

# Straight & Narrow

BY LAURA DAY DELCOTTO

## Ethics and Our Personal Health: Where Worlds Collide

In this profession, words matter. Our ethics rules remind us repeatedly of our obligations around civility and professionalism, including our need to encourage public support and confidence in the judicial system. Rolling into 2023, words matter more than ever. As bankruptcy professionals watching the headwinds of global and local economic turmoil, we have a unique stage on which to either help or hurt “public confidence” in our specific system of processes and remedies. When we each formulate our own New Years’ resolutions, where do our ethical duties align with our own personal health and wellness goals?



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Laura Day DelCotto has practiced law for more than 35 years in Kentucky, the first half of her career doing primarily secured lender and lender-liability work at one of the larger Kentucky-based law firms, and the second half doing mostly chapter 11 debtor and committee work at the six-attorney firm she co-founded in 2003.

### Model Rules Preamble

The preamble is not a requirement or rule that will get you in trouble with your state bar association. However, this does not mean we should just skip right over it and ignore the words — words like “special responsibility ... honest dealings ... advisor, evaluator and neutral ... not to harass or intimidate ... demonstrate respect ... uphold legal process ... seek improvement of the law ... cultivate knowledge ... ensure equal access to our system of justice ... vital role in the preservation of society ... guided by personal conscience and approbation of peers....”

It can be challenging to “demonstrate respect” to everyone when you have been up all night working on filings or participating in an auction. It can be hard to be the “neutral advisor” telling your clients the hard things they need to hear or putting the kibosh on wishful financial thinking, especially when your own fees are involved. When we are tired, stressed and under firm money-making pressures, not only are our “ethics” implicated, but our own mental, emotional and physical health suffer. We can do better. We must do better.

### Our Bodies Keep the Score

A recent *Wall Street Journal* article<sup>1</sup> spoke of the dangers of cocaine laced with fentanyl, not in poor and rural America, but within professional communities in New York, including the *AmLaw 100* legal community. *Above the Law* followed with a blog stat-

ing, “Cocaine use runs rampant throughout the legal community, and sometimes begins in law school.”<sup>2</sup> I hope you don’t find that surprising; the associate discussed in the *Above the Law* article who died from cocaine laced with fentanyl was 26 years old.

Please don’t think to yourself, “Well, that would never be me.” Pushing our bodies and minds to work harder, stay awake longer, have crazy to-do lists, bill more hours, work weekends and juggle never-ending client and firm demands does not just show up with the assistance of illegal stimulants: “Five Mountain Dews and a big bag of Cheetos to prepare for trial at night.” “Diet Cokes and slice-and-bake cookies at 4 a.m. to get me going.” “A bottle of wine to take the edge off before I start billing again.” These are exact quotes from conversations I’ve had with lawyer friends and acquaintances, anonymously listed here to protect the innocent.

The flip side has also been hanging over our professional practice area. As we well know from the last several years, the stresses of *not* being busy can be even worse: wondering whether the firm will terminate your position or cut your salary, sitting in silence with no ringing phones or emails, watching your billables and split levels shrink to numbers you never imagined possible. There are also pressures to (over)perform when you *do* have work, and feeling a vague dread over what is going to happen with the next avalanche of economic failures, if and when they ever come.

*The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* is legendary in numerous wellness communities, including addiction recovery, domestic violence, trauma-based counseling and others. We all have traumas and stressors in our lives, and the trauma gets stuck in our bodies, in our cells and neural pathways. As lawyers, please take note: It is not the mind or the intellect that keeps the score; it is the body:

As long as you keep secrets and suppress information, you are fundamentally at war with yourself. Hiding your core feelings takes an enormous amount of energy, it saps your motivation to pursue worthwhile goals, and it leaves you feeling bored and shut down. Meanwhile, stress hormones keep flooding your body, leading to head-

<sup>1</sup> Margot Patrick, “Three New Yorkers Ordered Cocaine from the Same Delivery Service. All Died from Fentanyl,” *Wall St. J.* (Oct. 23, 2022), available at [wsj.com/articles/fentanyl-cocaine-new-yorkers-drug-delivery-service-all-died-11666526726](https://www.wsj.com/articles/fentanyl-cocaine-new-yorkers-drug-delivery-service-all-died-11666526726) (unless otherwise specified, all links in this article were last visited on Nov. 23, 2022)

<sup>2</sup> Staci Zaretsky, “Promising Young Biglaw Associate Dies After Using Cocaine Laced with Fentanyl,” *Above the Law* (Oct. 24, 2022), available at [abovethelaw.com/2022/10/promising-young-biglaw-associate-dies-after-using-cocaine-laced-with-fentanyl/](https://abovethelaw.com/2022/10/promising-young-biglaw-associate-dies-after-using-cocaine-laced-with-fentanyl/)

aches, muscle aches... and irrational behaviors that may embarrass you and hurt the people around you.... Ignoring inner reality also eats away at your sense of self, identity and purpose.<sup>3</sup>

Taking care of our physical, emotional and mental health is not optional if we want to be capable of showing up as our best selves in our professional (and personal) lives, regardless of whether we are junior associates or senior partners.

## Does Our Duty of Competence Include Our Own Well-Being?

Some states have added an additional comment to Rule 1.1 expanding upon the meaning of our duties of competence. Go check on your state right now. The added comment provides that in addition to “competence,” meaning legal knowledge, skill, thoroughness and preparation, it also includes “the lawyer’s mental, emotional and physical well-being” or similar wording.<sup>4</sup>

The American Bar Association (ABA) has been an active advocate in this space. The ABA Commission on Lawyer Assistance Programs (CoLAP), in conjunction with the Hazelden Betty Ford Foundation, conducted an extensive 2016 study of more than 13,000 then-practicing attorneys. Around the same time, the ABA and other groups joined forces to create the National Task Force on Lawyer Well-Being. The Task Force published its 70-plus-page report on the study in 2017, titled *The Path to Lawyer Well-being: Practical Recommendations for Positive Change*.<sup>5</sup> The Task Force changed its name in 2020 and is now the Institute for Well-Being in Law. It is worth a read.

In a follow-up to the report, the ABA and Aspire, a consultancy firm for the legal profession, jointly published the 2018 *Well-Being Toolkit for Lawyers & Legal Employers*. If you are the type who loves worksheets, checklists, guided videos and question prompts, then this one is for you. It is chock full of information about health and tips for getting there.

The Task Force defines attorney well-being as “a continuous process whereby lawyers seek to thrive in each of the

following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others.”<sup>6</sup> The report goes on to recommend and proclaim that “lawyer well-being is part of the lawyer’s ethical duty of competence.” Some states have adopted this recommendation in their rules and others have not, but do we really need an ethics rule to force us to take better care of ourselves? (See Exhibit.)

**Chronic stress is 100 percent proven to lead to all manner of serious health problems. Our minds and our personas are what we sell, how we support our families and how we serve our clients. It is seriously stupid not to take care of our brain, and our brain is part of our physical body.**

Wellness is for sure not a “one and done,” and like all processes, some days are better than others. These processes include making healthy and positive choices for ourselves, being realistic about the pressures inherent in the legal system cultural norms, and knowing in our world of financial distress that most of those with whom we deal, borrowers and lenders alike, are operating under extreme stressors involving money, loss and scarcity. While those of us with consumer and small business clientele know this all too well, what happened in the *Neiman Marcus* case is a perfect reminder that sophisticated players with many zeros in their cases feel the same, if not more, pressures. We need to be at our best, because we know that our clients are nowhere near their personal best.<sup>7</sup>

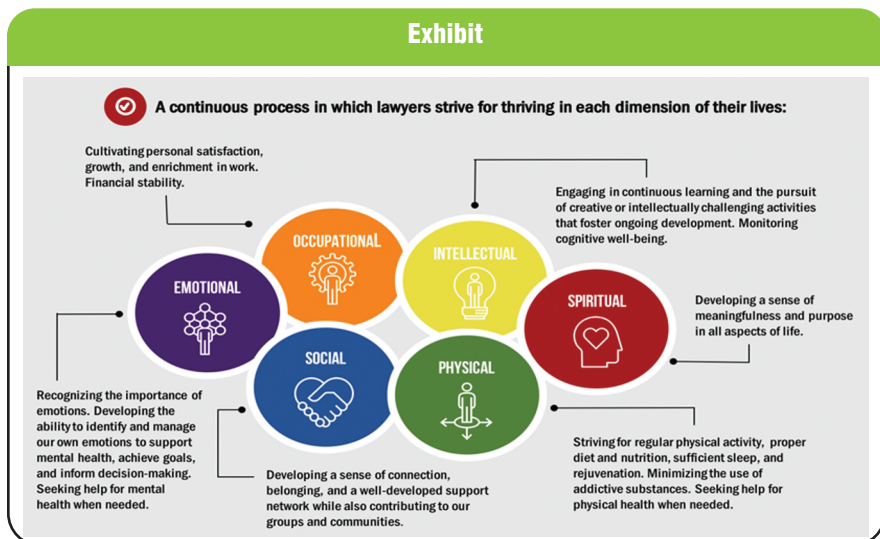
## Cultural and Individual Bankruptcy Practice Norms: If Not Me, Then Who?

One of my own never-ending “well-being” goals is the constant clearing out of all my “important reading materials” clutter. Somehow, “one lives in the naïve notion that *later* there will be more room than in the entire past.”<sup>8</sup> Yes, that would be me. Busted! “Wait, don’t throw those 2016 *Harvard Business Review* and *Success* magazines away — I am going to read them!” And indeed, the one on top caught my eye as I was writing this while also making give-away piles. I feel vindicated (but unfortunately, the magazine stack went back onto the shelf this time).

3 Dr. Bessel van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* at p. 235 (2015).

4 See, e.g., Cal. Rules Pro. Conduct R. 3-110; Vt. Rules Pro. Conduct. R. 1.1.; Va. Rules Pro. Conduct. R. 1.1.

5 See “2017 Path to Well-Being Report,” available at lawyerwellbeing.net/the-report.



6 *Id.* at 9.

7 The co-chair of the unsecured creditors’ committee was convicted of bankruptcy fraud for his actions involving the bidding procedures for assets. See, e.g., *In re Neiman Marcus Grp. Ltd. LLC*, Case No. 20-32519 (Bankr. S.D. Tex. 2020), ECF No. 1485 (U.S. Trustee report containing details of its investigation).

8 Elias Canetti, *The Human Province* (1978).

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The cover of the June 2016 issue of the *Harvard Business Review* has a big clock with the words “Managing the 24/7 Workplace” written on it. The lead article below the clock is “‘Always available’ cultures breed problems. Here’s how to handle them.” The article posits that “high-intensity” workplaces and cultures lead to a whole host of “dysfunctional” behaviors, and how we need to do better. It further explains how organizations and individuals are actually better at their jobs, and have more creativity and problem-solving skills, when they have a life.

If this was 2016, I can only imagine what would be written today, where work life and home life have blended together beyond recognition. With our consumer clients, we get calls 24/7, unless we set some clear front-end “client expectations,” then live up to enforcing them. With our chapter 11 cases, the culture of working 24/7 has become not only ingrained but also seemingly held in high esteem by some. With our colleagues, there are incoming emails, calls and texts at all hours of the day and night.

While we have seen the growth of the “melting ice cube” emergencies in almost every case these days, bankruptcy also needs to slow things down and create some stability and calm. Bankruptcy professionals need to sleep, and to have time to develop thoughtful professional advice. I encourage you to demand as much in your cases.

As you are working on your New Year’s resolutions, consider one or more healthy changes for your work life. Think about what you might do differently, what you might do to inspire a colleague, or how you might push back on a 24/7 mindset in your own circumstances. This will help you take that first tiny baby step.

## **Well-Being/Schmell-Being: What Does All This Have to Do with Ethics or Me?**

Those of us without diagnosed addiction, substance-abuse or significant mental health challenges often think that none of this applies to us. We’re “normal” and just stressed out, burned out or very tired. While various lawyer-assistance programs continue to revolve primarily around “support and assistance when confronting alcoholism, substance use disorders or mental health issues,” these groups have moved

beyond these original concerns to include emphasis on overall well-being, both individually and culturally within the profession. While much has been accomplished since 2017, much more needs to be done, and it depends on each of us.

No one likes being told what to do. No one wants to be nagged about eating better, adjusting our moods, or getting more exercise or sleep. There are no wellness police citing us for violations of common sense in our own self-care. Since this is January, we probably have some lofty resolutions around our personal health, but come February, the stats tell us that most of us will have already fallen off the wagon.

Chronic stress is 100 percent proven to lead to all manner of serious health problems. Our minds and our personas are what we sell, how we support our families and how we serve our clients. It is seriously stupid not to take care of our brain, and our brain is part of our physical body. The “mind” is in the brain, the gut and the nervous system — and they are all talking to each other all the time. Each of us owes it to ourselves to do whatever it takes to support our own health as best as we can, knowing that there is no perfection, only day-to-day choices.

Words matter. The words “wellness,” “mindfulness” and “well-being” are thrown around more often these days in legal circles, moving us beyond the words of civility, advocacy and professionalism. All these words can mean very different things to each of us. “What do they mean to me?” is the real question to ask yourself.

If you need ideas and inspiration to get started, the report, the tool kit, and the CoLAP, state LAPs and Institute for Well-Being in Law websites have resources that will keep you busy for weeks: podcasts, meditations, videos, links and reading. I will admit that I find it all a bit overwhelming, especially when I probably could benefit from it the most. I’m more of a “Keep it simple, stupid” girl: Eat better, hydrate, sleep enough, go to yoga and move my body around. Start again tomorrow.

Now, put down your *ABI Journal* for a minute, and go outside for a quick walk around the block. No telling what creative thought will pop into your mind when you give it a little break. Your loved ones, your co-workers and your clients will all say, “Thank you.” **abi**

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