admitted attorneys) to “self-medicate” with alcohol or drugs.⁴² In short, the very harm that Question 12B seeks to prevent may be exacerbated by the question’s very existence. The question effectively punishes people who seek help for their concerns and effectively rewards those who live in denial. A person who has never sought help may answer Question 12B in the negative; but that does not mean that they do not have mental health challenges that could impact their ability to practice law.

The Institute for Well-Being in Law, in recommending elimination of these questions, noted, “Some of the strongest advocates are legal educators and administrators who witness firsthand students failing to receive help they need for fear that their future will be jeopardized because of inquiries about their mental health or substance use history, diagnosis, or treatment on the bar application ...We encourage NCBE to be a leader in this well-being movement and consider the elimination of any mental health or substance use inquiry as part of the bar application process.”⁴³

RECOMMENDATION:

Remove Question 12B from the New Jersey Character and Fitness Application

Question 12B does not meet the threshold for determining the fitness of an applicant to practice law and discourages seeking appropriate mental health treatment. Questions regarding conduct as opposed to diagnosis are sufficiently addressed in Question 12A.

³⁹ See Christine Charnosky, *Study: Law Schools That Ignore Students’ Mental Health ‘Shirk’ Their Responsibilities*, LAW.COM (July 13, 2022), [law.com/2022/07/13/study-law-schools-that-ignore-students-mental-health-shirk-their-responsibilities/](https://www.law.com/2022/07/13/study-law-schools-that-ignore-students-mental-health-shirk-their-responsibilities/). See also Krystia Reed et al., *Problem Signs in Law School: Fostering Attorney Well-Being Early in Professional Training*, 47 Int’l J.L. & Psychiatry 148, 152 (2016).

⁴⁰ See e.g. Organ, J, Jaffe, D., and Bender, K., *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, 141 (2016). In this survey, which involved students at 15 separate law schools, 43% of respondents cited “potential threat to bar admission” as a factor that would discourage them from seeing a health professional specifically for mental health concerns. See also Jerome M. Organ et al., *The 2021 Survey of Law Student Well-Being: More Progress Needed in Fostering Help-Seeking among Law Students*, 91 BAR EXAMINER 8 (2022), available at thebarexaminer.ncbex.org/article/summer-2022/2021-survey-of-law-student-well-being/.

⁴¹ Organ, *supra* note 20.

⁴² Jerome M. Organ et al., *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. OF LEGAL EDUCATION 116, 127-136 (2016).

⁴³ *Id.* at 448-49.

ETHICS AND FEE ARBITRATION WORKING GROUP

In an effort to provide the Court with information regarding the current functioning of the disciplinary and fee arbitration systems, the Working Group on Ethics and Fee Arbitration (Ethics Working Group), collected information from a wide array of individuals who have experience with the system.

First, the Ethics Working Group reviewed the 2021 Office of Attorney Ethics (OAE) Annual Report. According to that report, 36,367 attorneys were engaged in private practice of New Jersey law (21,018 attorneys were engaged in full-time practice of law; 7,845 practiced on a part-time basis; 7,444 occasionally practiced; and 60 were unspecified).⁴⁴ Of the 21,028 attorneys engaged in the full-time practice of law, 124 attorneys were subject to discipline in the fiscal year 2021, which was down from 167 in 2020.⁴⁵ That means that one-half of 1% of attorneys in private practice were sanctioned.

In 2021, 768 grievances were filed, a reduction from a high of 1,318 in 2017; of that number, 166 received complaints, which means that the investigator deemed there existed reasonable prospect of proving unethical conduct by clear and convincing evidence. The age of investigations for the Office of Attorney Ethics and local Ethics Committee differed. The OAE investigative time increased from 196 days in 2020, to 241 days in 2021. Similarly, local committee investigative time increased from 177 days in 2020 to 194 days in 2021.⁴⁶

In 2021, 49 attorneys were approved for diversion (commonly referred to as PTI for ethics).⁴⁷ Diversion is an opportunity for an attorney who does not have an ethics record who engaged in minor misconduct to avoid an ethics record if they remediate their behavior as recommended by the Office of Attorney Ethics (OAE). If the attorney takes remedial steps to assure future compliance with the Rules of Professional Conduct (RPC) and successfully completes the conditions of diversion, the underlying grievance is dismissed, and no record of discipline is recorded.

Next, the Ethics Working Group reviewed the 2022 Quarterly Disciplinary Reports. According to those reports, 136 attorneys received final discipline as verified by the Quarterly Disciplinary Reports from the Office of Attorney Ethics⁴⁸ that included:

⁴⁴ Office of Attorney Ethics, *2021 State of the Attorney Disciplinary System Report*, available at: njcourts.gov/sites/default/files/attorneys/office-attorney-ethics/2021oaeannualrpt.pdf (hereinafter “*OAE 2021 Report*”).

⁴³ *OAE 2021 Report* at 3, 10.

⁴⁴ *OAE 2021 Report* at 5.

⁴⁵ *OAE 2021 Report* at 30.

⁴⁶⁻⁴⁸ Information available at the website for New Jersey Courts:

njcourts.gov/sites/default/files/attorneys/1stqtr2022.pdf

njcourts.gov/sites/default/files/attorneys/2ndqtr2022.pdf

njcourts.gov/sites/default/files/attorneys/3rdqtr2022.pdf

njcourts.gov/sites/default/files/attorneys/4rdqtr2022.pdf

- 13 disbarments;
- 55 suspensions;
- 27 censures;
- 26 reprimands; and
- 15 admonitions.

As of Dec. 31, 2022, 89 complaint/hearings were pending at the local level and 89 were pending at the OAE level for a total of 178 pending matters at the hearing stage.⁴⁹ The Ethics Working Group also undertook a process that included surveys and interviews, both of which relied on uniform questions to ensure that the results were valid.

1. The NJSBA sent a survey to all NJSBA members with questions about their contact and experience with the ethics and fee systems, OAE employees, and local district volunteers.
2. Individual telephone calls were made by volunteers of the PLF Task Force to local ethics and fee arbitration secretaries to survey their opinions. To that end, and to maintain uniformity, the PLF Task Force circulated a list of identical questions for each interview.
3. The PLF Task Force compiled a list of all attorneys who represented respondents in ethics matters in the last two years. The PLF Task Force members called the attorneys on the list and gathered their insights into the ethics process. Again, a list of questions was composed for the attorney representatives to use in each interview to maintain uniformity to the questioning.

Findings: Ethics Committees

The strengths of the system were recognized as:

- Dedicated, diligent and professional volunteers and committee members who serve with integrity;
- Lawyer and lay members present a good balance in the committees and hearing panels; and
- OAE has improved training and materials for volunteers;
- The mix between volunteer and paid employees;
- Local committees are critical to the investigative process as they know what lawyers face day-to-day and understand that not all mistakes are unethical;
- A lawyer is judged by their peers rather than a state employee who may or may not have practiced law in private practice;
- The system is public; and
- Regulated by a Supreme Court that gives due regard to the findings of the local committee.

The following areas were identified as concerns or in need of review/improvement:

⁴⁹ Information available at the website for New Jersey Courts: njcourts.gov/sites/default/files/attorneys/office-attorney-ethics/publichearinglist.pdf

- The most-cited suggestion referred to better screening of cases to “weed out” frivolous grievances at the outset because clients often misuse the system to avoid paying their legal fees;
- The second-most cited area for improvement centered around the length of time the entire ethics process takes;
- The third-most cited concern centered on the consumption of attorneys’ time in preparing a response to frivolous grievances;
- The fourth-most frequent concern was that the investigator should be from the same area of law as the respondent so that the investigator has a better understanding of customary practices in a particular area of law;
- The fifth-most frequent area of concern was the perception that OAE has a “bias” against lawyers, sets an inappropriate tone and often tries to micromanage the committees; and
- The sixth most frequent suggestion is for uniformity as to procedures.

Other concerns included:

- Communication avenues and timely turnarounds -- presently, communication is by fax or regular mail due to confidentiality concerns.
- There is no indication that lawyers are told that they have a right to an attorney at any stage of the investigation and that they should have counsel at all stages.
- OAE involvement in the investigative stage can be intrusive, with requests made to investigate issues not raised in the complaint or to add other people to the complaint.
- Citing the need for confidentiality, committee members are only permitted to discuss matters in a general sense – by docket numbers or initials – which stifles the ability of the committee to collaborate on a matter.
- Records are now required to be sent to the OAE on declined matters that were never docketed, and the files include personal data of attorneys when no grievance existed.
- OAE mindset is overly prosecutorial. This principle should be applied: “[T]he primary duty of a prosecutor is not to obtain convictions but to see that justice is done. ‘It is as much [a prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.’” *State v. Timmendequas*, 161 N.J. 515, 587 (1999) (internal citation omitted) (quoting *State v. Farrell*, 61 N.J. 99, 105 (1972) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935))).
- Diversion process is confusing and too limited.
- The investigator has no duty to discuss findings prior to issuing a report and diversion must be negotiated prior to the recommendation or filing of a complaint.
- Diversion is not promoted or encouraged by the OAE; diversions are being refused when they are justified.
- Several attorneys noted that the rules provide that the ethics investigator is not bound by the four corners of the grievance, and thus the investigation can go beyond the grievance, which leads to extended, lengthy investigations.
- There can be a large disconnect between the Disciplinary Review Board and situations in which the parties involved and the OAE agree on a course of action.

- Because the system can be subject to abuse, which takes a significant financial and emotional toll on an attorney under investigation, there should be consequences for false allegations against attorneys.
- There has been a substantial change in the overall approach of the OAE in recent years, which has been much more aggressive against lawyers.
- It is too easy to file a frivolous complaint.

Findings: Fee Arbitration

The strengths of the fee arbitration system were recognized as:

- Volunteers take their role seriously;
- Volunteers are knowledgeable, dedicated, and thorough;
- The greatest strength of the committee is the volunteers, which was noted by every secretary;
- In general, determinations are made quickly; and
- The fee arbitration system is fair and less stressful than having to litigate the matter in court to get paid.

The following areas were identified as concerns or in need of review/improvement:

- The largest area of concern was that the process took too long and that it favored clients because clients do not have to pay for attorneys' time;
- The second area most frequently noted is that lawyers have to "chase" clients for payment because judges do not always confirm the fee arbitration award.
- Training should be conducted via webinar;
- It is difficult to recruit new members;
- Communication is slow because everything must be done by fax or regular mail; and
- Since Covid-19, OAE may get online fee arbitration requests and there can be a time lag in getting those requests to the committee.

RECOMMENDATIONS:

As a general premise, the PLF Task Force concluded that although the ethics and fee arbitration systems generally work, there should be a much greater emphasis placed on helping lawyers "do the right thing" and to exact justice for the public *and lawyers*. The Ethics Working Group makes the following recommendations:

1. ***A New Commission Study***
 - a. The Supreme Court should establish a Commission to conduct a comprehensive study of both the ethics system and fee arbitration system and address the issues raised in this report.
 - b. The Commission should also consider whether these systems suffer from implicit bias, including an implicit bias against solo practitioners and small law firms.
 - c. The Commission should include wide representation from the bar.
 - d. The OAE should be required to participate in Commission's study.

3. *The Filing of a Grievance Stage*

- a. Because the most frequently cited concern was the docketing of frivolous grievances, clients must post a bond of some amount so that they have “skin in the game.”
- b. Change the standard for declination to one where there must be some standard of plausibility to the allegations for docketing and, if not, then the grievance is not docketed.
- c. *Rule* 1:20-8(a) creates “aspirational” time goals for investigations, but as noted in this report, these goals are rarely attained. The tremendous time commitment—and emotional toll—exacted on attorneys’ mental health requires greater certainty for time goals.
- d. Respondents should be copied on *any* grievance that is filed.
- e. Response time for respondents should be expanded from 10 days to 30 days.
- f. The first letter sent to the respondent, which provides notice of the docketing of the grievance should set time goals for completion of tasks akin to Case Management Orders.
- g. The first letter to a respondent should also state that the respondent has the right to hire an attorney, and it should require that an attorney who proceeds without counsel should sign a written waiver.
- h. The first letter to a respondent should list options to resolve an ethics matter such as diversion, stipulation of facts, or a consent to discipline.
- i. Respondents should be able to request diversion *before* any investigative report is filed.
- j. Investigators must discuss findings with respondents and their attorneys 30 days prior to filing a report that recommends discipline.
- k. Establish a private, secure online portal for fee arbitration participants and ethics grievants to alleviate the inconvenience and time delay of communication by fax and regular mail.

3. *Diversion*

- a. Diversion should be available at any stage of the proceeding if warranted by the facts.
- b. Diversion should be available for infractions that would ordinarily result in a reprimand *if the public has not been placed at risk*.
- c. A lawyer who only has a reprimand on their record for five years should be permitted to petition the Court to erase/expunge the matter.
- d. Three members of the OAE should review requests for diversion. The discretion should not be vested in any one or two individuals.

4. *Random Audits*

- a. Maximum of one random audit every five years for any attorney if no prior random audits resulted in discipline.
- b. OAE should share costs of production of documents if the costs exceed \$250.
- c. Attorneys should be advised, in writing, that they have the right to hire an attorney, and attorneys who do not hire counsel should sign a written waiver.

5. **Volunteers**

- a. Lawyers who investigate the respondent should be from the same practice area of law as the respondent.
- b. Volunteers may serve consecutive terms on ethics committees.
- c. Eliminate the one-year break requirement and limitation on terms.
- d. Volunteers should include retired attorneys to expand the pool of participants.

6. **OAE**

- a. OAE should implement a system to track and make a public record of the number of grievances that are initiated by the public *as well as* the number of grievances that emanate from OAE. This statistical breakdown will help further the mission of the ethics system to protect the public and ensure that the public's concerns are addressed.
- b. OAE should implement a system to track and make a public record of: (i) the counts to a complaint added by OAE; and (ii) the number of attorneys added to the complaint by OAE. This statistical breakdown will help address concerns about overreach and lack of "prosecutorial" discretion used by OAE.
- c. Guidance should be given to the OAE to avoid prosecution of frivolous ethics investigations, to expend less effort to expand beyond "the four corners" of the grievance and to cease overcharging.
- d. Training at the OAE level as to how to exercise their discretion (i.e., if their function is as prosecutors, they must also have—and use—appropriate "prosecutorial discretion"). Attitude issues were cited by interviewees across the board.
- e. Training and guidance for OAE to better appreciate and understand the substantial emotional and financial burdens these investigations cause attorneys, particularly unrepresented attorneys and solo and small-firm attorneys.
- f. Training and guidance for OAE to better appreciate and understand whether mental health or substance use issues are a contributing underlying problem for a respondent.
- g. At committee meetings, volunteer committee members should be permitted to speak with other members of their respective committees about docketed matters before the committee.
- h. Permit volunteers to extend their term to finish a report or hearing in which they are involved.
- i. Permit members to discuss matters by name, not by docket number.
- j. If a matter goes to complaint, then the hearing is sent to another committee so that the respondent and grievant are not facing a panel who has discussed the case at meetings.
- k. OAE should not "second guess" the local committee assignments of hearing panel members.
- l. OAE should be less involved at local meetings and allow those meetings to occur outside the presence of an OAE member.
- m. Permit training of volunteers to be conducted by webinar so volunteers can be immediately trained.

7. *Fee Arbitration*

- a. Permit one attorney to attend fee arbitration as opposed to every attorney who billed on a matter (e.g., allow a partner to appear as opposed to a partner and three associates).
- b. Allow attorneys who have been adverse to each other to serve as panelists if the responding attorney provides written consent. (The Ethics Working Group learned through this process that the current practice in some districts is that the secretary does not give the responding attorney the opportunity to waive the potential conflict.)
- c. Establish a program within fee arbitration, wherein the first hour is utilized to mediate the fee dispute.
- d. A fee arbitration award should automatically convert to a judgment if a certification is filed by an attorney that the client has not paid.
- e. Permit attorneys to file for fee arbitration with a caveat that the client can object and remove it from fee arbitration within 30 days of the attorney's filing.
- f. Clients should be required in their initial fee arbitration filing to state with specificity the exact billing entries in dispute. Instructions should be included with examples, so clients understand what is being asked of them when they file.
- g. Fee arbitration volunteers should receive ethics CLE credits.

Other Recommendations

8. Create a pathway to reinstatement for disbarred attorneys.
9. Establish a statute of limitations on the filing of an ethics grievance seven years from the last contact with the client (as this comports with how long an attorney needs to keep a client's file).
10. Constitutional challenges can be made at any time in the proceeding by making a motion to the Supreme Court rather than having to wait until the end of a long investigation and hearing and appellate review by the DRB.
11. Permit local committee volunteers to argue before the Supreme Court. This would require a rule change.
12. When an attorney is given, and completes, a diversion, the matter should not be listed on their ethical record with the Court.
13. OAE should be required to pay for administrative costs for frivolous complaints arising out of random audits that are dismissed when no misconduct is uncovered.
14. Training of volunteers should include training by both OAE and volunteers; NJSBA leadership should be invited to present at training sessions.
15. Create a skills-and-methods-type course in which lawyers must conduct a comprehensive accounting akin to "real world" practice.
16. On July 21, 2022, the Chairman of the Disciplinary Review Board, Maurice J. Gallipoli, A.J.S.C. (ret.), stated in a letter to New Jersey Supreme Court that, absent a rule change, he will continue voting to disbar attorneys who fail to file the affidavit required under *Rule 1:20-20*.⁵⁰ Clearly, the *Rule*, on its face, does not require disbarment for failure to file the *Rule 1:20-20(b)(15)* Affidavit. However, considering that the stated position of

⁵⁰ law.com/njlawjournal/2022/07/21/i-will-continue-to-vote-for-disbarment-over-unfiled-rule-120-20-affidavits-says-disciplinary-review-board-chair-gallipoli/

the Chairman is that failure to file the *Rule* 1:20-20(b)(15) Affidavit should result in an automatic disbarment, Judge Gallipoli's comment should be directly addressed and a possible *Rule* change considered by the Commission whose establishment is recommended in the first recommendation of this section: A New Commission Study.

NJSBA COMMITTED TO ADVANCING WELL-BEING

In addition to the central recommendations made herein, please know that the work to support our profession is ongoing.

The Putting Lawyers Task Force examined a number of other important issues, including: malpractice concerns; ways to help and support solo and small-firm attorneys as well as newly admitted attorneys and those transitioning to retirement; dealing with online reviews; successfully being relieved as counsel; and ensuring that attorneys are paid for their services.

Specifically, the NJSBA will work with its sections and committees to further study these areas and looks forward to sharing its findings with the Court in the future. These additional topics being explored include:

- Support and encourage efforts to build educational programs that focus on stigma-reduction within law firms, law schools, and other bar groups.
- Examine whether it is ripe to support well-being as a mandatory CLE topic.
- Work to amplify the presence of NJLAP.
- Identify needs and educate lawyers, judges and law school students about stress, pitfalls and available resources to address problems and foster wellness.
- Work with law firm partners to support attorneys at all stages of their careers.
- Explore creating a temporary disability status for attorneys struck by a serious illness.
- Develop guidelines for practicing solo and small-firm attorneys to encourage and empower them to have contingency plans in place for their matters after their death or disability.
- Seek opportunities to work with third parties in the larger community to enhance well-being for attorneys, members of the bench, students and clients.
- Examine and recommend pathways for responding to online reviews in an ethical and timely manner.
- Study whether there are recommendations or procedures to suggest ensuring an attorney to be relieved as counsel at the litigant's consent regardless of whether discovery is complete, a plea has been entered or a trial date has been scheduled so that clients can be assured of representation by a person of their own selection.
- Determine appropriate means for judicial review of motions where attorneys seek to be relieved of counsel so that no prejudice is assigned to the client.
- Recommend appropriate revisions to case management orders to include a section addressing counsel fees.
- Enhance resources on the NJSBA website and work closely with affinity and county bar associations to ensure the organized bar is working in concert on these issues.