Enhancing the Culture of the Legal Profession by Embracing

Well-Being and Civility

1 pm - Chief Justice Elizabeth "Beth" Walker, Supreme Court of Appeals of West Virginia

Promoting a legal profession in which lawyers and judges thrive professionally and personally has been a vibrant topic of conversation ever since the report of the National Task Force on Lawyer Well-Being in 2017. Chief Justice Walker will discuss this work in West Virginia, with an emphasis on the intersection of well-being, civility and public service.

2 pm - Panel Discussion: Thriving and Working Together

Moderator: Chris L. Newbold - President of the Institute for Well-Being In Law, Executive Vice President of ALPS

Panelists: Chief Justice Elizabeth "Beth" Walker - Supreme Court of Appeals of WV, Stephanne Thornton - Clinical Director of the WV Judicial & Lawyer Assistance Program, Mike McKnight - McKnight Mediations, and Gregg Greenfield - Greenfield Law

June 21, 2023

Ramkota Hotel, Sioux Falls

Brought to you by ALPS, Lawyers Assistance Committee & SD Lawyers Concerned for Lawyers

Justice Elizabeth "Beth" D. Walker was elected to the Supreme Court of Appeals of West Virginia on May 10, 2016, becoming the first Justice elected in a non-partisan race. She took office on January 1, 2017 and served as Chief Justice in 2019.

Justice Walker is active on social media and passionate about public engagement and civics education. In 2020, she and her friends Justice Rhonda Wood of the Arkansas Supreme Court, Chief Justice Bridget McCormack of the Michigan Supreme Court, and Justice Eva Guzman of the Texas Supreme Court launched the podcast Lady Justice: Women of the Court. It features discussions of the judicial branch of government and their experiences on their state's highest appellate court and is available online at www.ladyjusticepod.com.

Justice Walker was raised in Huron, Ohio. She is a 1987 summa cum laude graduate of Hillsdale College in Hillsdale, Michigan. She earned her law degree in 1990 from The Ohio State University, where she was Articles Editor for The Ohio State Law Journal. During her years of private practice, she participated in courses offered by the Program on Negotiation at Harvard Law School, including its Mediation Workshop.

Immediately after graduating from law school, Justice Walker moved to West Virginia and joined the law firm of Bowles Rice McDavid Graff & Love (now Bowles Rice) in Charleston. During her 22 years at Bowles Rice, she concentrated her statewide practice on labor and employment law and mediation. Justice Walker served on the firm's Executive Committee and in several other leadership roles.

After moving from Charleston to Morgantown in 2011, Justice Walker became Associate General Counsel for the West Virginia United Health System (also known as West Virginia University Medicine). In that role, she advised WVU Medicine's hospitals and other affiliates regarding labor and employment matters from 2012 until she resigned in 2016 to take office.

In 2012, Justice Walker was elected a Fellow of the College of Labor and Employment Lawyers. She is a 1999 graduate of Leadership West Virginia. A lifelong Girl Scout, Justice Walker is former chair of the board of directors of Girl Scouts of Black Diamond Council. She also served as chair of the boards of Leadership West Virginia and Kanawha Pastoral Counseling Center. She is married to Mike Walker and stepmother to Jennifer. They live in Charleston.

Enhancing the Culture of the Legal Profession by Embracing Well-Being and Civility

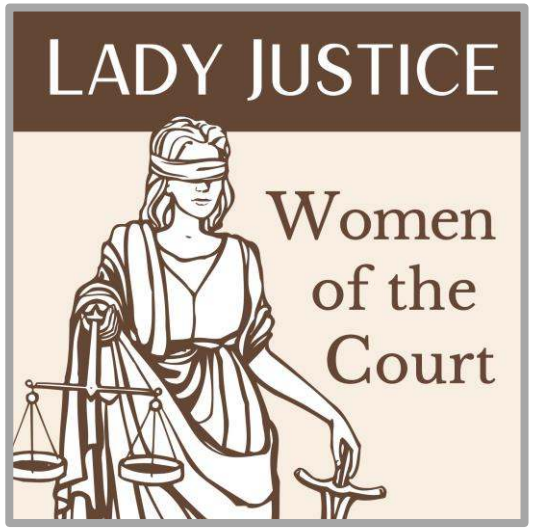
Chief Justice Beth Walker

June 21, 2023

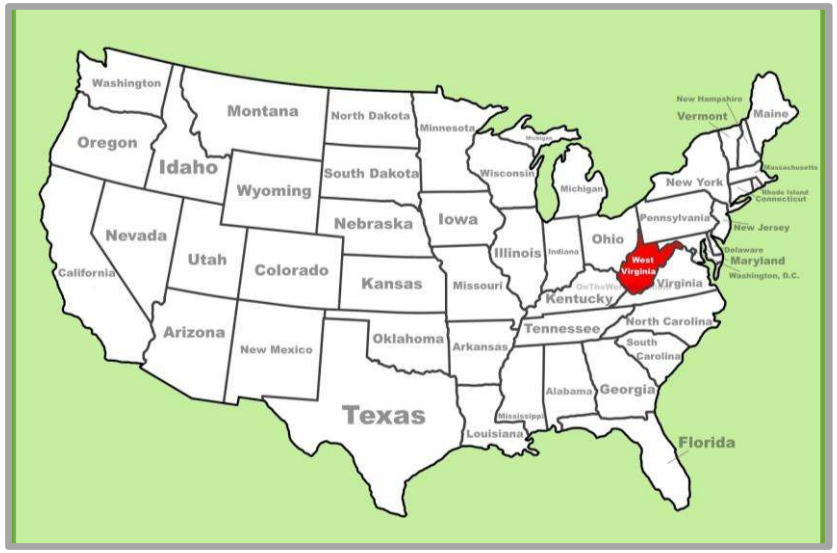
Sioux Falls, South Dakota

Justice Beth WALKER

WEST VIRGINIA SUPREME COURT



- 7 years on bench
- Chief Justice in 2019, 2023
- Labor and employment lawyer (1990-2016)
- @bethwalkr on Twitter
- @justicebethwalker on IG
- @BethWalkerWV on Facebook




BLICAN GOVERNMENT IS
THE EQUAL RIGHT OF EVERY CITIZEN IN HIS PERSON AND
PROPERTY AND IN THE


MEMBERS ONLY
WV Legislative Photography, Photo by Perry Bennett

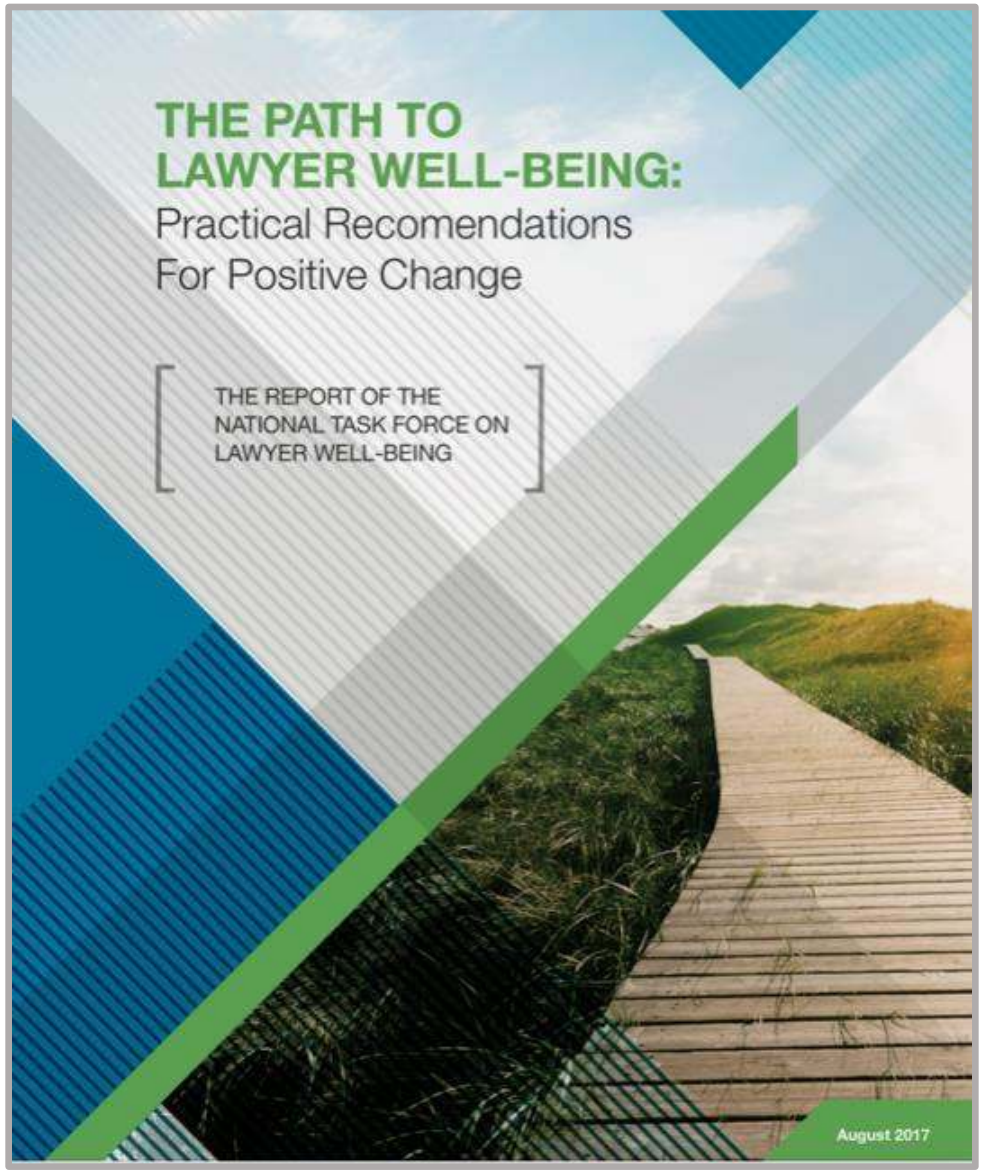

Shall Article XIV Against
Justice Walker Be Sustained
YEA 1 NAY 32 ABS 1 EXC 0
N ARVON
N ASHCRAFT
Y BALDWIN
N BEACH
N BLAIR
N BOLEY
N BOSO
N CLEMENTS
N CLINE
N DEEMER
N FACEMIRE
N FERRO
N GALUSHA
N JEFFRIES
N KARNES
N MAYNARD
N OJEDA
N PALUMBO
N PLYMALE
N PRESTON
N ROMANO
N RUCKER
N SMITH
N STOLLINGS
N SWOPE
N SYPOLT
N TAKUBO
N TRUMP
N UNGER
A WELD
N WOELFEL
N MR PRESIDENT

"I swear to tell the truth, the whole truth, and nothing but the truth—unless you ask me how I am, in which case I will say, 'I'm fine,' even though I'm not fine."

Assessing Our Profession

- ***The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*** *(the "Lawyer Study")*
  - P.R. Krill, R. Johnson, & L. Albert
  - 10 J. Addiction Med. 46 (2016)

- ***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*** *(the "Law Student Survey")*
  - J.M. Organ, D. Jaffe, K. Bender
  - 66 J. Legal Educ. 116 (2016)


THE PATH TO
LAWYER WELL-BEING:
Practical Recomendations
For Positive Change
THE REPORT OF THE
NATIONAL TASK FORCE ON
LAWYER WELL-BEING
August 2017

2017 Report: Legal Employer Recommendations

- Establish organizational infrastructure to promote well-being
  - Form a lawyer well-being committee
  - Assess lawyers' well-being
- Establish policies and practices to support lawyer well-being
  - Monitor for signs of work addiction and poor self-care
  - Actively combat social isolation and encourage interconnectivity
- Provide training and education on well-being, including during new lawyer orientation
  - Emphasize a service-centered mission
  - Create standards, align incentives and give feedback

Making the Business Case for Well-Being

Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being

- Jarrod F. Reich
- 65 Villanova Law Review 321 (2020)

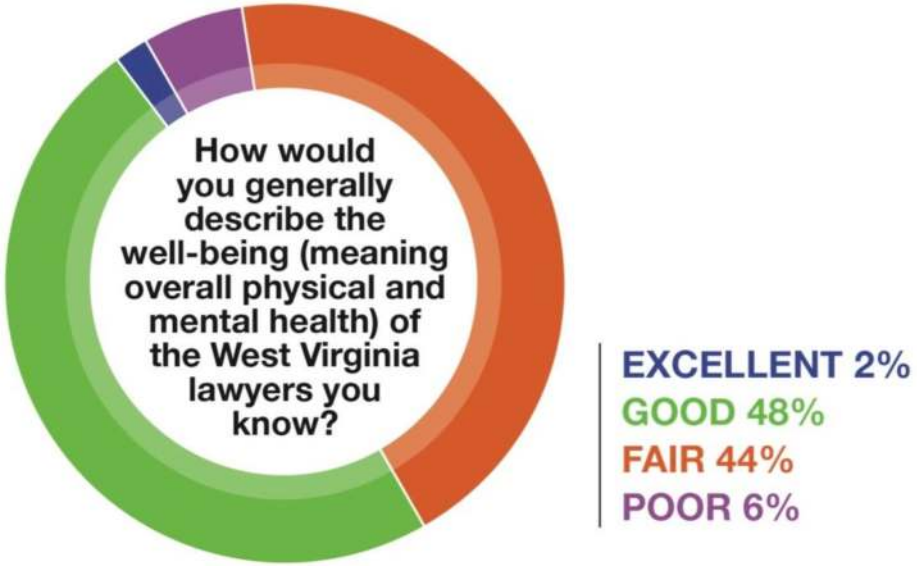
- The Costs
  - Lawyer Discipline: Malpractice and Sanctions
  - Absenteeism and "Presenteeism"
  - Replacement Costs and High Attrition
- Financial Benefits of Lasting and Meaningful Change
  - Performance: Client Demands for Efficiency
  - Retention
  - Recruiting the New Generations (Millennial and Generation Z)

National Developments

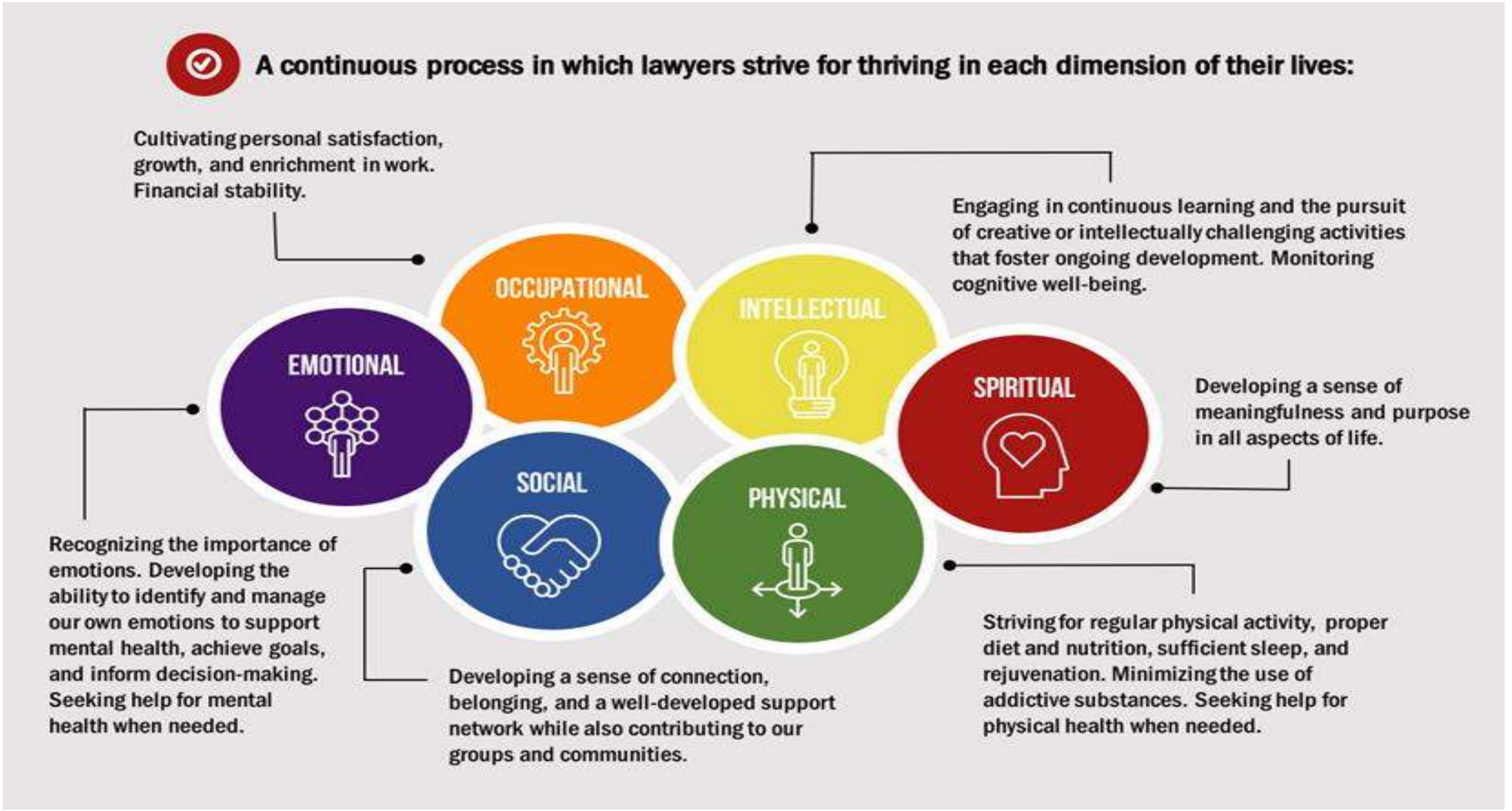
Institute For
Well-Being In Law

WV Task Force

- Character and fitness
- Well-being surveys (2018, 2022)
- Law school
- Continuing legal education



What is Lawyer Well-Being?

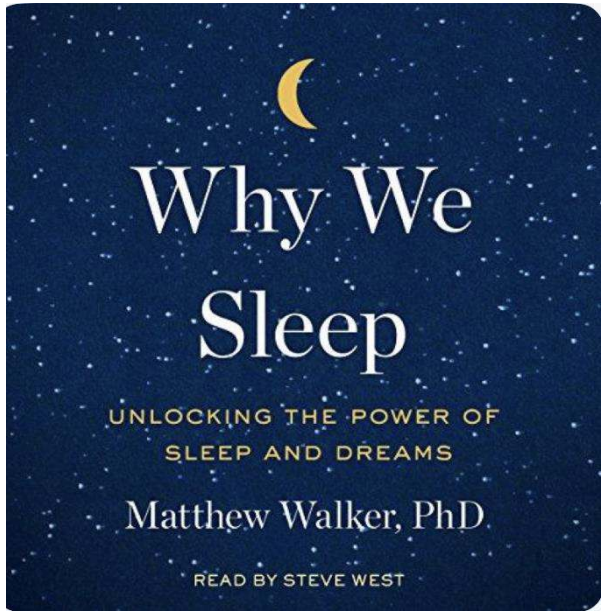


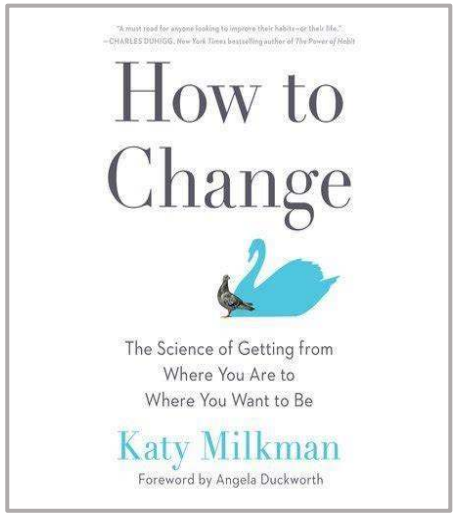
Chief Justice 2019, 2023

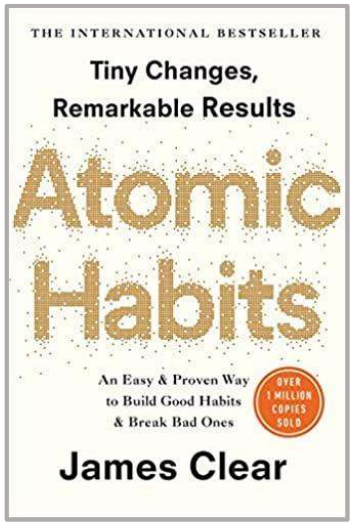

SPORT BEANS
6528

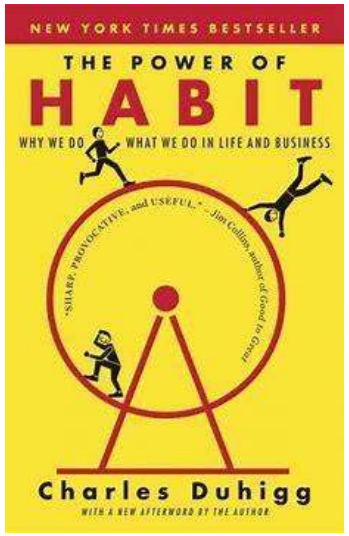
Sleep

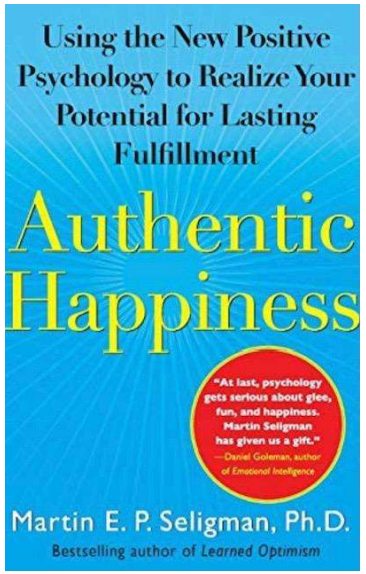
- “Sleep is a non-negotiable biological necessity”
- “Sleep deprivation fractures the brain mechanisms that regulate key aspects of our mental health.”
- “Sleep appears to restore our emotional brain circuits, and in doing so prepares us for the next day's challenges and social interactions.”

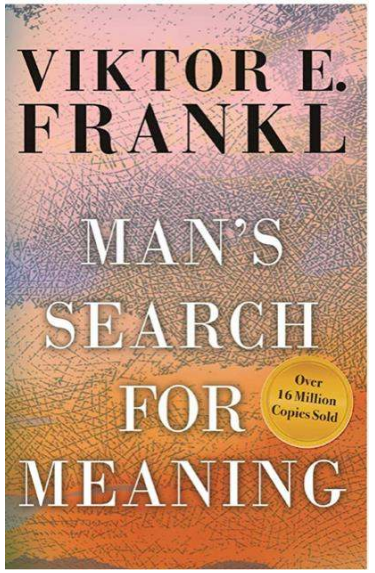



How to Change
The Science of Getting from Where You Are to Where You Want to Be
Katy Milkman
Foreword by Angela Duckworth


THE INTERNATIONAL BESTSELLER
Tiny Changes, Remarkable Results
Atomic Habits
An Easy & Proven Way to Build Good Habits & Break Bad Ones
OVER 1 MILLION COPIES SOLD
James Clear


NEW YORK TIMES BESTSELLER
THE POWER OF HABIT
WHY WE DO WHAT WE DO IN LIFE AND BUSINESS
Charles Duhigg
WITH A NEW AFTERWORD BY THE AUTHOR


Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment
Authentic Happiness
"At last, psychology gets serious about glee, fun, and happiness. Martin Seligman has given us a gift."
Martin E. P. Seligman, Ph.D.
Bestselling author of Learned Optimism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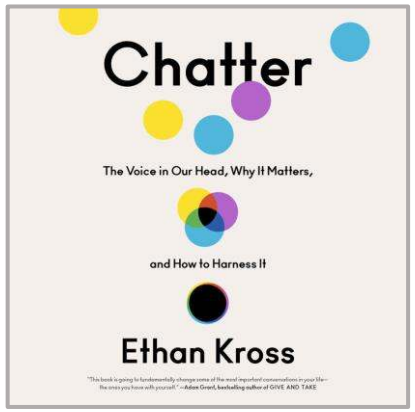
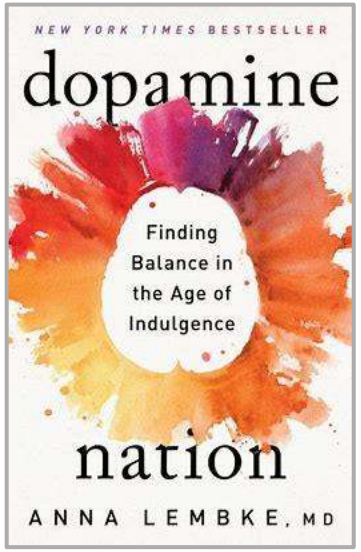
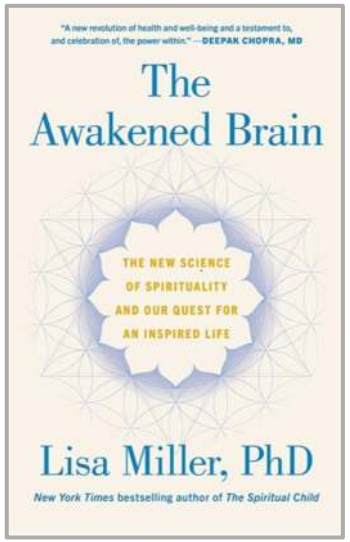
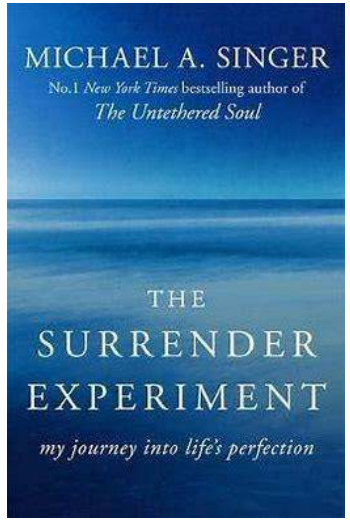
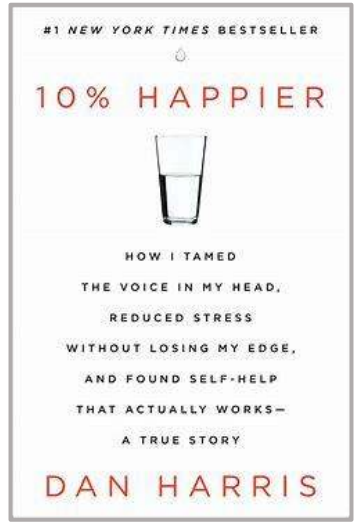
Over 16 Million Copies Sold


Chatter
The Voice in Our Head, Why It Matters, and How to Harness It
Ethan Kross


NEW YORK TIMES BESTSELLER
dopamine
Finding Balance in the Age of Indulgence
nation
ANNA LEMBKE, MD


The Awakened Brain
THE NEW SCIENCE OF SPIRITUALITY AND OUR QUEST FOR AN INSPIRED LIFE
Lisa Miller, PhD
New York Times bestselling author of The Spiritual Child


MICHAEL A. SINGER
No.1 New York Times bestselling author of The Untethered Soul
THE SURRENDER EXPERIMENT
my journey into life's perfection


#1 NEW YORK TIMES BESTSELLER
10% HAPPIER
HOW I TAMED THE VOICE IN MY HEAD, REDUCED STRESS WITHOUT LOSING MY EDGE, AND FOUND SELF-HELP THAT ACTUALLY WORKS— A TRUE STORY
DAN HARRIS


PATH
TO WELL-BEING IN LAW
PODCAST


HAPPIER
WITH
Gretchen
Rubin


THE LAB
HAPPINESS
PUSHKIN

Selected Links and Resources

- Mindfulness in Law Society https://www.mindfulnessinlawsociety.org/
- Lawyers Depression Project https://www.lawyersdepressionproject.org/
- If you or someone you know needs help, please *call* or *text* the National Suicide Prevention Lifeline, now known as 988 Suicide & Crisis Lifeline, at 988.

Bloomberg Law®

Professional Perspective

Why Lawyers are the Most Impaired Professionals

Corey Rabin, Caron Treatment Centers

Why Lawyers are the Most Impaired Professionals

Contributed by Corey Rabin, Caron Treatment Centers

Lawyers are under a great deal of pressure. From the first days of law school, we are conditioned to endure difficult schedules that require working more than 70 hours a week. We traditionally receive no training about how to handle stress in healthy ways. For many, decompressing often translates into drinking afterwards to relax. Then the cycle repeats. The high level of stress and unhealthy attempts to cope become normalized—leading lawyers to accept and often minimize destructive behavior as if it does not matter.

Except it does matter. Is it so surprising that lawyers are more likely to abuse alcohol and other substances than any other profession? A recent study of nearly 13,000 practicing lawyers conducted by the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation presented the issue quite clearly: 36% of lawyers in the survey were classified as active problem drinkers, and between 19% and 28% were struggling with stress, anxiety, or depression. These results are far higher than those seen in other professions—including doctors, whose addiction rates top off at 15%—as well as the general public.

Generally speaking, lawyers are on a treadmill of hourly billings. Unless we are equipped with the skills to step back and create a healthy balance in our lives, the stress will eventually take its toll on our health and result in higher likelihood of substance use.

The Pressures We Put on Ourselves

Our workload can be brutal, the competition fierce, and the work adversarial. Unlike most other professions, there are always winners and losers in the practice of law. In litigation, the stakes are high, the consequences frightening, and someone is guaranteed to suffer. These are external stressors, many of which we cannot control, but worse still is the pressure we put on ourselves. We obsess about competition, compensation, our clients, and fears of losing them. We like the intellectual challenges, but the combative demands of our work may be at odds with our own nature.

Clients depend on us, and we don't want to let them or anyone else down. Yet experience has taught us that we cannot anticipate everything. This drives many lawyers to become perfectionists, demanding the impossible of ourselves and others. No one can manage everything that happens in this world, but that doesn't stop lawyers from feeling responsible for poor outcomes. The stress and guilt can become overwhelming.

Additionally, personal values and ethics are often challenged in our work. Many times, what we do while advocating on behalf of our clients may not align with our own moral code. Harsh circumstances may demand that we compromise our personal values, which creates a significant internal struggle. We may not be able to discuss this with anyone, whether because of attorney-client privilege or our own guilty feelings. How then should we cope with those negative feelings about ourselves and our actions? Unfortunately, we may numb ourselves with alcohol or other substances to quiet the critical voices in our heads and to take the edge off.

Hesitant to Seek Help

It is challenging to live up to the expectations of the profession. People look to us to solve complicated, life-changing problems they can't fix themselves. And we get used to doing this for our clients and our friends. As the perceived authority in so many areas, we don't want to disappoint people. We also come to feel superior because we often know more than the people asking us questions.

The practice of law is fundamentally a caregiving profession, which makes it hard for us to ask for help when we ourselves are in trouble. With our profession having conditioned us to think we know it all, reality can be a cold slap in the face.

Lawyers are especially hesitant to seek help for mental health or substance use problems. We are a risk averse lot, with a multitude of fears. In many cases these fears are quite reasonable. Some of our institutions were set up to punish us for our imperfections and vulnerabilities. Underlying these fears are concerns about harming our professional reputation or jeopardizing our licenses. We also may think we don't need anyone's help and that we can fix the problem ourselves, or we may even deny there is a problem in the first place.

A New Culture is Emerging

The good news is that it doesn't have to be this way. We are beginning to see changes in the legal profession focused on instilling greater well-being in the profession. For example, the University of Miami established a first of its kind Mindfulness and Law Program designed to teach balancing work/life and stress in the profession. Their webinar series has been well-recognized. The Penn Law administration recently put forward policies and programs seeking to increase awareness of well-being. Morgan Lewis established its first-ever position of Director of Employee Well-Being and the American Bar Association created a well-being pledge.

In the past, a stigma was associated with help-seeking actions. Fortunately, that stigma is slowly dissipating. Many states have or are considering eliminating questions on state bar applications regarding past treatment for mental health and substance use. There is a growing recognition that well-being is a critical component of capable lawyering.

Taking Action

Balancing work and life are not easy. There comes a time when you must evaluate your priorities. What is most important—your ego, your reputation, your financial position, your health or your family life?

Asking for help is not a weakness, nor does it mean the end of our careers. My late colleague, Link Christin, who was an ardent advocate for wellness in the legal profession, would often tell me that successful lawyers are the hardest to get into treatment for substance use disorders, but once in treatment, their success ratio is very high.

I encourage all lawyers to educate themselves about the signs and symptoms of substance use disorder and create a strategy for their own wellness. If a lawyer is struggling, it's important not to let fear of repercussions impair the ability to ask for support.

Lawyers and law students can get anonymous help in many ways. There are a wide variety of inpatient and outpatient substance use disorder treatment programs built specially for legal professionals to provide support in achieving wellness. These services are designed to accommodate professional needs and to minimize business disruption. Programs offer post-treatment aftercare and family support that is critical to achieving success.

Twelve step programs provide tried and true connection to others seeking to live a life of sobriety. Many lawyer assistance programs hold 12 Step meetings at their more private bar association headquarters, specifically for lawyers in recovery.

Law firms have begun to partner with lawyer assistance programs which provide confidential services to support lawyers and law students facing substance use disorders or mental health issues. Some firms have also begun mentoring and sponsorship programs and replaced boozy firm outings with yoga, meditation, and other healthy lifestyle support.

From Impaired to Repaired It is exciting to see our profession take these important steps, but there is still much work to do. In these especially trying times, it is more important than ever that we come together as a guild to create even more meaningful change to enrich, and in some cases save, the lives of our colleagues. We need to further prioritize education and recovery services and strive to make asking for help a badge of honor, not a stigma.

THE WEST VIRGINIA LAWYER

The 2023 WVSB ANNUAL MEETING at The Greenbrier

- NEW SEGMENT: Pro Bono Focus
- Meet the WVSB Executive Director
- The Importance of Defending Judges

Winter 2022-23

JOIN the CONVERSATION

Lessons from the West Virginia lawyer well-being surveys

One of the most exciting projects of the West Virginia Task Force on Lawyer Well-Being has been to survey lawyers about their job satisfaction and overall well-being. First in 2018 and again in 2022, hundreds of West Virginia lawyers and judges[1] responded to an invitation to participate in the short, anonymous, online survey.[2] While some results have been encouraging, we learned that many members of our profession now need more support — especially in the wake of the COVID-19 pandemic. The purpose of this article is to highlight key findings in the survey and inspire more conversations about supporting each other.

In 2018, the survey included 17 questions (including those seeking basic demographic information). That original survey asked general questions about well-being but made no specific inquiries about health conditions or alcohol use. When we formulated the 2022 survey, the Task Force included more specific questions to assess the impact of the COVID-19 pandemic. So, in addition to the original 17 questions posed in 2018, the 2022 survey included questions about the impact of the pandemic on mental health, physical health and alcohol use.

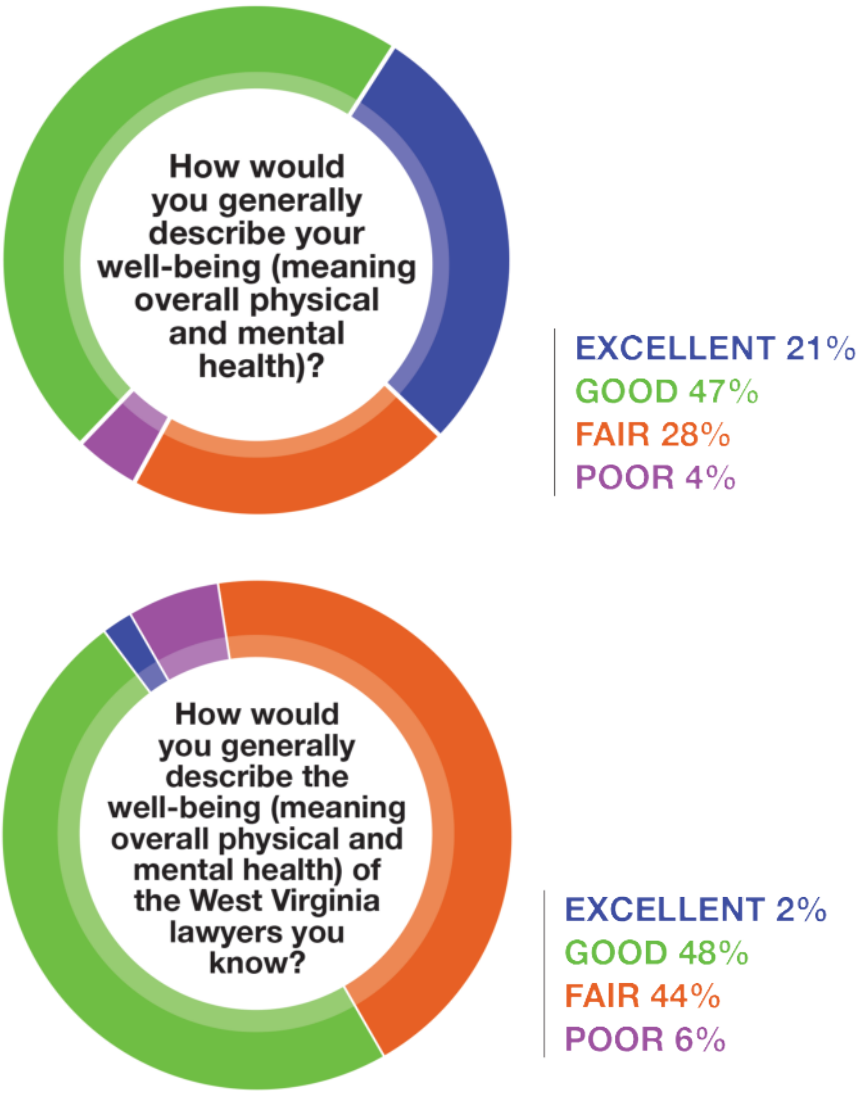
Job Satisfaction and Civility

In 2018 and again in 2022, more than 80% of lawyers reported satisfaction in their current jobs while fewer than 20% described

By Justice Beth Walker

themselves as unsatisfied. Breaking down those results by area of practice, we learn that judges and corporate counsel are more likely to be satisfied than lawyers working in government or private practice, a trend that continued over both studies. But when asked, "If you had to do it all over again, would you become a lawyer?", about 60% in both surveys reported that they would, about 30% that they would not, with the remaining 10% unsure.

A consistent 45% of lawyers responding to both surveys reported that they would encourage others to attend law school if asked for advice. But almost half of the lawyers surveyed reported that their actual work as a lawyer fell short or failed to meet their own expectations before law school of what life would be like as a lawyer. On a positive note, a strong majority of lawyers reported that their interactions with other West Virginia lawyers have been civil and professional. This survey response (90% agreement) was virtually identical in 2018 and 2022.



Well-Being Generally

In the 2018 survey, 74% of lawyers described their own well-being as excellent or good (and the remaining 26% described their own well-being as fair or poor). The 2022 survey showed a very slight decline as to this question, with 68% describing their own well-being as excellent or good and 32% as fair or poor. In both surveys, the term well-being was described as "overall physical and mental health."

But even more interesting information emerged when survey participants were asked to describe the well-being of other lawyers they know (rather than themselves). In the 2018 survey, less than half (45%) described the well-being of those "other lawyers" as excellent or good (and the remaining 55% chose fair, poor or unsure). But in 2022, 50% of the survey respondents described the well-being of their colleagues as excellent or good and 50% chose fair or poor.

Pandemic Impact and Next Steps

Having been one of the few states to conduct a lawyer well-being survey prior to the spring of 2020 when so many aspects of our profession (and life overall) changed, the West Virginia Task Force was in a great position to compare survey results. And since the survey was so well received in 2018, the Task Force decided to ask lawyers directly how the pandemic affected them in the 2022 survey. The results are insightful.

First, one-third of lawyers reported in 2022 that their mental health got worse during the

pandemic (while 58% said it stayed the same and 9% that it got better). Similarly, 36% responded that their physical health got worse during the same time frame (with 48% reporting that it stayed the same and 16% reporting better).

And in the first-ever West Virginia lawyer well-being survey question asking directly about alcohol use, 17% reported they drink more alcohol following the pandemic. On the other hand, 44% reported that their alcohol consumption remains the same and 17% that their alcohol consumption reduced. Twenty-four percent of survey respondents reported that they don't drink alcohol.

These results are concerning and demonstrate that continued work by the Task Force and by the West Virginia Judges and Lawyers Assistance Program is necessary. WVJLAP, which serves members of our profession struggling with substance use, mental health and other concerns, is very well positioned to address these challenges. But the well-being survey results demonstrate that more education and awareness about WVJLAP is needed. Fortunately, 61% of lawyers responding to the 2022 survey stated that they would be likely to contact WVJLAP if they or a family member needed help — up from 51% in 2018. On the other hand, 35% reported in 2022 that they would be unlikely to contact WVJLAP for assistance (down from 41% in 2018).

WVJLAP has already expanded its confidential services, including more targeted support for lawyers who experience mental and physical health challenges that complements its support for lawyers with substance use disorders. WVJLAP's new Clinical Director, Stephanne Thornton, LICSW, MAC, CCTP, CSOTP, is very well qualified to help provide this expanded support. Ms. Thornton recently gave presentations at the State Bar's popular regional meetings to educate and encourage lawyers to seek mental health assistance when needed. And, WVJLAP has added a separate weekly support group specific to mental health and well-being that is rapidly gaining in popularity. This group is entirely separate from WVJLAP's vibrant recovery support group for lawyers with substance use challenges. More details about these groups and other WVJLAP services are available at www.wvjlap.org.

As the 2018 and 2022 surveys demonstrate, the work of the West Virginia Task Force on Lawyer Well-Being needs to continue. The Task Force shares the mission of WVJLAP to support our colleagues and protect the interest of clients, litigants and the general public from harm caused by impaired lawyers and judges. In addition, the Task Force is committed to supporting a collegial and rewarding profession for our West Virginia lawyers. With more communication, education and discussion, the Task Force can strive to normalize discussions of well-being as a necessary element of not just lawyer competence but excellence and sustainability. Ultimately, we are advocating for cultural change in our profession. We hope you join us in these conversations. WVL

> There is a ***notable disparity*** between how lawyers describe their ***own well-being*** versus that of ***their peers***.

Endnotes

1. For ease of reference, this article refers to the lawyers and judges who responded to the surveys generally as "lawyers" or "lawyers responding to the survey."
2. In consultation with an independent opinion research firm, the West Virginia Task Force on Lawyer Well-Being (with administrative support from the West Virginia State Bar) conducted these membership surveys among qualified respondents throughout the State. Those qualified to participate in the surveys were West Virginia state and federal court judges, and lawyers who were current in-state members of the State Bar. The surveys were designed to capture the attitudes, perceptions and opinions of West Virginia judges and lawyers on a host of important topics related to personal and professional qualities of life. Respondents were assured anonymity in this research effort, and at no point were responses associated with any identifying information. The survey was administered by email, which included an introductory letter from Justice Beth Walker explaining the confidentiality and purpose of the study. 1,346 attorneys responded to the survey in 2018, and 810 attorneys responded in 2022. The independent opinion research firm aggregated the results and analyzed the data.

Justice Beth Walker has served on the Supreme Court of Appeals of West Virginia since 2017 and will be Chief Justice in 2023. She chairs the West Virginia Task Force on Lawyer Well-Being.

Selected Documents from the 2018 Impeachment of Justices of the Supreme Court of Appeals of West Virginia

Articles of Impeachment (HR 202) 002

Justice Walker's Motion to Dismiss and Motion in Limine 014

Senate Journal (September 11, 2018) 020

Senate Roll Call Vote (October 2, 2018) 052

State ex rel. Workman v. Carmichael, 241 W.Va. 105 (2018) 053

Article I

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of his personal office, to the sum of approximately $363,000, which sum included the purchase of a $31,924 couch, a $33,750 floor with medallion, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article II

That the said Justice Robin Davis, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high office, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of her personal office, to the sum of approximately $500,000, which sum included, but is not limited to, the purchase of an oval rug that cost approximately $20,500, a desk chair that cost approximately $8,000 and over $23,000 in design services, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article III

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about June 20, 2013, cause a certain desk, of a type colloquially known as a "Cass Gilbert" desk, to be transported from the State Capitol to his home, and did maintain possession of such desk in his home, where it remained throughout his term as Justice for approximately four and one-half years, in violation of the provisions of W.Va. Code §29-1-7 (b), prohibiting the removal of original furnishings of the state capitol from the premises; further, the expenditure of state funds to transport the desk to his home, and refusal to return the desk to the state, constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IV

That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, commencing in or about 2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of Article VIII, §7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of the provisions of W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article V

That the said Justice Robin Davis, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2014, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the statutorily limited maximum salary for such Judges, which overpayment is a violation of the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VI

That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VII

That the said Justice Allen Loughry, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at that relevant time individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high offices, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justices, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about May 19, 2017, did in his capacity as Chief Justice, draft an Administrative Order of the Supreme Court of Appeals, bearing his signature, authorizing the Supreme Court of Appeals to overpay certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; his authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VIII

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, and continuing thereafter for a period of years, intentionally acquire and use state government vehicles for personal use; including, but not limited to, using a state vehicle and gasoline purchased utilizing a state issued fuel purchase card to travel to the Greenbrier on one or more occasions for book signings and sales, which such acts enriched his family and which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IX

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, intentionally acquired and used state government computer equipment and hardware for predominately personal use—including a computer not intended to be connected to the court's network, utilized state resources to install computer access services at his home for predominately personal use, and utilized state resources to provide maintenance and repair of computer services for his residence resulting from predominately personal use; all of which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article X

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, made statements while under oath before the West Virginia House of Delegates Finance Committee, with deliberate intent to deceive, regarding renovations and purchases for his office, asserting that he had no knowledge and involvement in these renovations, where evidence presented clearly demonstrated his in-depth knowledge and participation in those renovations, and, his intentional efforts to deceive members of the Legislature about his participation and knowledge of these acts, while under oath.

Article XIV

That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, did, in the absence of any policy to prevent or control expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as: to remodel state offices, for large increases in travel budgets—including unaccountable personal use of state vehicles, for unneeded computers for home use, for regular lunches from restaurants, and for framing of personal items and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by failing to carry out one or more of the following necessary and proper administrative activities:

A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees to a greater burden than the Justices;

B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and further subjected subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;

C) To provide proper supervision, control, and auditing of the use of state purchasing cards leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;

D) To prepare and adopt sufficient and effective home office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in an executed information upon one former Justice and the indictment of another Justice.

F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state-owned computer;

G) To provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.

The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

We, John Overington, Speaker Pro Tempore of the House of Delegates of West Virginia, and Stephen J. Harrison, Clerk thereof, do certify that the above and foregoing Articles of Impeachment against Justices of the Supreme Court of Appeals of West Virginia, were adopted by the House of Delegates on the Thirteenth day of August, 2018.

In Testimony Whereof, we have signed our names hereunto this Fourteenth day of August, 2018.

John Overington

John Overington,

Speaker Pro Tempore of the House of Delegates

Stephen J. Harrison

Stephen J. Harrison,

Clerk of the House of Delegates

IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION
2018

In the Matter of Impeachment Proceedings
Against Respondent Justice Elizabeth D. Walker

APPLICATION TO JUSTICE PAUL T. FARRELL, PRESIDING OFFICER:

JUSTICE WALKER'S MOTION TO DISMISS ARTICLE XIV

Justice Beth Walker moves to dismiss Article XIV in order to bring these proceedings against her to an efficient and appropriate conclusion. Although the House of Delegates affirmatively rejected the only article specifically alleging that Justice Walker committed impeachable conduct, Justice Walker has accepted responsibility and expressed remorse for her personal spending decisions and pledged to support legislative oversight efforts.

But the House did not stop there. It also adopted Article XIV, a "catch-all" that purports to hold Justice Walker responsible for *institutional* policies that—as a lone Justice with a single vote—she never had the authority to make. Not only that, but several of the alleged policy failures in Article XIV arose years before Justice Walker took the bench. In short, there is not a single allegation in Article XIV against Justice Walker individually—only generalized allegations against the Court as a collective body. Removal cannot rest on such allegations as a matter of logic or law. This motion should be granted.

BACKGROUND

Justice Walker took office in January 2017, little over a year and a half ago. In that time, Justice Walker never served as Chief Justice or was vested with any other authority as an individual Justice to impose policies on the Court or her colleagues.

The final article of impeachment adopted by the House of Delegates in House Resolution 202 is Article XIV, which is the only article that attempts to place blame on each Justice *individually* for conduct by the Court *collectively*. Unlike all other articles approved by the House, Article XIV makes no individualized allegations against specific Justices.

ARGUMENT

Rule 23(a) provides that motions may be made "by the parties" and "shall be addressed to the Presiding Officer, who shall decide the motion." The Presiding Officer's decision on a motion is final unless "overturn[ed]" by a majority vote of the Senators present following a demand of any Senator sustained by one tenth of the Senators present. Rule 23(a). The vote to overturn the Presiding Officer's decision on "any motion" will be taken "without debate." *Id.*

Article XIV fails to state a removable offense against Justice Walker individually.

Nowhere in the text of Article XIV does the House of Delegates allege individualized conduct against Justice Walker—much less any conduct amounting to a removable offense. *See United States v. Thomas*, 367 F.3d 194, 187 (4th Cir. 2004) (dismissal for failure to state an offense).

First, logic and law dictate that Justice Walker cannot be tried and held responsible as an individual Justice for alleged offenses that could have only been committed collectively by the Court (by majority vote) or by the Chief Justice, the only single Justice with authority to make administrative decisions that can bind the Court. There is no dispute that Justice Walker never served as Chief Justice and was never otherwise imbued with the special administrative powers of that office. And there is no dispute that Justice Walker holds only a single vote. Justice Walker could no more establish or change policies to bind her colleagues with a single vote than she could decide an appeal by herself alone.

Under the relevant standard set out in Article IV, Section 9 of the West Virginia Constitution, there can be no "maladministration" where an *individual* Justice has no authority to "administer" the Court in the first place. Accordingly, Article XIV fails to state a removable offense against Justice Walker individually.

Second, the structure of Article XIV is inconsistent with Rule 19, which requires separate trials for each Respondent—a rule informed by the precedent of the Senate and basic notions of fundamental fairness. Justice Walker is entitled to a separate trial on Article XIV, meaning that her culpability under the article must depend on her actions alone. The decision to sweep-up every then-sitting Justice in the dragnet of Article XIV comes with a cost: the individual Respondents will be unable to adequately prepare a defense against allegations that are cast only against "the Court" as a collective whole—decisions that no single Justice, apart from a Chief Justice, can fairly be made to answer for.

After all, it is conceivable that one Justice could be convicted of Article XIV as written based only on actions by a majority of *other* Justices or the Chief Justice—even if the one Justice was against the majority's decision-making. Just as no single Senator can fairly be held responsible for actions taken by the body as a whole, the allegations of Article XIV cannot support a fair trial of individual Justices in any respect that is consistent with Rule 19 or due process. Article XIV is therefore logically and legally flawed and should be dismissed.

CONCLUSION

For the foregoing reasons, Justice Walker moves the Presiding Officer to dismiss Article XIV.

Dated: September 7, 2018

Respectfully submitted,

Hon. Elizabeth D. Walker

By Counsel

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IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION
2018

In the Matter of Impeachment Proceedings
Against Respondent Justice Elizabeth Walker

APPLICATION TO JUSTICE PAUL T. FARRELL, PRESIDING OFFICER:

JUSTICE WALKER'S MOTION IN LIMINE
TO PRECLUDE EVIDENCE OF UNIMPEACHED CONDUCT

Justice Walker cannot be removed by the Senate for conduct that the House of Delegates expressly concluded did not rise to the level of impeachment. Accordingly, evidence related to renovations of Justice Walker's personal office should be inadmissible in these proceedings.

Under our Constitution, the Senate tries impeachments, but the House of Delegates has the sole authority to determine impeachable conduct. W.V. Const. art. IV § 9. The House expresses its determinations by voting on Articles of Impeachment. If an Article is adopted, then the Senate must decide whether to remove the officer based on the conduct described in the Article. If an Article is rejected, then the Senate has no authority to remove the officer based on the content therein.

During days of hearings in the Judiciary Committee and hours of debate on the floor, the House carefully considered the allegations against Justice Walker in Article XII, H.R. 202, concerning the renovation of her chambers. At the end of that deliberate process, Article XII was defeated by a vote of 51 to 44. In other words, the House concluded that the renovation of Justice Walker's chambers did *not* amount to impeachable conduct.

The lone Article pending against Justice Walker—Article XIV—concerns the Justices' alleged collective failure to carry out certain administrative responsibilities. The preamble to Article XIV does contain a reference to alleged "unnecessary and lavish spending," and includes, as an example, a non-specific reference to "remodel[ing] state offices." But this generalized language—making no specific allegation against Justice Walker individually—cannot be read to override the House's express rejection of the spending allegations against Justice Walker in Article XII.

As a result, any attempt to introduce specific evidence related to spending on Justice Walker's chambers would not only be highly prejudicial but would exceed the legitimate Constitutional scope of these proceedings. The motion should be granted.

Dated: September 7, 2018

Respectfully submitted,

Hon. Elizabeth D. Walker

By Counsel

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Michael B. Hissam (WVSC #11526)
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JOURNAL
OF
THE SENATE
SITTING FOR THE TRIAL OF
THE VARIOUS JUSTICES OF THE
SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA,
UPON ARTICLES OF IMPEACHMENT

TUESDAY, SEPTEMBER 11, 2018

THE STATE OF WEST VIRGINIA

VS

THE VARIOUS JUSTICES OF THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

The Senate, sitting as a Court of Impeachment to consider proceedings against Robin Jean Davis, Retired Justice of the Supreme Court of Appeals of the State of West Virginia; Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia; Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia; and Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia.

Upon direction of the President of the Senate, the oath was administered to the Honorable Paul T. Farrell, Acting Chief Justice of the Supreme Court of Appeals of the State of West Virginia, by the Honorable Lee Cassis, Clerk of the West Virginia Senate.

The Acting Chief Justice of the Supreme Court of Appeals of the State of West Virginia assumed the chair and directed the Honorable Lee Cassis, Clerk of the West Virginia Senate, to administer the oath to the following members of the West Virginia Senate:

First Senatorial District: Ryan J. Ferns of the County of Ohio;

First Senatorial District: Ryan W. Weld of the County of Brooke;

Second Senatorial District: Michael J. Maroney of the County of Marshall;

Second Senatorial District: Charles H. Clements of the County of Wetzel;

Third Senatorial District: Donna J. Boley of the County of Pleasants;

Third Senatorial District: Michael T. Azinger of the County of Wood;

Fourth Senatorial District: Mitch Carmichael of the County of Jackson;

Fourth Senatorial District: Mark A. Drennan of the County of Putnam;

Fifth Senatorial District: Robert H. Plymale of the County of Wayne;

Fifth Senatorial District: Michael A. Woelfel of the County of Cabell;

Sixth Senatorial District: Mark R. Maynard of the County of Wayne;

Sixth Senatorial District: Chandler Swope of the County of Mercer;

Seventh Senatorial District: Ron Stollings of the County of Boone;

Seventh Senatorial District: Richard N. Ojeda II of the County of Logan;

Eighth Senatorial District: C. Edward Gaunch of the County of Kanawha;

Eighth Senatorial District: Glenn D. Jeffries of the County of Putnam;

Ninth Senatorial District: Sue Cline of the County of Wyoming;

Ninth Senatorial District: Lynne Carden Arvon of the County of Raleigh;

Tenth Senatorial District: Kenny Mann of the County of Monroe;

Tenth Senatorial District: Stephen Baldwin of the County of Greenbrier;

Eleventh Senatorial District: Robert Karnes of the County of Upshur;

Eleventh Senatorial District: Gregory L. Boso of the County of Nicholas;

Twelfth Senatorial District: Douglas E. Facemire of the County of Braxton;

Twelfth Senatorial District: Michael J. Romano of the County of Harrison;

Thirteenth Senatorial District: Roman W. Prezioso, Jr. of the County of Marion;

Thirteenth Senatorial District: Robert D. Beach of the County of Monongalia;

Fourteenth Senatorial District: Dave Sypolt of the County of Preston;

Fourteenth Senatorial District: Randy E. Smith of the County of Tucker;

Fifteenth Senatorial District: Craig Blair of the County of Berkeley;

Fifteenth Senatorial District: Charles S. Trump IV of the County of Morgan;

Sixteenth Senatorial District: John R. Unger II of the County of Berkeley;

Sixteenth Senatorial District: Patricia Puertas Rucker of the County of Jefferson;

Seventeenth Senatorial District: Corey Palumbo of the County of Kanawha;

Seventeenth Senatorial District: Tom Takubo of the County of Kanawha.

The Presiding Officer then announced that the oath having been administered to all the Senate members present, the Senate was now organized as a Court of Impeachment to consider proceedings against the various justices of the Supreme Court of Appeals of the State of West Virginia, and directed the Sergeant at Arms to make the following proclamation: All persons are commanded to keep silence, on pain of imprisonment, while the Senate is sitting as a Court of Impeachment.

The Presiding Officer then announced that summonses had been issued against and served upon each of the Respondents; that returns of service were made for the same; and that the summonses and returns are available for review.

The Presiding Officer then directed the Sergeant at Arms to summon the Managers, attorneys, and respondents.

The Managers, appointed by the House of Delegates to conduct the trial of impeachment of the various justices of the Supreme Court of Appeals of the State of West Virginia, to wit: Delegates Shott, Hollen, Byrd, and Miller (Delegate Foster, one of the said managers, being absent) entered the Senate Chamber and took the seats assigned them.

Brian Casto, Marsha Kaufmann, and Joe Altizer, counsel for the Managers of the House of Delegates, accompanied said Managers.

Respondent Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia, and the respondents' counsel entered the Senate Chamber and took the seats assigned them.

The Presiding Officer recognized John H. Shott, Chair of the Managers appointed by the House of Delegates, for a presentation concerning an agreement between the Managers and Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia, and Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia.

The Presiding Officer then recognized Andrew D. Byrd, one of the Managers appointed by the House of Delegates, to read the *Stipulation and Agreement of the Parties.*

IN THE WEST VIRGINIA SENATE

IN THE MATTER OF IMPEACHMENT PROCEEDINGS AGAINST RESPONDENTS CHIEF JUSTICE MARGARET WORKMAN AND JUSTICE ELIZABETH WALKER

Honorable Paul T. Farrell
Acting Justice of the
Supreme Court of Appeals of West Virginia
Presiding Officer

STIPULATION AND AGREEMENT OF PARTIES

Respondents Chief Justice Margaret L. Workman and Justice Elizabeth D. Walker (the "Respondents"), together with the Board of Managers of the West Virginia House of Delegates for the impeachment trials pending in the West Virginia Senate (the "Board of Managers"), jointly agree and stipulate as follows:

1. The Respondents acknowledge indefensible spending by the Supreme Court of Appeals of West Virginia (the "Court"), as well as the absence of Court policies and practices that likely would have prevented that indefensible spending.

2. The Respondents accept full responsibility for all spending on renovations to their personal offices over which they exercised or should have exercised spending oversight and approval.

3. The Respondents acknowledge the need for changed policies and practices to correct the failures identified in Article XIV of the Articles of Impeachment and rebuild public trust in the Court.

4. The Respondents have begun and will continue to implement reforms to improve the administration of the Court and prevent future inappropriate expenditures, and to ensure compliance with all applicable laws and regulations governing the conduct of the Court.

5. The Respondents and the Board of Managers therefore agree to:

a. Jointly recommend that the Senate adopt a resolution of censure with respect to the Respondents, which is included with this Stipulation and Agreement of Parties; and

b. Upon passage of such a resolution of censure, jointly move to dismiss the Articles of Impeachment with respect to the Respondents.

6. The Respondents and the Board of Managers further agree that if the Senate does not dismiss the Articles of Impeachment with respect to the Respondents, no part of this Stipulation and Agreement of Parties may be used in any trial of the Articles of Impeachment.

Agreed to by:

Dated: 9/11/18

The Hon. John Shott
For: Board of Managers

Dated: 9/11/18

The Hon. Andrew D. Byrd
For: Board of Managers

Dated: 9/11/18

The Hon. Margaret L. Workman

Dated: 9/11/18

The Hon. Elizabeth D. Walker

SENATE RESOLUTION _____

Publicly reprimanding and censuring Chief Justice Margaret L. Workman and Justice Elizabeth D. Walker of the Supreme Court of Appeals of West Virginia.

Whereas, Chief Justice Margaret Workman was named in Articles IV and VI of the Articles of Impeachment, which allege overpayment of senior status judges;

Whereas, Chief Justice Workman and Justice Walker were named in Article of Impeachment XIV, which alleges that the Justices of the Supreme Court of Appeals generally and collectively failed to provide or prepare policies and reasonable supervisory oversight of the operations of the Court and in the absence of such policies and oversight, wasted state funds on unnecessary renovations, travel, computers for home use, lunches, and the framing of personal items, and;

Whereas, the House of Delegates also adopted House Resolution 203 censuring all then-sitting Justices related to their conduct concerning, among other things, the spending on their personal offices;

Whereas, Chief Justice Workman and Justice Walker have accepted full responsibility for all spending on renovations to their personal offices over which they exercised or should've exercised spending oversight and approval;

Whereas, Chief Justice Workman and Justice Walker have previously and publicly acknowledged indefensible spending by the Court and the absence of appropriate policies and practices that likely would have prevented that indefensible spending;

Whereas, Chief Justice Workman and Justice Walker have publicly acknowledged the need for changed policies and practices to rebuild public trust in the Court;

Whereas, Chief Justice Workman and Justice Walker have begun and will continue to implement reforms to improve the administration of the Court and prevent future inappropriate expenditures and to ensure compliance with all applicable laws and regulations governing the conduct of the Court;

Whereas, Justice Walker has not served as Chief Justice over the Court or Judicial Branch in the time that she has served on the Supreme Court of Appeals;

Whereas, Chief Justice Workman and Justice Walker support increased legislative oversight, transparency, and accountability of the Supreme Court of Appeals;

Whereas, Chief Justice Workman and Justice Walker accept personal and institutional responsibility for the Court's failure to enact certain specific policies as described in Article XIV in the Articles of Impeachment; therefore, be it

Resolved by the Senate:

That Chief Justice Workman and Justice Walker be hereby publicly reprimanded and censured for and because of the aforementioned conduct; and be it

Further Resolved, That the Clerk is hereby directed to forward a copy of this resolution to Chief Justice Workman and Justice Walker.

Delegate Byrd then presented the *Stipulation and Agreement of the Parties* document to the Clerk of the Senate.

The Presiding Officer then recognized Ben Bailey, counsel for Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia, to address the Court of Impeachment concerning the *Stipulation and Agreement of the Parties.*

The Presiding Officer then recognized Mike Hissam, counsel for Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia, to address the Court of Impeachment concerning the *Stipulation and Agreement of the Parties.*

On motion of Senator Ferns, at 10:54 a.m., the Court of Impeachment to consider proceedings against the various justices of the Supreme Court of Appeals of the State of West Virginia adjourned until 2:30 p.m. today.

The Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature and the Articles of Impeachment Against the Various Justices of the Supreme Court of Appeals of the State of West Virginia are as follows:

RULES OF THE WEST VIRGINIA SENATE
WHILE SITTING AS A COURT OF IMPEACHMENT
DURING THE EIGHTY-THIRD LEGISLATURE

1. Definitions

(a) “Articles of Impeachment” or “Articles” means one or more charges adopted by the House of Delegates against a public official and communicated to the Senate to initiate a trial of impeachment pursuant to Article IV, Section 9 of the Constitution of West Virginia.

(b) “Board of Managers” or “Managers” means a group of members of the House of Delegates authorized by that body to serve as prosecutors before the Senate in a trial of impeachment.

(c) “Conference of Senators” means a private meeting of the Court of Impeachment, including an executive session authorized by W. Va. Code §6-9A-4.

(d) “Counsel” means a member of the Board of Managers or an attorney, licensed to practice law in this state, representing the Board of Managers or a Respondent in a trial of impeachment.

(e) “Court of Impeachment” or “Court” means all Senators participating in a trial of impeachment.

(f) “Parties” means the Board of Managers and its counsel and the Respondent and his or her counsel.

(g) “Presiding Officer” means the Chief Justice of the West Virginia Supreme Court of Appeals or other Justice, pursuant to the provisions of Article IV, Section 9 or Article VIII, Section 8 of the Constitution of West Virginia.

(h) “Respondent” means a person against whom the House of Delegates has adopted and communicated Articles of Impeachment to the Senate.

(i) “Trial” means the trial of impeachment.

(j) “Two thirds of the Senators elected” means at least 23 Senators.

2. Pre-Trial Proceedings

(a) Whenever the Senate receives notice from the House of Delegates that Managers have been appointed by the House of Delegates to prosecute a trial of impeachment against a person or persons and are directed to carry Articles of Impeachment to the Senate, the Clerk of the Senate shall immediately inform the House of Delegates that the Senate is ready to receive the Managers for the reporting of such Articles.

(b) When the Board of Managers for the House of Delegates is introduced at the bar of the Senate and signifies that the Managers are ready to communicate Articles of Impeachment, the President of the Senate shall direct the Sergeant at Arms to make the following proclamation: “All persons are commanded to keep silence, on pain of imprisonment, while the House of Delegates is reporting to the Senate Articles of Impeachment”; after which the Board of Managers shall report the Articles. Thereupon, the President of the Senate shall inform the Managers that the Senate will notify the House of Delegates of the date and time on which the Senate will proceed to consider the Articles.

(c) Upon the reporting of Articles of Impeachment to the Senate, the Senate shall adjourn until a date and time directed by the President of the Senate when the Senate will proceed to consider the Articles and shall notify the House of Delegates and the Supreme Court of Appeals of the same. Before proceeding to consider evidence, the Clerk shall administer the oaths provided in these Rules to the Presiding Officer; to the members of the Senate then present; and to any other members of the Senate as they shall appear.

(d) If the Board of Managers reports Articles of Impeachment against more than one person, the Senate shall conduct a separate trial of each Respondent individually as required by Rule 19 of these Rules.

3. Pre-Trial Conference

The Presiding Officer shall hold a pre-trial conference with the parties in the presence of the Court to stipulate to facts and exhibits and address procedural issues.

4. Clerk of the Court of Impeachment; Duties

The Clerk of the Senate, or his or her designee, shall serve as the Clerk of the Court of Impeachment, administer all oaths, keep the Journal of the Court of Impeachment, and perform all other duties usually performed by the clerk of a court of record in this state. The Clerk of the Senate may designate other Senate personnel to assist in carrying out the Clerk’s duties. The Clerk shall promulgate all forms necessary to carry out the requirements of these Rules.

5. Marshal of the Court of Impeachment; Duties

The Sergeant at Arms of the Senate, or other person designated by the President of the Senate, shall serve as the Marshal of the Court of Impeachment. The Marshal of the Court of Impeachment shall keep order in accordance with these Rules under the direction of the Presiding Officer.

6. Trial to be Recorded in Journal of the Court of Impeachment

(a) All trial proceedings, not including transcripts of the trial and copies of documentary evidence required to be appended to the bound Journal of the Court of Impeachment by section (c) of this Rule, shall be recorded in the Journal of the Court of Impeachment. The Journal of the Court of Impeachment shall be read, corrected, and approved the succeeding day. It shall be published under the supervision of the Clerk and made available to the members without undue delay.

(b) After the Journal of the Court of Impeachment has been approved and fully marked for corrections, the Journal of the Court of Impeachment so corrected shall be bound in the Journal of the Senate. The bound volume shall, in addition to the imprint required by Rule 49 of the Rules of the Senate, 2017, reflect the inclusion of the official Journal of the Court of Impeachment.

(c) When available, transcripts of the trial and copies of any documentary evidence presented therein shall be printed and bound as an appendix to the Journal of the Court of Impeachment.

7. Site of Trial

The trial shall be held in the Senate Chamber of the West Virginia State Capitol Complex. All necessary preparations in the Senate Chamber shall be made under the direction of the President of the Senate.

8. Floor Privileges

Only the following persons may enter the floor of the Senate Chamber during the trial: Members of the Court of Impeachment; designated personnel of the Court of Impeachment; the parties; the Presiding Officer; a law clerk of the Presiding Officer; witnesses and their counsel while testifying; and authorized media, who shall be located in an area of the chamber designated by the Clerk.

9. Representation of Parties

The House of Delegates shall be represented by its Board of Managers and its counsel. The Respondent may appear in person or by counsel.

10. Method of Address

Senators shall address the Presiding Officer as “Madam (or Mr.) Chief Justice” or “Madam (or Mr.) Justice”.

11. Oaths

(a) The following oath, or affirmation, shall be taken and subscribed by the Presiding Officer: “Do you solemnly swear [or affirm] that you will support the Constitution of the United States and the Constitution of the State of West Virginia and that you will faithfully discharge the duties of

Presiding Officer of the Court of Impeachment in all matters that come before this Court to the best of your skill and judgment?"

(b) The following oath, or affirmation, shall be taken and subscribed by every Senator before sitting as a Court of Impeachment: "Do each of you solemnly swear [or affirm] that you will do justice according to law and evidence while sitting as a Court of Impeachment?"

(c) The following oath, or affirmation, shall be taken and subscribed by every witness before providing testimony: "Do you solemnly swear [or affirm] that the testimony you shall give shall be the truth, the whole truth, and nothing but the truth?"

12. Service of Process

(a) The Respondent shall be served with a summons for the appearance of the Respondent or his or her counsel before the Court of Impeachment and provided with a copy of the Articles of Impeachment and a copy of these Rules. The summons shall be signed by the Clerk of the Court of Impeachment, bear the Seal of the Senate, identify the nature of proceedings and the parties, and be directed to the Respondent. It shall also state the date and time at which the Respondent shall appear to answer the Articles of Impeachment and notify the Respondent that if he or she fails to appear without good cause, the allegations contained in the Articles of Impeachment shall be uncontested and that the Senate shall proceed to vote on whether to sustain such Articles pursuant to Rule 15 of these Rules.

(b) The notice required by this Rule shall be served on the Respondent in the manner required by Rule 4 of the West Virginia Rules of Civil Procedure. All process shall be served by the Sergeant at Arms of the Senate, unless otherwise ordered by the President of the Senate. A copy of the summons to the Respondent, upon its issuance, along with a copy of the Articles of Impeachment and a copy of these Rules, shall be provided by the Clerk of the Court of Impeachment to the Clerk of the West Virginia House of Delegates. Upon service of the same upon the Respondent, a copy of the return of service shall be provided by the Clerk of the Court of Impeachment to the Clerk of the West Virginia House of Delegates.

13. Dismissal of Articles Upon Resignation of Respondent; Termination of Trial

(a) Any Senator may move to dismiss the Articles of Impeachment against a Respondent if at any time before the presentation of evidence commences in his or her trial of impeachment the Respondent has resigned or retired from his or her public office. Upon motion of any Senator to dismiss the Articles pursuant to this Rule, all Senators not excused shall vote on the question of whether to dismiss the Articles against the Respondent. If a majority of Senators elected vote to dismiss the Articles against the Respondent, a judgment of dismissal shall be pronounced and entered upon the Journal of the Court of Impeachment or the Journal of the Senate, whichever is convened at the time such vote is taken.

(b) A vote pursuant to this Rule shall be taken by yeas and nays.

(c) Upon dismissal of the Articles of Impeachment against a Respondent pursuant to this Rule, all pre-trial and trial proceedings regarding said Respondent shall immediately cease.

(d) If the House of Delegates adopts and communicates Articles of Impeachment that name more than one Respondent in one or more of the Articles, a dismissal pursuant to this Rule shall not dismiss the articles as to any Respondent who has not resigned or retired.

14. Commencement of Trial; Answer to Articles of Impeachment

At the time and date fixed and upon proof of service of the summons directed to the Respondent, the Respondent shall be called to answer the Articles of Impeachment. If the Respondent appears in person or by counsel, the appearance shall be recorded. If the Respondent does not appear, either personally or by counsel, then the failure of the Respondent to appear shall be recorded. While the Court of Impeachment is in session, the business of the Senate shall be suspended except as otherwise ordered by the President of the Senate.

15. Failure of Respondent to Appear and Contest

(a) If the Respondent fails to appear personally or by counsel without good cause at the time and date specified in the notice required by Rule 12 of these Rules, the allegations contained in the Articles of Impeachment shall be uncontested.

(b) If the allegations contained in the Articles of Impeachment are determined to be uncontested under section (a) of this Rule, the Presiding Officer shall then call upon the Board of Managers to deliver a summary of the evidence of the allegations contained in such Articles.

(c) After the summary of evidence delivered by the Managers, the Court of Impeachment shall vote on the question of whether to sustain one or more of the Articles of Impeachment in accordance with the requirements of Rule 31 of these Rules.

16. Entry of Plea or Pleas; Procedures Based on Plea or Pleas

If the Respondent appears and pleads not guilty to each article, the trial shall proceed. If the Respondent appears and pleads guilty to one or more articles, the Court of Impeachment shall immediately vote on the question of whether to sustain the Articles of Impeachment to which a plea of guilty has been entered in accordance with the requirements of Rule 31 of these Rules.

17. Subpoenas

A subpoena shall be issued by the Clerk of the Court of Impeachment for a witness on application of a party.

18. Procedure in a Contested Matter

(a) After preliminary motions are heard and decided, the Board of Managers or its counsel may make an opening statement. Following the opening statement by the Managers, the Respondent or his or her counsel may then make an opening statement.

(b) The trial shall be a daily special order of business following the Third Order of Business of the Senate, unless otherwise ordered by the President of the Senate. When the hour shall arrive for the special order of business, the President of the Senate shall so announce. The Presiding Officer shall cause proclamation to be made, and the business of the trial shall proceed. The trial may be recessed or adjourned and continued from day to day, or to specific dates and times, by

majority vote of the Senators present and voting. The adjournment of the trial shall not operate as an adjournment of the Senate, but upon such adjournment, the Senate shall resume.

(c) After the presentation of all evidence to the Court of Impeachment, the Board of Managers shall present a closing argument, after which the Respondent shall present a closing argument. Following the Respondent's closing argument, the Board of Managers may offer a rebuttal.

(d) The Board of Managers shall have the burden of proof as to all factual allegations. The Presiding Officer shall direct the order of the presentation of evidence.

19. Separate Trials of Multiple Respondents; Order of Trials

(a) If the House of Delegates communicates Articles of Impeachment against more than one Respondent, the Senate shall schedule and conduct a separate trial of each Respondent.

(b) The Presiding Officer, in consultation with the parties, shall determine the order in which multiple Respondents shall be tried.

20. Witnesses

(a) All witnesses shall be examined by the party producing them and shall be subject to cross-examination by the opposing party. Only one designee of each party may examine each witness. The Presiding Officer may permit redirect examination and recross-examination.

(b) After completion of questioning by the parties, any Senator desiring to question a witness shall reduce his or her question to writing and present it to the Presiding Officer who shall pose the question to the witness without indicating the name of the Senator presenting the question. If objection to a Senator's question is raised by a party, the objection shall be decided in the manner provided in Rule 23 of these Rules.

(c) It shall not be in order for any Senator to directly question a witness.

21. Discovery Procedures

(a) Within five days after service upon the Respondent of the Articles of Impeachment, the Respondent may request, and the Board of Managers shall disclose to the Respondent and make available for inspection, copy, or photograph, the following:

(1) Any written or recorded statement of the Respondent in the Managers' possession which the Managers intend to introduce into evidence in their case-in-chief during the trial;

(2) Any books, papers, documents, data, photographs, tangible objects, buildings or places, or copies of portions of such items in the Managers' possession that the Managers intend to use in their case-in-chief as to one or more Articles of Impeachment;

(3) A list of the persons the Board of Managers intends to call as witnesses in its case-in-chief during the trial; and

(4) A written summary of any expert testimony the Managers intend to use during their case-in-chief. Any summary provided must describe the witness' opinions, the bases and reasons for the opinions, and the witness's qualifications.

(b) The Board of Managers shall make its response to the Respondent's written requests within 10 days of service of the requests.

(c) If the Respondent makes a request pursuant to this Rule, he or she shall be required to provide the same information to the Managers, reciprocally, within 10 days following his or her request.

(d) A copy of all requests pursuant to this section shall be provided to the Clerk. The parties shall provide to the Clerk, in a format or in formats directed by the Clerk, copies of all items disclosed pursuant to this Rule.

(e) The Clerk may require parties to number or Bates stamp any trial exhibits or other information provided to the Clerk. The Clerk may hold a meeting with the parties to organize trial exhibits.

22. Court Reporters; Transcripts

(a) All proceedings shall be reported by an official court reporter or certified court reporter: *Provided*, That if the services of an official court reporter or certified court reporter are unavailable on one or more days of the trial, the proceedings shall be digitally recorded and copies of the recording made available to the parties.

(b) Upon request of a party, the Presiding Officer, or any Senator, the Clerk shall provide a copy of the transcript of any portion of the trial, when such transcripts are available.

23. Motions, Objections, and Procedural Questions

(a) All motions, objections, and procedural questions made by the parties shall be addressed to the Presiding Officer, who shall decide the motion, objection, or procedural question: *Provided,* That a vote to overturn the Presiding Officer's decision on any motion, objection, or procedural question shall be taken, without debate, on the demand of any Senator sustained by one tenth of the Senators present, and an affirmative vote of a majority of the Senators present and voting shall overturn the Presiding Officer's decision on the motion, objection, or procedural question.

(b) On the demand of any Senator or at the direction of the Presiding Officer, the movant shall reduce the motion to writing.

24. Qualification to Sit as Court of Impeachment

Every Senator is qualified to participate on the Court of Impeachment, unless he or she has been excused pursuant to Rule 43 of the Rules of the Senate, 2017.

25. Members as Witnesses

The parties may not call as witnesses, nor subpoena the personal records of, the Senators, members of the Board of Managers, personnel of the Court of Impeachment, the Presiding Officer, or counsel for the parties.

26. Attendance of Members

Every Senator is required to attend the trial unless he or she has been granted a leave of absence, pursuant to Rule 50 of the Rules of the Senate, 2017, or has been excused from voting on the Articles, pursuant to Rule 43 of the Rules of the Senate, 2017. Any Senator who has been granted a leave of absence shall be provided an opportunity to review the exhibits, video or audio recordings, and transcripts for the date or dates he or she is absent and may participate in the vote on verdict and judgment as provided in Rule 31 of these Rules.

27. Notetaking

Senators may take notes during the trial and such notes are not subject to the provisions of W. Va. Code §29B-1-1 *et seq.*

28. Applicability of Rules of the Senate

Except as otherwise provided herein, the Rules of the Senate shall apply to proceedings of the trial and the President of the Senate retains the authority to invoke such rules.

29. Applicability of Rules of Evidence

When not in conflict with these Rules or the Rules of the Senate, the Presiding Officer shall rule on the admissibility of evidence in accordance with West Virginia Rules of Evidence: *Provided*, That a vote to overturn the Presiding Officer's ruling on the admissibility of evidence shall be taken, without debate, on demand of any Senator sustained by one tenth of the members present, and an affirmative vote of the majority of Senators present shall overturn the ruling.

30. Instruction

At any time, the Presiding Officer may, sua sponte, or on motion of a party or upon request of a Senator, instruct the Senators on procedural or legal matters.

31. Verdict and Judgment

(a) After closing arguments, the Court may enter into a Conference of Senators for deliberation. After conclusion of said conference and return to open proceedings, or pursuant to Rule 15 or Rule 16 of these Rules, all Senators not excused shall vote on the question of whether to sustain one or more Articles of Impeachment: *Provided,* That any vote of the Senators on the question of whether or not to sustain an Article of Impeachment shall decide only that Article, and no single vote of the Senate shall sustain more than one Article of Impeachment. The Presiding Officer shall have no vote in the verdict or judgment of the Court of Impeachment.

(b) If two thirds of the Senators elected vote to sustain one or more Articles of Impeachment, a judgment of conviction and removal from office shall be pronounced and entered upon the Journal of the Court of Impeachment. If the Respondent is acquitted of any Article of Impeachment, a judgment of acquittal as to such Article or Articles shall be pronounced and entered upon the Journal.

(c) If two thirds of the Senators elected vote to sustain one or more Article of Impeachment, a vote shall then be taken on the question of whether the Respondent shall also be disqualified to hold any office of honor, trust, or profit under the state. If two thirds of the Senators elected vote to disqualify, a judgment of disqualification to hold any office of honor, trust, or profit under the state shall be pronounced and entered upon the Journal of the Court of Impeachment.

(d) Each vote pursuant to this Rule shall be taken by yeas and nays.

(e) A copy of all judgments entered shall be deposited in the office of the Secretary of State.

32. Conference of Senators

(a) On motion of any Senator and by a vote of the majority of the members present and voting, there shall be an immediate Conference of Senators. No Senator or any other person may photograph, record, or broadcast a Conference of Senators. Any motion made pursuant to this Rule shall be nondebatable.

(b) The President of the Senate, or his or her designee, shall preside over a Conference of Senators and the Rules of the Senate shall apply during said conference except as otherwise provided herein.

33. Contempt; Powers of Presiding Officer

The following powers shall be exercised by the Presiding Officer:

(1) The power to compel the attendance of witnesses subpoenaed by the parties;

(2) The power to enforce obedience to the Court's orders;

(3) The power to preserve order;

(4) The power to punish contempt of the Court's authority; and

(5) The power to make all orders that may be necessary and that are not inconsistent with these Rules or the laws of this state.

34. Prohibited Conduct; Sanctions

The Court of Impeachment shall have the power to provide for its own safety and the undisturbed transaction of its business, as provided in Article VI, Section 26 of the Constitution of West Virginia.

ARTICLES OF IMPEACHMENT AGAINST THE VARIOUS JUSTICES OF THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

Article I

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of his personal office, to the sum of approximately $363,000, which sum included the purchase of a $31,924 couch, a $33,750 floor with medallion, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article II

That the said Justice Robin Davis, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high office, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did waste state funds with little or no concern for the costs to be borne by the tax payer for unnecessary and lavish spending in the renovation and remodeling of her personal office, to the sum of approximately $500,000, which sum included, but is not limited to, the purchase of an oval rug that cost approximately $20,500, a desk chair that cost approximately $8,000 and over $23,000 in design services, and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court, which represents a waste of state funds.

Article III

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about June 20, 2013, cause a certain desk, of a type colloquially known as a "Cass Gilbert" desk, to be transported from the State Capitol to his home, and did maintain possession of such desk in his home, where it remained throughout his term as Justice for approximately four and one-half years, in violation of the provisions of W.Va. Code §29-1-7 (b), prohibiting the removal of original furnishings of the state capitol from the premises; further, the expenditure of state funds to transport the desk to his home, and refusal to return the desk to the state, constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IV

That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, commencing in or about 2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of Article VIII, §7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of the provisions of W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article V

That the said Justice Robin Davis, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2014, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the statutorily limited maximum salary for such Judges, which overpayment is a violation of the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VI

That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VII

That the said Justice Allen Loughry, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at that relevant time individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high offices, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justices, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did on or about May 19, 2017, did in his capacity as Chief Justice, draft an Administrative Order of the Supreme Court of Appeals, bearing his signature, authorizing the Supreme Court of Appeals to overpay certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code §51-2-13 and W.Va. Code §51-9-10; his authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code §61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code §61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

Article VIII

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, and continuing thereafter for a period of years, intentionally acquire and use state government vehicles for personal use; including, but not limited to, using a state vehicle and gasoline purchased utilizing a state issued fuel purchase card to travel to the Greenbrier on one or more occasions for book signings and sales, which such acts enriched his family and which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article IX

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, did beginning in or about December 2012, intentionally acquired and used state government computer equipment and hardware for predominately personal use—including a computer not intended to be connected to the court's network, utilized state resources to install computer access services at his home for predominately personal use, and utilized state resources to provide maintenance and repair of computer services for his residence resulting from predominately personal use; all of which acts constitute the use of state resources and property for personal gain in violation of the provisions of W.Va. Code §6B-2-5, the provisions of the West Virginia State Ethics Act, and constitute a violation of the provisions of Canon I of the West Virginia Code of Judicial Conduct.

Article X

That the said Justice Allen Loughry, being a Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of his high office, and contrary to the oaths taken by him to support the Constitution of the State of West Virginia and faithfully discharge the duties of his office as such Justice, while in the exercise of the functions of the office of Justice, in violation of his oath of office, then and there, with regard to the discharge of the duties of his office, made statements while under oath before the West Virginia House of Delegates Finance Committee, with deliberate intent to deceive, regarding renovations and purchases for his office, asserting that he had no knowledge and involvement in these renovations, where evidence presented clearly demonstrated his in-depth knowledge and participation in those renovations, and, his intentional efforts to deceive members of the Legislature about his participation and knowledge of these acts, while under oath.

Article XIV

That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, did, in the absence of any policy to prevent or control expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as: to remodel state offices, for large increases in travel budgets—including unaccountable personal use of state vehicles, for unneeded computers for home use, for regular lunches from restaurants, and for framing of personal items and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by failing to carry out one or more of the following necessary and proper administrative activities:

A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees to a greater burden than the Justices;

B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and further subjected subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;

C) To provide proper supervision, control, and auditing of the use of state purchasing cards leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;

D) To prepare and adopt sufficient and effective home office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in an executed information upon one former Justice and the indictment of another Justice.

F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state-owned computer;

G) To provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.

The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

We, John Overington, Speaker Pro Tempore of the House of Delegates of West Virginia, and Stephen J. Harrison, Clerk thereof, do certify that the above and foregoing Articles of Impeachment against Justices of the Supreme Court of Appeals of West Virginia, were adopted by the House of Delegates on the Thirteenth day of August, 2018.

In Testimony Whereof, we have signed our names hereunto this Fourteenth day of August, 2018.

John Overington,

Speaker Pro Tempore of the House of Delegates

Stephen J. Harrison,

Clerk of the House of Delegates

The following letter from the Honorable Lee Cassis, Clerk of the West Virginia Senate, is inserted into the Journal of the Court of Impeachment:

The Senate of West Virginia
Charleston

September 11, 2018

The Honorable Mitch B. Carmichael
President of the Senate
And
The Honorable Members of the West Virginia Senate

Dear Mr. President and Members:

Pursuant to Rule 4 of the Rules of the Senate While Sitting as a Court of Impeachment, I have this day designated Kristin Canterbury, the Assistant Clerk of the Senate, to serve as Clerk of the Court of Impeachment in my absence. This designation will be filed in the Journal of the Senate and the Journal of the Court of Impeachment.

Sincerely,

Lee Cassis
Clerk of the Senate

The Senate, sitting as a Court of Impeachment to consider proceedings against Robin Jean Davis, Retired Justice of the Supreme Court of Appeals of the State of West Virginia; Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia; Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia; and Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia, met on Tuesday, September 11, 2018, at 2:57 p.m.

The Honorable Paul T. Farrell, Acting Chief Justice of the Supreme Court of Appeals of the State of West Virginia, assumed the chair and presided over the Court of Impeachment.

The Presiding Officer then directed the Sergeant at Arms to summon the Managers, attorneys, and respondents.

Without objection, the Journal of the Court of Impeachment to consider proceedings against the various justices of the Supreme Court of Appeals of the State of West Virginia was considered as having been read and approved.

The Managers, appointed by the House of Delegates to conduct the trial of impeachment of the various justices of the Supreme Court of Appeals of the State of West Virginia, to wit: Delegates Shott, Hollen, Byrd, and Miller (Delegate Foster, one of the said managers, being absent) entered the Senate Chamber and took the seats assigned them.

Brian Casto, Marsha Kaufmann, and Joe Altizer, counsel for the Managers of the House of Delegates, accompanied said Managers.

Respondent Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia, and the respondents' counsel entered the Senate Chamber and took the seats assigned them.

The Presiding Officer informed the Managers, attorneys, and Respondents that the Court of Impeachment had not adopted a resolution publicly reprimanding and censuring Chief Justice Margaret L. Workman and Justice Elizabeth D. Walker and that the trials would move forward.

The Presiding Officer then directed Mike Hissam, counsel for Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia, to approach the podium.

The Presiding Officer stated that Elizabeth D. Walker, Justice of the Supreme Court of Appeals of the State of West Virginia, was charged in Article XIV of the Articles of Impeachment and asked if Justice Walker admitted or denied the same. Mike Hissam, counsel for Justice Walker, responded that Justice Walker denied the charge.

The Presiding Officer then set the trial date for Justice Walker for Monday, October 1, 2018, at 9 a.m.

The Presiding Officer then directed Steven R. Ruby, counsel for Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia, to approach the podium.

The Presiding Officer stated that Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia, was charged in Articles IV, VI, and XIV of the Articles of Impeachment and asked if Chief Justice Workman admitted or denied the same. Steven R. Ruby, counsel for Chief Justice Workman, responded that Chief Justice Workman denied the charges.

The Presiding Officer then set the trial date for Chief Justice Workman for Monday, October 15, 2018. The Presiding Officer stated that pre-trial motions would be taken up at that time.

The Presiding Officer then directed Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia, and John A. Carr, counsel to Justice Loughry, to approach the podium.

The Presiding Officer then asked Mike Hissam, counsel for Justice Walker, and Steven R. Ruby, counsel for Chief Justice Workman, if the Respondents formally waive the reading of the Articles of Impeachment. Mike Hissam, counsel for Justice Walker, and Steven R. Ruby, counsel for Chief Justice Workman, responded that Justice Walker and Chief Justice Workman waived the reading of the Articles.

The Presiding Officer then asked Justice Loughry if he formally waived the reading of the Articles of Impeachment. John A. Carr, counsel for Justice Loughry, responded that Justice Loughry waived the reading of the Articles.

The Presiding Officer stated that Allen H. Loughry II, Justice of the Supreme Court of Appeals of the State of West Virginia, was charged in Articles I, III, VII, VIII, IX, X, and XIV of the Articles of Impeachment and asked if Justice Loughry admitted or denied the same. Allen H. Loughry II responded that he denied the charges.

The Presiding Officer then set the trial date for Justice Loughry for Monday, November 12, 2018, at 9 a.m.

The Presiding Officer then directed the counsel for Robin Jean Davis, Retired Justice of the Supreme Court of Appeals of the State of West Virginia, to approach the podium.

The Presiding Officer stated a motion for *pro hac vice* admission of James M. Cole had been filed for James M. Cole to appear as counsel on behalf of Retired Justice Davis during the Court of Impeachment. The Presiding Officer then stated the motion was granted.

The Presiding Officer then asked James M. Cole, counsel for Retired Justice Davis, if the Respondent formally waives the reading of the Articles of Impeachment. James M. Cole, counsel for Retired Justice Davis, responded that Retired Justice Davis waived the reading of the Articles.

The Presiding Officer stated that Robin Jean Davis, Retired Justice of the Supreme Court of Appeals of the State of West Virginia, was charged in Articles II, IV, V, and XIV of the Articles of Impeachment and asked if Retired Justice Davis admitted or denied the same. James M. Cole, counsel for Retired Justice Davis, responded that Retired Justice Davis denied the charges.

The Presiding Officer then set the trial date for Retired Justice Davis for Monday, October 29, 2018.

James M. Cole, counsel for Retired Justice Davis, stated a motion for continuance for filing motions and reciprocal discovery had been filed, to which the House Managers did not oppose.

The Presiding Officer noted that Robin Jean Davis had retired from the office of Justice of the Supreme Court of Appeals of the State of West Virginia and there were provisions relating to this matter contained in the Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature and that the Constitution of West Virginia states, in part, that the removal from office is the only punishment in an impeachment [Art. IV, Sec. 9].

Senator Trump then moved that, pursuant to Rule 13 of the Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature, Articles II, IV, V, and XIV of the Articles of Impeachment adopted by the House of Delegates be dismissed in so far as they relate to Robin Jean Davis, Retired Justice of the Supreme Court of Appeals of West Virginia.

Following extended discussion,

The question being on the adoption of Senator Trump's aforestated motion,

The roll being taken, the yeas were: Arvon, Baldwin, Boley, Drennan, Facemire, Gaunch, Jeffries, Palumbo, Plymale, Prezioso, Romano, Stollings, Swope, Trump, and Carmichael (Mr. President)—15.

The nays were: Azinger, Beach, Blair, Boso, Clements, Cline, Ferns, Karnes, Mann, Maroney, Maynard, Ojeda, Rucker, Smith, Sypolt, Takubo, Unger, Weld, and Woelfel—19.

Absent: None.

So, a majority of those present and voting not having voted in the affirmative, the Presiding Officer declared Senator Trump's aforestated motion had not prevailed.

Whereupon, the Presiding Officer stated the trial date for Retired Justice Davis would be Monday, October 29, 2018.

Steven R. Ruby, counsel for Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of the State of West Virginia, stated a motion had been filed to set a trial date and a briefing schedule. He also stated a motion had been filed to set a Bill of Particulars.

John H. Shott, Chair of the Managers appointed by the House of Delegates, stated one of the dates in the proposed briefing schedule had already passed and the House Managers questioned the validity of certain motions under the Rules of the West Virginia Senate While Sitting as a Court of Impeachment During the Eighty-Third Legislature. Chairman Shott then stated the House Managers objected to Chief Justice Workman's motion for a Bill of Particulars.

The Presiding Officer stated a Bill of Particulars was a criminal type motion and this was not a criminal trial; therefore, the motion for a Bill of Particulars was denied.

The Presiding Officer recognized John H. Shott, Chair of the Managers appointed by the House of Delegates, to address the Court of Impeachment.

Following a point of inquiry to the Presiding Officer, with resultant response thereto,

At 3:29 p.m., the Court of Impeachment to consider proceedings against the various justices of the Supreme Court of Appeals of the State of West Virginia adjourned until Monday, October 1, 2018, at 9 a.m.

_____

West Virginia Senate
Roll Call

Shall Article XIV Against Justice Walker Be Sustained

Yea: 1 Nay: 32 Absent: 1 Excused: 0

N	ARVON	N	GAUNCH	N	RUCKER
N	AZINGER	N	JEFFRIES	N	SMITH
Y	BALDWIN	N	KARNES	N	STOLLINGS
N	BEACH	N	MANN	N	SWOPE
N	BLAIR	N	MARONEY	N	SYPOLT
N	BOLEY	N	MAYNARD	N	TAKUBO
N	BOSO	N	OJEDA	N	TRUMP
N	CLEMENTS	N	PALUMBO	N	UNGER
N	CLINE	N	PLYMALE	A	WELD
N	DRENNAN	N	PREZIOSO	N	WOELFEL
N	FACEMIRE	N	ROMANO	N	MR PRESIDENT
N	FERNS				

SEQ. NO. 0006. RCS # 6

241 W.Va. 105
Supreme Court of Appeals of West Virginia.

STATE of West Virginia EX REL.
Margaret L. WORKMAN, Petitioner
v.
Mitch CARMICHAEL, as President of the Senate; Donna J. Boley, as President Pro Tempore of the Senate; Ryan Ferns, as Senate Majority Leader, Lee Cassis, Clerk of the Senate; and the West Virginia Senate, Respondents

No. 18-0816
|
Filed: October 11, 2018

Synopsis

Background: Chief Justice of the Supreme Court of Appeals filed petition for a writ of mandamus, seeking to halt impeachment proceedings pending against her.

Holdings: The Supreme Court of Appeals, Matish, Acting C.J., held that:

the Supreme Court of Appeals does not have jurisdiction over an appeal of a final decision by the Senate in its role as the Court of Impeachment;

as a matter of first impression, an impeached official may seek redress in the Supreme Court of Appeals for an alleged violation of his or her constitutional rights in impeachment proceedings;

the Supreme Court of Appeals has constitutional authority to issue an extraordinary writ against the Legislature when the law requires, disapproving *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611;

statute limiting payment to senior-status judges violated Separation of Powers Clause of state constitution;

Senate officials were prohibited from further prosecuting Chief Justice on Articles of Impeachment alleging violation of the unconstitutional statute;

alleged or established violations of the Code of Judicial Conduct could not form a basis for impeachment of Chief Justice;

Articles of Impeachment that failed to comply with provisions of House Resolution violated Chief Justice's right to procedural due process.

Writ granted.

Bloom and Reger, Acting Justices, concurred in part and dissented in part, with opinion.

Procedural Posture(s): Original Jurisdiction.

West Codenotes

Prior Version Recognized as Invalid

W. Va. Code Ann. §§ 3-7-3, 57-3-1, 51-2-10

Prior Version Recognized as Unconstitutional

W. Va. Code Ann. §§ 30-2-1, 55-7B-6d

Limitation Recognized

W. Va. Code Ann. § 56-1-1(a)(7), 56-10-1, 57-2-1, 55-7B-7, 60A-7-705(d), 62-9-1

Prior Version's Limitation Recognized

W. Va. Code Ann. §§ 50-4-7, 51-2-9, 51-2-10

Recognized as Invalid

W. Va. Code Ann. §§ 30-2-1, 30-2-7, 56-9-2

Held Unconstitutional

W. Va. Code Ann. § 51-9-10

Syllabus by the Court

1. In the absence of legislation providing for an appeal in an impeachment proceeding under Article IV, § 9 of the Constitution of West Virginia, this Court does not have jurisdiction over an appeal of a final decision by the Court of Impeachment.

2. An officer of the state who has been impeached under Article IV, § 9 of the Constitution of West Virginia,

may seek redress for an alleged violation of his or her constitutional rights in the impeachment proceedings, by filing a petition for an extraordinary writ under the original jurisdiction of this Court.

3. To the extent that syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) may be interpreted as prohibiting this Court from exercising its constitutional authority to issue an extraordinary writ against the Legislature when the law requires, it is disapproved.

4. West Virginia Code § 51-9-10 (1991) violates the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the West Virginia Constitution. Consequently, W.Va. Code § 51-9-10, in its entirety, is unconstitutional and unenforceable.

5. This Court has exclusive authority and jurisdiction under Article VIII, § 8 of the West Virginia Constitution and the rules promulgated thereunder, to sanction a judicial officer for a violation of a Canon of the West Virginia Code of Judicial Conduct. Therefore, the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution prohibits the Court of Impeachment from prosecuting a judicial officer for an alleged violation of the Code of Judicial Conduct.

6. The Due Process Clause of Article III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedures that it creates to impeach a public officer. Failure to follow such rules will invalidate all Articles of Impeachment that it returns against a public officer.

Attorneys and Law Firms

****258** Marc E. Williams, Melissa Foster Bird, Thomas M. Hancock, Christopher D. Smith, Nelson Mullins Riley & Scarborough, Huntington, West Virginia, Attorneys for Petitioner

J. Mark Adkins, Floyd E. Boone, Jr., Richard R. Heath, Jr., Lara Brandfass, Bowles Rice, Charleston, West Virginia, Attorneys for Respondents

Opinion

Matish, Acting Chief Justice:

****259** ***113** The Petitioner, the Honorable Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of West Virginia, brought this proceeding under the original jurisdiction of this Court as a petition for a writ of mandamus that seeks to halt impeachment proceedings against her. The Respondents named in the petition are the Honorable Mitch Carmichael, President of the Senate; the Honorable Donna J. Boley, President Pro Tempore of the Senate; the Honorable Ryan Ferns, Senate Majority Leader; the Honorable Lee Cassis, Clerk of the Senate; and the West Virginia Senate. [1] The Petitioner seeks to have this Court prohibit the Respondents from prosecuting her under ****260** ***114** three Articles of Impeachment returned against her by the West Virginia House of Delegates. The Petitioner has briefed the following issues to support her contention that she is entitled to the relief sought. The Petitioner has alleged several issues which we have distilled to the essence as alleging that the Articles of Impeachment against her violate the Constitution of West Virginia because (1) an administrative rule promulgated by the Supreme Court supersede statutes in conflict with them; (2) the determination of a violation of the West Virginia Code of Judicial Conduct rests exclusively with the Supreme Court; (3) the Articles of Impeachment were filed in violation of provisions of House Resolution 201. Upon careful review of the briefs, the appendix record, and the applicable legal authority, we grant relief as outlined in this opinion. [2]

INTRODUCTION

Although the Petitioner in this matter requested oral argument under Rule 20 of the Rules of Appellate Procedure, and even though this case presents issues of first impression, raises constitutional issues, and is of fundamental public importance, the Respondents, however, waived that right as follows:

> Oral argument is unnecessary because no rule to show cause is warranted. This case presents the straightforward application of unambiguous provisions of the

> Constitution of West Virginia that, under governing precedent of this Court, the Supreme Court of the United States and courts across the nation unquestionably affirm the West Virginia Senate's role as the Court of Impeachment.

This Court further notes that the Respondents declined to address the merits of the Petitioner's arguments. The Respondents stated the following:

> At the outset, it important to note that Respondents take no position with respect to facts as laid out by Petitioner, or the substantive merits of the legal arguments raised in the Petition. In fact, it is constitutionally impermissible for Respondents to do so, as they are currently sitting as a Court of Impeachment in judgment of Petitioner for the allegations made in the Articles adopted by the House.

The Respondents have not cited to any constitutional provision which prevents them from responding directly or through the Board of Managers (the prosecutors), to the merits of the Petitioner's arguments. It is expressly provided in Rule 16(g) of the Rules of Appellate Procedure that "[i]f the response does not contain an argument in response to a question presented by the petition, the Court will assume that the respondent agrees with the petitioner's view of the issue." In light of the Respondent's waiver of oral argument and refusal to address the merits of the Petitioner's arguments, this Court exercises its discretion to not require oral argument and will rule upon the written Petition, Response, Reply, and various appendices. [3]

Our forefathers in establishing this Country, as well as the leaders who established the framework for our State, had the forethought to put a procedure in place to address issues that could arise in the future; in the ensuing years that system has served us well. What our forefathers did not envision is the fact that subsequent leaders would not have the ability or willingness to read, understand, or to follow those guidelines. The problem we have today is that people do not bother to read the rules, or if they read ****261** ***115** them, they decide the rules do not apply to them.

There is no question that a governor, if duly qualified and serving, can call a special session of the Legislature. There is no question that the House of Delegates has the right to adopt a Resolution and Articles of a Bill of Impeachment. There is no question that the Senate is the body which conducts the trial of impeachment and can establish its own rules for that trial and that it must be presided over by a member of this Court. This Court should not intervene with any of those proceedings because of the separation of powers doctrine, and no one branch may usurp the power of any other coequal branch of government. However, when our constitutional process is violated, this Court must act when called upon.

Fundamental fairness requires this Court to review what has happened in this state over the last several months when all of the procedural safeguards that are built into this system have not been followed. In this case, there has been a rush to judgment to get to a certain point without following all of the necessary rules. This case is not about whether or not a Justice of the Supreme Court of Appeals of West Virginia can or should be impeached; but rather it is about the fact that to do so, it must be done correctly and constitutionally with due process. We are a nation of laws and not of men, and the rule of law must be followed.

By the same token, the separation of powers doctrine works six ways. The Courts may not be involved in legislative or executive acts. The Executive may not interfere with judicial or legislative acts. So the Legislature should not be dealing with the Code of Judicial Conduct, which authority is limited to the Supreme Court of Appeals.

The greatest fear we should have in this country today is ourselves. If we do not stop the infighting, work together, and follow the rules; if we do not use social media for good rather than use it to destroy; then in the process, we will destroy ourselves.

I.

FACTUAL AND PROCEDURAL HISTORY

The Petitioner was appointed as a judge to the Circuit Court of Kanawha County, by former Governor John D. Rockefeller,

IV, on November 16, 1981. She was later elected in 1982 by the voters to fill out the remainder of the unexpired term of her appointment. She was subsequently elected again in 1984 for a full term. In 1988, the Petitioner was elected by the voters to fill a vacancy on the West Virginia Supreme Court of Appeals. She served a full term and left office in 2000. The Petitioner ran again for a position on the Supreme Court in 2008 and won.

In late 2017, the local media began publicizing reports of their investigations into the costs for renovating the offices of the Supreme Court Justices. Those publicized reports led to an investigation by the Legislative Auditor into the spending practices of the Supreme Court in general. The Auditor's office issued a report in April of 2018. This report was focused on the conduct of Justice Allen Loughry and Justice Menis Ketchum. The report concluded that both Justices may have used state property for personal gain in violation of the state Ethics Act. The report indicated that the matter was referred to the West Virginia Ethics Commission for further investigation. [4] In June of 2018 the Judicial Investigation Commission charged Justice Loughry with 32 violations of the Code of Judicial Conduct and the Rules of Professional Conduct. Justice Loughry was subsequently indicted by the federal government on 22 charges. [5]

On June 25, 2018, Governor Jim Justice issued a Proclamation calling the Legislature to convene in a second extraordinary session to consider the following:

> First: Matters relating to the removal of one or more Justices of the Supreme Court ****262 *116** of Appeals of West Virginia, including, but not limited to, censure, impeachment, trial, conviction, and disqualification; and
>
> Second: Legislation authorizing and appropriating the expenditure of public funds to pay the expenses for the Extraordinary Session.

Pursuant to this Proclamation, the Legislature convened on June 26, 2018, to carry out the task outlined therein.

The record indicates that on June 26, 2018, the House of Delegates adopted House Resolution 201. This Resolution empowered the House Committee on the Judiciary to investigate impeachable offenses against the Petitioner and the other four Justices of the Supreme Court. [6] Under the Resolution, the Judiciary Committee was required to report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact; and, if the recommendation was that of impeachment of any of the Justices, the Committee had to present to the House of Delegates a proposed resolution of impeachment and proposed articles of impeachment. Upon receipt of a proposed Resolution of Impeachment and Articles of Impeachment by the House of Delegates, Resolution 201 authorized the House to adopt a Resolution of Impeachment and formal articles of impeachment as prepared by the Judiciary Committee, and deliver the same to the Senate for consideration.

The Judiciary Committee conducted impeachment hearings between July 12, 2018 and August 6, 2018. On August 7, 2018, the Judiciary Committee adopted fourteen Articles of Impeachment. The Petitioner was named in four of the Articles of Impeachment. On August 13, 2013, the House of Delegates voted to approve only eleven of the Articles of Impeachment. The Petitioner was impeached on three of the Articles of Impeachment. [7] First, the Petitioner and Justice Davis were named in Article IV, [8] which alleged that they improperly authorized the overpayment of senior-status judges. [9] Second, the Petitioner was named exclusively in Article VI, which alleged that she improperly authorized the overpayment of senior-status judges. [10] Third, the Petitioner was named, along with three other justices, in Article XIV, which set out numerous allegations against them which included charges that they failed to implement various administrative policies and procedures. [11]

Subsequent to the House of Delegates' adoption of the Articles of Impeachment they were submitted to the Senate for the purpose of conducting a trial. On August 20, 2018 the Senate adopted Senate Resolution 203, which set forth the rules of procedure for the impeachment trial. A pre-trial conference was held on September 11, 2018. At that conference the Petitioner, Justice Walker, and the Board of Managers submitted a "Proposed Stipulation and Agreement of Parties" that would have required the charges against both of them be dismissed. [12] The Senate voted to reject the settlement offer. Thereafter Acting Chief Justice Farrell set a separate trial date for the Petitioner on October 15, 2018. The Petitioner subsequently filed this proceeding to have the Articles of Impeachment against her dismissed.

II.

THIS COURT'S JURISDICTION TO ADDRESS CONSTITUTIONAL ISSUES ARISING FROM THE COURT OF IMPEACHMENT

Before we examine the merits of the issues presented we must first determine ****263** ***117** whether this Court has jurisdiction over issues arising out of a legislative impeachment proceeding. The Respondents contend that this Court does not have jurisdiction over the impeachment proceeding. [13] This is an issue of first impression for this Court.

Resolution of this issue requires an analysis of constitutional principles. In undertaking our analysis we are reminded that the United States Supreme Court stated in *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962), that the determination of whether a matter is exclusively committed by the constitution to another branch of government "is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution." We are also guided by the principle that

> A constitution is the fundamental law by which all people of the state are governed. It is the very genesis of government. Unlike ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law.

State ex rel. Smith v. Gore, 150 W.Va. 71, 77, 143 S.E.2d 791, 795 (1965). Further,

> It is axiomatic that our Constitution is a living document that must be viewed in light of modern realities. Reasonable construction of our Constitution ... permits evolution and adjustment to changing conditions as well as to a varied set of facts.... The solution [to problems of constitutional interpretation] must be found in a study of the specific provision of the Constitution and the best method [under current conditions] to further advance the goals of the framers in adopting such a provision.

State ex rel. McGraw v. Burton, 212 W. Va. 23, 36, 569 S.E.2d 99, 112 (2002) (internal quotation marks and citation omitted).

As an initial matter, we observe that "[q]uestions of constitutional construction are in the main governed by the same general rules applied in statutory construction." Syl. pt. 1, *Winkler v. State Sch. Bldg. Auth.*, 189 W.Va. 748, 434 S.E.2d 420 (1993). We have held that "[t]he object of construction, as applied to written constitutions, is to give effect to the intent of the people in adopting it." Syl. pt. 3, *Diamond v. Parkersburg–Aetna Corp.*, 146 W.Va. 543, 122 S.E.2d 436 (1961). This Court held in syllabus point 3 of *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965) that "[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Therefore, "[i]f a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court must apply and not interpret the provision." Syl. pt. 1, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953). On the other hand, "if the language of the constitutional provision is ambiguous, then the ordinary principles employed in statutory construction must be applied to ascertain such intent." *State ex rel. Forbes v. Caperton*, 198 W.Va. 474, 480, 481 S.E.2d 780, 786 (1996) (internal quotations and citations omitted). An ambiguous provision in a ****264** ***118** constitution "requires interpretation consistent with the intent of both the drafters and the electorate." *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 127, 207 S.E.2d 421, 436-437 (1973). Although we are empowered with the authority "to construe, interpret and apply provisions of the Constitution, ... [we] may not add to, distort or ignore the plain mandates thereof." *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 643, 246 S.E.2d 99, 107 (1978).

It is axiomatic that "in every case involving the application or interpretation of a constitutional provision, analysis must begin with the language of the constitutional provision itself."

State ex rel. Mountaineer Park, Inc. v. Polan, 190 W.Va. 276, 283, 438 S.E.2d 308, 315 (1993). The framework for impeaching and removing an officer of the state is set out under Article IV, § 9 of the Constitution of West Virginia. The full text of Section 9 provides as follows:

> Any officer of the state may be impeached for maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor. The House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence of two thirds of the members elected thereto. When sitting as a court of impeachment, the president of the supreme court of appeals, or, if from any cause it be improper for him to act, then any other judge of that court, [14] to be designated by it, shall preside; and the senators shall be on oath or affirmation, to do justice according to law and evidence. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under the state; but the party convicted shall be liable to indictment, trial judgment, and punishment according to law. The Senate may sit during the recess of the Legislature, for the trial of impeachments.

Pursuant to Section 9 "[t]he House of Delegates has the sole power of impeachment, and the Senate the sole power to try impeachments." *Slack v. Jacob*, 1875 W.L. 3439, 8 W. Va. 612, 664 (1875). To facilitate the trial of an impeachment proceeding Section 9 created a Court of Impeachment.

It is clear from the text of Section 9 that it does not provide this Court with jurisdiction over an appeal of a final decision by the Court of Impeachment. [15] Consequently, and we so hold, in the absence of legislation providing for an appeal in an impeachment proceeding under Article IV, § 9 of the Constitution of West Virginia, this Court does not have jurisdiction over an appeal of a final decision by the Court of Impeachment.

Although it is clear that an appeal is not authorized from a decision by the Court of Impeachment, we do find under the plain language of Section 9, the actions or inactions of the Court of Impeachment may be subject to a proceeding under the original jurisdiction of this Court. [16] The authority for this proposition is contained in the Law and Evidence Clause found in Section 9, which states: "the senators shall ... do justice according to law and evidence." The Law and Evidence Clause of Section 9 uses the word "shall" in requiring the Court of Impeachment to follow the law. We have recognized that "[t]he word 'shall,' ... should be afforded a mandatory connotation[,] and when used in constitutions and statutes, [it] leaves no way open for the substitution of discretion." *Silveti v. Ohio Valley Nursing Home, Inc.*, 240 W. Va. 468, 813 S.E.2d 121, 125 (2018) ****265 *119** (internal quotation marks and citations omitted). See Syl. pt. 3, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953) ("As used in constitutional provisions, the word 'shall' is generally used in the imperative or mandatory sense."). Insofar as the Law and Evidence Clause imposes a mandatory duty on the Court of Impeachment to follow the law, there is an implicit right of an impeached official to have access to the courts to seek redress, if he or she believes actions or inactions by the Court of Impeachment violate his or her rights under the law. [17]

The implicit right of redress in the courts found in the Law and Evidence Clause, is expressly provided for in Article III, § 17 of the Constitution of West Virginia. Section 17 provides as follows:

> The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

The Certain Remedy Clause of Section 17 has been found to mean that "[t]he framers of the West Virginia Constitution provided citizens who have been wronged with rights to pursue a remedy for that wrong in the court system." *Bias v. E. Associated Coal Corp.*, 220 W. Va. 190, 204, 640 S.E.2d 540, 554 (2006) (Starcher, J., dissenting). See *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 697, 237 S.E.2d 504, 506 (1977) ("[T]he concept of American justice ... pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy[.]"); *Gardner v. Buckeye Sav. & Loan Co.*, 108 W.Va. 673, 680, 152 S.E. 530, 533 (1930) ("It is the proud boast of all lovers of justice that for every wrong there is a remedy."); *Lambert v. Brewster*, 97 W.Va. 124, 138, 125 S.E. 244, 249 (1924) ("As for public policy, the strongest policy which appeals to us is that fundamental theory of the common law that for every wrong there should be a remedy."). In the leading treatise on the Constitution of West Virginia, the following is said,

> The second clause of section 17, providing that all persons "shall have remedy by due course of law" ... limits ... the ability of the government to constrict an individual's right to invoke the judicial process[.]

Robert M. Bastress, *The West Virginia State Constitution*, at 124 (2011).

This Court has held that "enforcement of rights secured by the Constitution of ****266** ***120** this great State is engrained in this Court's inherent duty to neutrally and impartially interpret and apply the law." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 544, 782 S.E.2d 223, 239 (2016). That is, "[c]ourts are not concerned with the wisdom or expediencies of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution." Syl. pt. 3, *State ex rel. Casey v. Pauley*, 158 W.Va. 298, 210 S.E.2d 649 (1975).

Insofar as an officer of the state facing impeachment in the Court of Impeachment has a constitutional right to seek redress for an alleged violation of his or her rights by that court, we now hold that an officer of the state who has been impeached under Article IV, § 9 of the Constitution of West Virginia, may seek redress for an alleged violation of his or her constitutional rights in the impeachment proceedings, by filing a petition for an extraordinary writ under the original jurisdiction of this Court.[18] See *Kinsella v. Jaekle*, 192 Conn. 704, 723, 475 A.2d 243, 253 (1984) ("A court acting under the judicial power of ... the constitution may exercise jurisdiction over a controversy arising out of impeachment proceedings only if the legislature's action is clearly outside the confines of its constitutional jurisdiction to impeach any executive or judicial officer; or egregious and otherwise irreparable violations of state or federal constitutional guarantees are being or have been committed by such proceedings."); *Smith v. Brantley*, 400 So.2d 443, 449 (Fla. 1981) ("The issue of subject matter jurisdiction for impeachment is properly determined by the judiciary, of course. Our conclusion on this question is that one must be such an officer to be impeachable."); *Dauphin County Grand Jury Investigation Proceedings*, 332 Pa. 342, 345, 2 A.2d 802, 803 (1938) ("the courts have no jurisdiction in impeachment proceedings, and no control over their conduct, *so long as actions taken are within constitutional lines*.") (emphasis added); *People ex rel. Robin v. Hayes*, 82 Misc. 165, 172–73, 143 N.Y.S. 325, 330 (Sup. Ct. 1913) ("[A court] has no jurisdiction to inquire into the sufficiency of charges for which a Governor may be impeached, nor, I take it, whether the proceedings looking to that end were properly conducted, *unless at their foundation, in their exercise, constitutional guaranties are broken down or limitations ignored*.") (emphasis added).[19]

It will be noted that this Court held in syllabus point 3 of ****267** ***121** *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) that "[u]nder the Separation of Powers doctrine, Article V, Section 1 of the Constitution of West Virginia, courts have no authority—by mandamus, prohibition, contempt or otherwise—to interfere with the proceedings of either house of the Legislature." This holding is not applicable to the issue under consideration in the instant matter.[20] In *Holmes* the Court was called upon to address the issue of a circuit court issuing an order that required the Clerk of the Senate and the Clerk of the House of Delegates remove references to a pardon by the Governor in the official journals of the Senate and the House of Delegates. When the Clerks refused to obey the order, the circuit court issued a rule to show cause as to why they should not be held in contempt. This Court determined that the judicial order encroached on the exclusive authority of the Legislature to maintain journals:

> [T]he Clerks argue that it is beyond the authority of a circuit court to compel them to alter the Journals, whether

in their printed form or in their electronic form published on the internet. The Clerks generally assert that the circuit court exceeded its jurisdiction, because the Journals are a protected legislative function under the Constitution of West Virginia. The Constitution of West Virginia vests the State's legislative power in a Senate and a House of Delegates. W.Va. Const., Art. VI, § 1. Each house of the Legislature is charged with determining its own internal rules for its proceedings and with choosing its own officers. W.Va. Const., Art. VI, § 24.

The Constitution mandates that each house must keep and publish a "journal of its proceedings." Article VI, Section 41 states:

> Each house shall keep a journal of its proceedings, and cause the same to be published from time to time, and all bills and joint resolutions shall be described therein, as well by their title as their number, and the yeas and nays on any question, if called for by one tenth of those present shall be entered on the journal.

A variation of this mandate has been in our Constitution since the founding of our State in 1863. The founding fathers indicated during the constitutional convention that there are two goals underlying this provision: to ensure that the votes of legislators are correctly recorded, and to make a public record of the actions of legislators.

Holmes, 226 W. Va. at 483–84, 702 S.E.2d at 615–16. The facts giving rise to syllabus point 3 in *Holmes* clearly establish the limitations of that syllabus point. That is, the facts of the case concerned a trial court interfering in legislative administrative matters when no legal authority permitted such interference. Neither the opinion nor syllabus point 3 were intended to limit the authority of this Court to entertain an extraordinary writ against the Legislature when the law permits. For example, the case of *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 730 S.E.2d 368 (2012) involved several consolidated actions for prohibition and mandamus against the Speaker of the House of Delegates and government officials concerning the constitutionality of redistricting. This Court denied the writs and in doing so held that

> In the absence of constitutional infirmity, as the precedent evaluated above irrefutably establishes, the development and implementation of a legislative redistricting plan in the State of West Virginia are entirely within the province of the Legislature. The role of this Court is limited to a determination of whether the Legislature's actions have violated the West Virginia Constitution.

Cooper, 229 W. Va. at 614, 730 S.E.2d at 397. See *State ex rel. W. Virginia Citizen Action Grp. v. Tomblin*, 227 W. Va. 687, 715 S.E.2d 36 (2011) (granting mandamus in part against the Governor, Speaker of the House of Delegates and other government officials requiring a special election be called); *State ex rel. League of Women Voters of W. Virginia v. Tomblin*, 209 W. Va. 565, 578, 550 S.E.2d 355, 368 (2001) (finding that mandamus would be issued against the President of the ****268 *122** Senate, Speaker of the House of Delegates and other government officials that required "the Legislature to only include as part of the budget digest information that has been the subject of discussion, debate, and decision prior to final legislative enactment of the budget bill."); *State ex rel. Meadows v. Hechler*, 195 W. Va. 11, 19, 462 S.E.2d 586, 594 (1995) granting mandamus against the President of the Senate and Speaker of the House of Delegates that required "the Legislature to promptly draft legislation to replace the unconstitutional section of article 29A and additionally, to consider passage of legislation that would exempt certain administrative regulations from conformance with APA implementation requirements, such as where compliance with federal law is mandated."). In view of the foregoing, we hold that to the extent that syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010) may be interpreted as prohibiting this Court from exercising its constitutional authority to issue an extraordinary writ against the Legislature when the law requires, it is disapproved.

The Respondents have cited to the decision in *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) as authority for the proposition that the judiciary does not have jurisdiction over impeachment proceedings. In *Nixon*, a federal district judge was impeached and removed from office, in a proceeding in which the United States Senate allowed a committee to take testimony and gather evidence.

The former judge filed a declaratory judgment action in a district court seeking a ruling that the Senate's failure to hold a full evidentiary hearing before the entire Senate violated its constitutional duty to "try" all impeachments. The District Court denied relief and dismissed the case. The Court of Appeals affirmed. The United States Supreme Court granted certiorari to determine whether the constitutional requirement that the Senate "try" cases of impeachment precludes the use of a committee to hear evidence. The opinion held that the issue presented could not be brought in federal court. The Court reasoned as follows:

> We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?

Nixon, 506 U.S. at 236, 113 S.Ct. at 739.

The decision in *Nixon* is not controlling and is distinguishable. See *Peters v. Narick*, 165 W. Va. 622, 628 n.13, 270 S.E.2d 760, 764 n.13 (1980), modified on other grounds by *Israel by Israel v. W. Virginia Secondary Sch. Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989) ("States have the power to interpret state constitutional guarantees in a manner different than the United States Supreme Court has interpreted comparable federal constitutional guarantees."). The narrowly crafted text of the impeachment provision found in the Constitution of the United States prevented the Supreme Court from finding a basis for allowing a constitutional challenge to the impeachment procedure adopted by the Senate. The text of the federal impeachment provision is found in Article I, § 3 of the Constitution of the United States and provides the following:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy ****269** ***123** any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

It is clear that Article 1, § 3 does not contain the Law and Evidence Clause that is found in Article IV, § 9 of the Constitution of West Virginia. Therefore, our constitution provides greater impeachment protections than the Constitution of the United States.[21] See *State ex rel. K.M. v. W. Virginia Dep't of Health & Human Res.*, 212 W. Va. 783, 794 n.15, 575 S.E.2d 393, 404 n.15 (2002) ("it is clear that our Constitution may offer greater protections than its federal counterpart."); *State ex rel. Carper v. W. Virginia Parole Bd.*, 203 W. Va. 583, 590 n.6, 509 S.E.2d 864, 871 n.6 (1998) ("This Court has determined repeatedly that the West Virginia Constitution may be more protective of individual rights than its federal counterpart."); *State v. Bonham*, 173 W. Va. 416, 418, 317 S.E.2d 501, 503 (1984) ("[T]he United States Supreme Court has also recognized that a state supreme court may set its own constitutional protections at a higher level than that accorded by the federal constitution. There are a number of cases where state supreme courts have set a higher level of protection under their own constitutions."); Syl. pt.2, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) ("The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution."). Moreover, *Nixon* was not called upon to address the substantive type of issues presented in this case. The case was focused upon the right of the Senate to craft rules of procedure for impeachment.

The Respondents have cited to the decision in *In re Judicial Conduct Comm.*, 145 N.H. 108, 111, 751 A.2d 514, 516 (2000). In that case the New Hampshire House Judiciary Committee began an impeachment investigation into conduct by the state Supreme Court chief justice and other members

of that court. The state Supreme Court Committee on Judicial Conduct filed a motion seeking an order requiring the House Committee to allow it to attend any House Committee deposition of any Judicial Conduct member or employee. The state Supreme Court held that the issue presented was a nonjusticiable political question and therefore denied relief. However, the opinion was clear in holding that the judiciary had authority to intervene in an impeachment proceeding:

> The [House Judiciary Committee] first argues that the judicial branch lacks jurisdiction over any matter related to a legislative impeachment investigation. We disagree.
>
> > The investigative power of the Legislature, however penetrating and persuasive its scope, is not an absolute right but, like any right, is "limited by the neighborhood of principles of policy which are other than those on which [that] right is founded, and which become strong enough to hold their own when a certain point is reached." United States v. Rumely, 345 U.S. 41, 44, [73 S.Ct. 543, 97 L.Ed. 770 (1953)]; Hudson Water Co. v. McCarter, 209 U.S. 349, 355, [28 S.Ct. 529, 52 L.Ed. 828 (1908)]. The contending principles involved here are those underlying the power of the Legislature to investigate on the one hand and those upon which are based certain individual rights guaranteed to our citizens by the State and National Constitutions.
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> *Nelson v. Wyman*, 99 N.H. 33, 41, 105 A.2d 756, 764 (1954).
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> * * *
>
> The court system is available for adjudication of issues of constitutional or other fundamental rights.... In such circumstances, Part I, Article 17 of the New Hampshire ConstitutionPart I, Article 17 of the New Hampshire Constitution does not deprive persons whose rights are violated from seeking judicial redress simply because the violation occurs in the course of an impeachment investigation.
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> * * *
>
> The constitutional authority of the House of Representatives to conduct impeachment proceedings without interference ****270 *124** from the judicial branch is extensive, but not so extensive as to preclude this court's jurisdiction to hear matters arising from legislative impeachment proceedings. "It is the role of this court in our co-equal, tripartite form of government to interpret the Constitution and to resolve disputes arising under it." *Petition of Mone*, 143 N.H. [128,] at 133, 719 A.2d [626,] at 631 [(1998)] (quoting *Monier [v. Gallen]*, 122 N.H. [474,] at 476, 446 A.2d [454,] at 455 [(1982)]; citing *Merrill v. Sherburne*, 1 N.H. 199, 201-02 (1818)). However, upon briefing and argument, it is apparent that the specific issue raised by the JCC is nonjusticiable. Accordingly, the JCC's request for its special counsel to attend HJC depositions of JCC members and employees is denied.

In re Judicial Conduct, 145 N.H. at 110-113, 751 A.2d at 515. Although the Respondents cited to the decision in *In re Judicial Conduct*, it is clear that the constitutional principles of law discussed in the case are consistent with this Court's ruling, i.e., the judiciary may intervene in an impeachment proceeding to protect constitutional rights.

The Respondents cited to the decision in *Larsen v. Senate of Pennsylvania*, 166 Pa. Cmwlth. 472, 646 A.2d 694 (1994) without any discussion. In *Larsen* a former justice on the state Supreme Court was sentenced to removal from office by a trial court after he was found guilty of an infamous crime. The former justice filed for a preliminary injunction to prevent a senate impeachment trial and asserted numerous grounds for relief, that included: (1) he was no longer in office and could not be removed by the senate, (2) senate rules were unconstitutional, (3) the senate could not permit a committee to hear the case, and (4) he was denied sufficient time to prepare. The court, relying on the decision in *Nixon*, found that the state's impeachment clause was similar to the federal clause and therefore denied relief. However, the opinion noted that the decision by the state Supreme Court decision in *Dauphin County Grand Jury Investigation Proceedings*, 332 Pa. 342, 345, 2 A.2d 802, 803 (1938) held that "the courts have no jurisdiction in impeachment proceedings and no control over their conduct, so long as actions taken are within constitutional lines...." *Larsen*, 166 Pa. Cmwlth. at 482, 646 A.2d at 699. The opinion limited *Dauphin's* qualification on judicial intervention to impeachment proceedings that had ended. The decision in *Larsen* is distinguishable because that state's impeachment clause was aligned with the federal impeachment clause, and did not have a Law and Evidence

Clause like the Constitution of West Virginia. Moreover, Larsen recognized that it could not overrule the state Supreme Court's ruling in *Dauphin*, which left open the door for intervention in an impeachment proceeding for "actions [not] taken within constitutional lines." *Larsen* limited intervention to post-impeachment.

The Respondents have also cited to the decision in *Mecham v. Gordon*, 156 Ariz. 297, 751 P.2d 957 (1988). In that case the state Governor filed a petition for injunctive relief with the state Supreme Court, to prevent the state senate from conducting an impeachment trial against him until his criminal trial was over. The Governor also challenged the impeachment procedures. The state Supreme Court denied relief as follows:

> [W]e can only conclude that the power of impeachment is exclusively vested in the House of Representatives and the power of trial on articles of impeachment belongs solely to the Senate. The Senate's task is to determine if the Governor should be removed from office. Aside from disqualification from holding any other state position of "honor, trust, or profit," the Senate can impose no greater or lesser penalty than removal and can impose no criminal punishment. Trial in the Senate is a uniquely legislative and political function. It is not judicial.

Mecham, 156 Ariz. at 302, 751 P.2d at 962. The decision in *Mecham* is factually distinguishable because it did not involve allegations of a violation of substantive constitutional rights. More importantly, even though the court in *Mecham* denied the requested relief, it made clear that the judiciary could intervene in an impeachment proceeding to protect the constitutional rights of an impeached official:

> ****271 *125** This Court does have power to ensure that the legislature follows the constitutional rules on impeachment. For instance, should the Senate attempt to try a state officer without the House first voting articles of impeachment, we would not hesitate to invalidate the results.

Mecham, 156 Ariz. at 302-303, 751 P.2d at 962-963. See *Mecham v. Arizona House of Representatives*, 162 Ariz. 267, 782 P.2d 1160 (1989) (declining to review impeachment of state Governor because constitutional requirements were met).

In the instant proceeding the Petitioner has alleged that the impeachment charges brought against her are unlawful and violate her constitutional rights. In view of the above analysis, we have jurisdiction to consider the validity of these allegations. [22]

III.

STANDARD OF REVIEW

The Petitioner filed this matter seeking a writ of mandamus to prohibit enforcement of the Articles of Impeachment filed against her. This Court has explained that the function of mandamus is "the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law." *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999). It was held in syllabus point two of *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969) that

> A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

In our review of the type of relief the Petitioner seeks we do not believe that mandamus is the appropriate remedy. "In appropriate situations, this Court has chosen to treat petitions for extraordinary relief according to the nature of the relief sought rather than the type of writ pursued." *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W. Va. 696, 699, 619 S.E.2d 209, 212 (2005). See *State ex rel. Potter v. Office of Disciplinary Counsel of State*, 226 W. Va. 1, 2 n.1, 697 S.E.2d 37, 38 n.1 (2010) ("this Court has, in past cases, treated a request for relief in prohibition as a petition for writ of mandamus if so warranted by the facts. Accordingly, we consider the present petition as a request for mandamus relief."); *State ex rel. Beirne v. Smith*, 214 W. Va. 771, 774, 591 S.E.2d 329, 332 (2003) ("Although Mr. Bradley brought his case as a petition for a writ of prohibition, while Mr. Beirne requested a writ of mandamus, we choose to treat each as a petition for a writ of mandamus, because both petitioners wish to compel the Commissioner to do an affirmative act, i.e., pay benefits."); *State ex rel. Wyant v. Brotherton*, 214 W. Va. 434, 437, 589 S.E.2d 812, 815 (2003) ("Because we find this case to be in the nature of prohibition as opposed to mandamus, we will henceforth treat it as a petition for writ of prohibition."); *State ex rel. Riley v. Rudloff*, 212 W. Va. 767, 771–72, 575 S.E.2d 377, 381–82 (2002) ("This case was initially brought as a petition for writ of habeas corpus and/or mandamus. We granted the writ of habeas corpus, leaving for resolution only issues related to mandamus. ****272 *126** Upon further consideration of the issues herein raised, however, we choose (as we have done in many appropriate cases) to treat this matter as a writ of prohibition."); *State ex rel. Sandy v. Johnson*, 212 W. Va. 343, 346, 571 S.E.2d 333, 336 (2002) ("Although this case was brought and granted as a petition for a writ of prohibition, we choose to treat it as a writ of mandamus action."); *State ex rel. Conley v. Hill*, 199 W.Va. 686, 687 n. 1, 487 S.E.2d 344, 345 n. 1 (1997) ("Although this case was brought and granted as a petition for mandamus, we choose to treat this matter as a writ of prohibition.").

In light of the issues raised by the Petitioner, we find that the more appropriate relief lies in a writ of prohibition. As a quasi-judicial body the Court of Impeachment is subject to the writ of prohibition. See *State ex rel. York v. W. Virginia Office of Disciplinary Counsel*, 231 W. Va. 183, 187 n.5, 744 S.E.2d 293, 297 n.5 (2013) ("prohibition lies against only judicial and 'quasi-judicial tribunals'[.]"); *Lewis v. Ho-Chunk Nation Election Bd.*, 7 Am. Tribal Law 84 (Ho-Chunk Trial Ct. 2007) ("Therefore, the House may institute a case against a sitting president after determining probable cause of official wrongdoing, and, through designated managers, present the matter before the Senate, which assumes a quasi-judicial role in hearing and deliberating the charges."); *Mayor & City Council of Baltimore ex rel. Bd. of Police of City of Baltimore*, 1860 WL 3363, 15 Md. 376, 459 (1860) ("the present Constitution, invested the Legislature with quasi judicial functions, in exercising the power of impeachment and punishment, as therein provided."). The purpose of the writ is "to restrain inferior courts from *proceeding in causes over which they have no jurisdiction*[.]" Syl. pt. 1, in part, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953) (emphasis added). "The writ [of prohibition] lies as a matter of right whenever the inferior court (a) has not jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate." *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 394, 655 S.E.2d 137, 140 (2007) (internal citation and quotation marks omitted). See W. Va. Code § 53-1-1 (1923) ("The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.").

In syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), we set forth the following guideline for issuance of a writ of prohibition that does not involve lack of jurisdiction:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's

> order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

With the foregoing in mind, we turn to the merits of the case.

IV.

DISCUSSION

The Petitioner has presented several issues that she contends ultimately require the dismissal of the impeachment charges against her.[23] All of the arguments presented ****273 *127** by the Petitioner have one common thread: they expressly or implicitly contend that the charges are brought in violation of the separation of powers doctrine. Because this common theme permeates all of her arguments, we will provide a separate discussion of that doctrine before we address the merits of each individual issue.

A.

The Separation of Powers Doctrine

"[T]he separation of powers doctrine [is] set forth in our State Constitution." *Erie Ins. Prop. & Cas. Co. v. King*, 236 W. Va. 323, 329, 779 S.E.2d 591, 597 (2015). The doctrine is set out in Article V, § 1 of the Constitution of West Virginia as follows:

> The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.[24]

With regard to this provision, this Court has stated:

> The separation of these powers; the independence of one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of Government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained. No theory of government has been more loudly acclaimed.

State ex rel. W. Virginia Citizen Action Grp. v. Tomblin, 227 W. Va. 687, 695, 715 S.E.2d 36, 44 (2011), quoting *State v. Huber*, 129 W.Va. 198, 209, 40 S.E.2d 11, 18 (1946). It has been held that "Article V, section 1 of the Constitution ... is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. pt. 1, in part, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981). We have observed that

> The separation of powers doctrine implies that each branch of government has inherent power to "keep its own house in order," absent a specific grant of power to another branch.... This theory recognizes that each branch of government must have sufficient power to carry out its assigned tasks and that these constitutionally assigned tasks will be performed properly within the governmental branch itself.

State v. Clark, 232 W. Va. 480, 498, 752 S.E.2d 907, 925 (2013). Further, the "separation of powers doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved unto them." *Simpson v. W.*

Virginia Office of Ins. Com'r, 223 W. Va. 495, 505, 678 S.E.2d 1, 11 (2009). It has also been observed that

> The Separation of Powers Clause is not self-executing. Standing alone the doctrine has no force or effect. The Separation of Powers Clause is given life by each branch of government working exclusively within its constitutional domain and not encroaching upon the legitimate powers of any other branch of government. This is the essence and longevity of the doctrine.

State ex rel. Affiliated Constr. Trades Found. v. Vieweg, 205 W.Va. 687, 702, 520 S.E.2d 854, 869 (1999) (Davis, J., concurring). Professor Bastress has pointed out the purpose and application of the separation of powers doctrine as follows:

> ****274 *128** A system of divided powers advances several purposes. First, it helps to prevent government tyranny. By allocating the powers among the three branches and establishing a system of checks and balances, the constitution ensures that no one person or institution will become too powerful and allow ambition to supersede the public good....
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> Thus, under the current doctrine, the court's role is to apply Article V to ensure that the system of government in the state remains balanced and that no one branch assumes powers specifically delegated to another, or imposes burdens on another, or passes on its own responsibilities to another branch in such a manner as to threaten the balance of power, facilitate tyranny, or weaken the system of government.

Bastress, *West Virginia State Constitution*, at 141-144. See Syl. pt. 2, *Appalachian Power Co. v. Public Serv. Comm'n of West Virginia*, 170 W.Va. 757, 296 S.E.2d 887 (1982) ("Where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1 of Article V of the West Virginia Constitution.").

The decision in *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 207 S.E.2d 421 (1973) summarized the development of the separation of powers doctrine as follows:

> From the time of its adherence to by Montesquieu, the author or at least an early supporter of the concept of separation of powers, the political merit of that design of government has not been seriously questioned. Hodges v. Public Service Commission, 110 W.Va. 649, 159 S.E. 834 [(1931)]; Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377 [(1880)]. That concept was invoked in the early consideration of the formulation of our federal Constitution. Reflecting the import which he attributed to the concept of separation of powers in government, James Madison, in support of the proposed Constitution, wrote: 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. * * * where the Whole power of one department is exercised by the same hands which possess the Whole *114 power of another department, the fundamental principles of a free constitution are subverted.' Speaking of the judiciary, Madison, quoting Montesquieu, wrote: "Were it (judicial power) joined to the executive power, The judge might behave with all the violence of An oppressor." The Federalist Papers, Hamilton, Madison and Jay (Rossiter, 1961). Commenting on the relationship between the three recognized branches of government and the urgency of maintaining a wholly independent judiciary, Alexander Hamilton, in Essay No. 78 of The Federalist Papers, noted: 'The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.' With the real affirmative powers of government reposing in the hands of the executive and legislative branches, it becomes urgent that the judiciary department, one function of which under our fundamental law is to prevent encroachment by the other two branches, remains free and completely independent. As noted by

> Montesquieu in Spirit of Laws, Vol. 1, page 181: '* * * there is no liberty if the power of judging be not separated from the legislative and executive powers.' Thus, judicial independence is essential to liberty—lest the executive sword become a 'Sword of Damocles', precariously and intimidatingly suspended over the judicial head and the legislative law making power be used to usurp the ****275** ***129*** rights granted by the Constitution to the people.

Brotherton, 157 W. Va. at 113–14, 207 S.E.2d at 430.

We have recognized that "[t]he system of 'checks and balances' provided for in American state and federal constitutions and secured to each branch of government by 'Separation of Powers' clauses theoretically and practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch." Syl. pt. 1, *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994). We have also determined that "the role of this Court is vital to the preservation of the constitutional separation of powers of government where that separation, delicate under normal conditions, is jeopardized by the usurpatory actions of the executive or legislative branches of government." *State ex rel. Steele v. Kopp*, 172 W. Va. 329, 337, 305 S.E.2d 285, 293 (1983). See *State ex rel. W. Virginia Citizens Action Grp. v. W. Virginia Econ. Dev. Grant Comm.*, 213 W. Va. 255, 264, 580 S.E.2d 869, 878 (2003) ("Underlying any encroachment of power by one branch of government is the paramount concern that such action will impermissibly foster[ ] ... dominance and expansion of power."). Moreover, this Court has never "hesitated to utilize the doctrine where we felt there was a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government." *Appalachian Power Co. v. PSC*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982). See, e.g., *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Dev. Grant Comm.*, 213 W.Va. 255, 580 S.E.2d 869 (2003) (finding statute that gave legislature a role in appointing members of the West Virginia Economic Grant Committee violated Separation of Powers Clause); *State ex rel. Meadows v. Hechler*, 195 W.Va. 11, 462 S.E.2d 586 (1995) (finding statute which permitted administrative regulations to die if legislature failed to take action violated Separation of Powers Clause); *State ex rel. State Bldg. Comm'n v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966) (finding statute naming legislative officers to State Building Commission violated Separation of Powers Clause).

The United States Supreme Court in *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933) articulated the need for separating the powers of government into three distinct branches:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Government of Philippine Islands*, 277 U.S. 189, 201, 48 S.Ct. 480, 72 L.Ed. 845 [(1928)]; namely, to preclude a commingling of these essentially different powers of government in the same hands....
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> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, *but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments*. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." 1 Andrews, The Works of James Wilson (1896), Vol. 1, p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." 1 Story on the Constitution, 4th ed. s 530.

****276** ***130*** *O'Donoghue*, 289 U.S. at 530–31, 53 S.Ct. at 743 (emphasis added). [25]

It must also been understood that this Court "has long recognized that it is not possible that division of power among the three branches of government be so precise and exact that there is no overlapping whatsoever." *State ex rel. Sahley v. Thompson*, 151 W.Va. 336, 341, 151 S.E.2d 870, 873 (1966), overruled in part by *State ex rel. Hill v. Smith*, 172 W.

Va. 413, 305 S.E.2d 771 (1983). See *Appalachian Power Co. v. Public Serv. Comm'n of West Virginia*, 170 W. Va. 757, 759, 296 S.E.2d 887, 889 (1982) ("we have recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern day government[.]"). "While the Constitution contemplates the independent operation of the three fields of government as to all matters within their respective fields, there can be no doubt that the people, through their Constitution, may authorize one of the departments to exercise powers otherwise rightfully belonging to another department." *State ex rel. Thompson v. Morton*, 140 W.Va. 207, 223, 84 S.E.2d 791, 800–801 (1954).

With these general principles of the separation of powers doctrine guiding our analysis, we now turn to the merits of the issues presented.

B.

An Administrative Rule Promulgated by the Supreme Court Supersede Statutes in Conflict with Them

The first issue we address is the Petitioner's contention that two of the Articles of Impeachment against her are invalid, because they can only be maintained by violating the constitutional authority of the Supreme Court to promulgate rules that have the force of law and supersede any statute that conflicts with them. The two Articles of Impeachment in question are Article IV[26] and Article VI.[27] Both of those Articles ****277** ***131** charge the Petitioner with improperly overpaying senior-status judges. The Petitioner argues that the statute relied upon by Article IV and Article VI is in conflict with an administrative order promulgated by the Chief Justice.

We begin by observing that the 1974 Judicial Reorganization Amendment of the Constitution of West Virginia centralized the administration of the state's judicial system and placed the administrative authority of the courts in the hands of this Court.[28] See *State ex rel. Casey v. Pauley*, 158 W. Va. 298, 300, 210 S.E.2d 649, 651 (1975) ("The Judicial Reorganization Amendment was ratified by a large majority throughout the state."). The Amendment rewrote Article VIII, substituting §§ 1 to 15 for former §§ 1 to 30, amended § 13 of Article III, and added §§ 9 to 13 to Article IX. Justice Cleckley made the following observations regarding the changes:

> These changes include the entirety of the Reorganization Amendment and its concept of a unified court system administered by this Court and not the legislature. More specifically, that same amendment altered Section 1 of Article VIII to provide that the judicial power of the State "shall be vested solely " in this Court and its inferior courts. The predecessor provision to Section 1, though similarly worded, did not include the limiting adverb "solely." In addition, the Modern Budget Amendment insulated the judiciary from political retaliation by preventing the governor and legislature from reducing the judiciary's budget submissions. W.Va. Const., art. V, § 51; *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 246 S.E.2d 99 (1978); *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421 (1973). Taken together, these amendments create a strong and independent judiciary that can concentrate on delivering a high quality, fair, and efficient system of justice to the citizens of West Virginia. Such measures are particularly useful in a State such as ours that continues, and appropriately so, to elect judges to fixed terms of office. That is, because judges remain ultimately beholden to the electorate, the need is even greater to insulate the judiciary from the more routine politics of the annual budget process and legislative or executive manipulation.
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> [A]ltering the administrative structure did not negate all prior laws that are tangentially related to administrative matters. To the contrary, the Reorganization Amendment provides us with a hierarchy to be used in resolving administrative conflicts and problems. As we explained in *Rutledge [v. Workman]*, this Court's "exclusive authority over the administration, and primary responsibility for establishing rules of practice and procedure, secures businesslike management for the courts and promotes simplified and more economical judicial procedures." 175 W.Va. [375,] at 379, 332 S.E.2d [831,] at 834 [(1985)]. Under the Amendment, the Judiciary, not the executive branch, is vested with the authority to resolve any substantial, genuine, and irreconcilable administrative conflicts regarding court personnel. The judicial system was revised, among other things, to simplify the administrative process and to complement prior nonconflicting statutory and case law. Clearly, the administrative structure requires that if there is a conflict,

> we must not only consider the concerns of the parties, but also look ****278** ***132** at the hierarchy of the court system. The administration of the court is very important to the unobstructed flow of court proceedings and business. Court actions are complicated enough without adding to their complexity a struggle over every administrative decision to be made. The purpose of judicial administrative authority is to enhance and simplify our court system and not to burden it.

State ex rel. Frazier v. Meadows, 193 W. Va. 20, 26-28, 454 S.E.2d 65, 71-73 (1994). Professor Bastress has compared the general authority of the Supreme Court before and after the Reorganization Amendment as follows:

> The third and fourth paragraphs, added by the Judicial Reorganization Amendment of 1974, establish the unitary judicial system in West Virginia. The first of those grants the court the power to promulgate rules of procedure relating to all aspects of judicial proceedings in the state. Although the court had previously asserted that as an inherent power, it also conceded that the legislature retained the ultimate authority. After the 1974 amendment, however, the court has ruled, in justifiable reliance on the language of section 3, that the court's rules supersede any legislation in conflict with a court-promulgated rule.

Bastress, *West Virginia State Constitution*, at 227. See *Foster v. Sakhai*, 210 W. Va. 716, 724 n.3, 559 S.E.2d 53, 61 n.3 (2001) ("the constitutional power and inherent power of the judiciary prevent another branch of government from usurping the Court's authority.").

One of the most important changes that the Reorganization Amendment made was to provide this Court with the exclusive constitutional authority to promulgate administrative rules for the effective management of the judicial system, that "have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl. pt. 1, in part, *Stern Brothers, Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977). This authority is found in Article VIII, § 3 of the Constitution of West Virginia. We will address the relevant text of both provisions separately. [29]

To begin, we will look at the Rule-Making Clause of Section 3. The relevant text of the Rule-Making Clause of Section 3 provides as follows:

> The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law.

Section 3 unquestionably provides this Court with the sole constitutional authority to promulgate rules for the judicial system, and demands that those rules have the force of law. See Syl. pt. 5, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999) ("The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect."); Syl. pt. 10, *Teter v. Old Colony Co.*, 190 W. Va. 711, 714, 441 S.E.2d 728, 731 (1994) "Under Article VIII, ... Section 3 of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."); Syl. pt. 1, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988), superseded by statute as stated in *Miller v. Allman*, 240 W. Va. 438, 813 S.E.2d 91 (2018) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law.").

The responsibility imposed on this Court by Section 3 was articulated in *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 246 S.E.2d 99 (1978):

> ****279 *133** The Judicial Reorganization Amendment, Article VIII, Section 3, of the Constitution, placed heavy responsibilities on this Court for administration of the state's entire court system. The mandate of the people, so expressed, commands the members of the Court to be alert to the needs and requirements of the court system throughout the state.

Bagley, 161 W.Va. at 644–45, 246 S.E.2d at 107. "Not only does our Constitution explicitly vest the judiciary with the control over its own administrative business, but it is a fortiori that the judiciary must have such control in order to maintain its independence." Syl. pt. 2, *State ex rel. Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997).

In carrying out the responsibility imposed by Section 3, this Court has not been hesitant in finding statutes void when they were in conflict with any rule promulgated by this Court. See Syl. pt. 1, *Witten v. Butcher*, 238 W. Va. 323, 794 S.E.2d 587 (2016) ("The provision in W. Va. Code § 3-7-3 (1963) requiring oral argument to be held in an appeal of a contested election, is invalid because it is in conflict with the oral argument criteria of Rule 18 of the West Virginia Rules of Appellate Procedure."); Syl. pt. 6, *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907 (2013) ("Because it addresses evidentiary matters that are reserved to and regulated by this Court pursuant to the Rule–Making Clause, Article VIII, § 3 of the West Virginia Constitution, West Virginia Code § 57–3–1 (1937), commonly referred to as the Dead Man's Statute, is invalid, as it conflicts with the paramount authority of the West Virginia Rules of Evidence."); Syl. pt. 3, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005) ("The provisions contained in W. Va. Code § 55–7B–6d (2001) were enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule–Making Clause, Article VIII, § 3 of the West Virginia Constitution. Consequently, W. Va. Code § 55–7B–6d, in its entirety, is unconstitutional and unenforceable."); *Games-Neely ex rel. W. Virginia State Police v. Real Property*, 211 W. Va. 236, 245, 565 S.E.2d 358, 367 (2002) ("Rule 60(b) has the force and effect of law; applies to forfeiture proceedings under the Forfeiture Act; and supersedes West Virginia Code § 60A–7–705(d) to the extent that Section 705(d) can be read to deprive a circuit court of its grant of discretion to review a default judgment order."); *Oak Cas. Ins. Co. v. Lechliter*, 206 W. Va. 349, 351 n.3, 524 S.E.2d 704, 706 n.3 (1999) ("We note, however, that to any extent that W. Va. Code § 56–10–1 may be in conflict with W. Va. R. Civ. P. Rule 22, it has been superseded."); *W. Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 150, 516 S.E.2d 769, 773 (1999) ("if W.Va. Code § 37–14–1 et seq., unambiguously prohibited anyone but a licensed or certified appraiser from testifying with regard to the value of real estate in a court proceeding, this prohibition would be contrary to the Rules of Evidence promulgated by this Court, pursuant to article eight, section three of our Constitution, and, thus, the prohibition would be void."); *State v. Jenkins*, 195 W. Va. 620, 625 n.5, 466 S.E.2d 471, 476 n.5 (1995) (finding W.Va. R. Evid. Rule 901 superseded W.Va. Code § 57-2-1); Syl. pt. 2, *Williams v. Cummings*, 191 W. Va. 370, 445 S.E.2d 757 (1994) ("West Virginia Code § 56-1-1(a)(7) provides that venue may be obtained in an adjoining county '[i]f a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his court....' This statute refers to a situation under which a judge might be disqualified, and therefore it is in conflict with and superseded by Trial Court Rule XVII, which addresses the disqualification and temporary assignment of judges."); *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (finding W.Va. Code, 55-7B-7, which outlined the qualifications of an expert in a medical malpractice case, was superseded by W.Va. R. Evid. 702); *Teter v. Old Colony Co.*, 190 W. Va. 711, 726, 441 S.E.2d 728, 743 (1994) ("a legislative enactment which is substantially contrary to provisions in our Rules of Evidence would be invalid."); Syl. pt. 2, *State ex rel. Gains v. Bradley*, 199 W. Va. 412, 484 S.E.2d 921 (1997) ("Rule 1B of the Administrative Rules for Magistrate Courts supersedes W.Va. Code § 50-4-7 (1992), and prospectively ****280 *134** provides there is no automatic mandatory right of a party to have a magistrate disqualified."); *Gilman v. Choi*, 185 W. Va. 177, 178, 406 S.E.2d 200, 201 (1990), overruled on other grounds by *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) ("W.Va. Code, 55–7B–7 [1986], being

concerned primarily with the competency of expert testimony in a medical malpractice action, is valid under Rule 601 of the West Virginia Rules of Evidence."); Syl. pt. 2, *State v. Davis*, 178 W. Va. 87, 88, 357 S.E.2d 769, 770 (1987), overruled on other grounds *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994) ("Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure supersedes the provisions of W.Va. Code, 62-9-1, to the extent that the indorsement of the grand jury foreman and attestation of the prosecutor are no longer required to be placed on the reverse side of the indictment. Such indorsement and attestation are sufficient if they appear on the face of the indictment."); *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985) (invalidating a statute in part that was in conflict with W. Va. R.App. P., Rule 23); *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 425, 306 S.E.2d 233, 236 (1983) ("W.Va. Code, 30-2-1, as amended, is an unconstitutional usurpation of this Court's exclusive authority to regulate admission to the practice of law in this State."); Syl. pt. 2, in part, *Carey v. Dostert*, 170 W. Va. 334, 294 S.E.2d 137 (1982) "(West Virginia Code, 30-2-7 and a circuit court's common-law power to disbar are obsolete and have been superseded by ... the Judicial Reorganization Amendment of our Constitution, Article VIII."); *State ex rel. Askin v. Dostert*, 170 W. Va. 562, 567, 295 S.E.2d 271, 276 (1982) (holding that to the extent W.Va. Code § 30-2-1 required security from attorneys to insure their good behavior, it "conflicts with the rules promulgated by this Court [and] must fall.").

Before we address the issue of overpayment of senior-status judges, we must examine the text of the Senior-Status Clause found in Article VIII, § 8 of the Constitution of West Virginia provides as follows:

> A retired justice or judge may, with his permission and with the approval of the supreme court of appeals, be recalled by the chief justice of the supreme court of appeals for temporary assignment as a justice of the supreme court of appeals, or judge of an intermediate appellate court, a circuit court or a magistrate court.

The issue of the authority of the Chief Justice to appoint judges for temporary service has been addressed in two cases by this Court. First, in *State ex rel. Crabtree v. Hash*, 180 W. Va. 425, 376 S.E.2d 631 (1988) the judge for the Fifth Judicial Circuit (consisting of Calhoun, Jackson and Roane counties) retired from office. A special judge was elected and appointed to fill the vacancy by several members of the Jackson County Bar Association, pursuant to W.Va. Code § 51-2-10. [30] The Administrative Director of this Court filed a writ of prohibition to prevent the newly appointed judge from holding office. The opinion succinctly held that the statute was void as follows:

> W.Va. Const. art. VIII, §§ 3 and 8, and all administrative rules made pursuant to the powers derived from article VIII, supersede W.Va. Code, 51-2-10 [1931] and vest the Chief Justice of the Supreme Court of Appeals with the sole power to appoint a judge for temporary service in any situation which requires such an appointment.
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> * * *
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> Any election conducted pursuant to W.Va. Code, 51-2-10 [1931] is void as the constitutional power to assign judges for temporary service rests with the Chief Justice of the West Virginia Supreme Court of Appeals.

Crabtree, 180 W. Va. at 428, 376 S.E.2d at 634. In a footnote in *Crabtree* this Court made further observations relevant to this proceeding:

> W.Va. Const. art. VIII, governing the judiciary, has only been amended twice in the State's history, in 1880 and 1974. Prior to 1974, the Supreme Court of Appeals had no constitutionally derived administrative authority over the lower tribunals of the State. Instead, the legislature had substantial ****281** ***135** authority, including the power to create laws concerning special judges. W.Va. Const. art. VIII, § 15 (repealed) stated: "The legislature shall provide by law for holding regular and special terms of the circuit courts, where from any cause the judge shall fail to attend, or, if in attendance, cannot properly preside."
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> The upshot of this authority was W.Va. Code, 51-2-10 [1931]. By virtue of former art. VIII, § 15, this Court had no constitutional authority to act in such matters.
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> However, as a result of the Judicial Reorganization Amendment of 1974, the legislature was divested of all administrative powers over state court judges. No provision

> similar to former art. VIII, § 15 exists. Instead, this Court was given "general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts," and the Chief Justice, as "administrative head of all the courts," was specifically given the power of temporary assignment of circuit judges.

Crabtree, 180 W. Va. at 427 n.3, 376 S.E.2d at 633 n.3 (internal citations omitted).

The decision in *Stern Bros. v. McClure*, 160 W. Va. 567, 236 S.E.2d 222 (1977) addressed the issue of statutes that attempted to control assignments of judges, but were in conflict with an administrative rule of this Court. In *Stern* the defendants filed a writ of prohibition with this Court to have a substitute trial judge removed from their case. The trial judge was appointed by the Chief Justice of this Court because the original judge was disqualified. The defendants argued that the manner in which the substitute judge was appointed was inconsistent with the statutory scheme for appointing a substitute judge when the original judge is disqualified. This Court found that the administrative rule adopted by this Court for the appointment of a substitute judge invalidated the statutes. The opinion reasoned as follows:

> Procedures for appointment of a substitute judge were promulgated by this Court on May 29, 1975, in an administrative rule dealing with the temporary assignment of circuit court judges where a particular judge is disqualified from handling a case....
>
> The power to promulgate administrative rules is expressly conferred upon this Court under the Judicial Reorganization Amendment, and under Section 8 explicit recognition is made of the inherent rulemaking power of the Court, which prior to the Judicial Reorganization Amendment had been utilized by this Court to adopt judicial rules.
>
> Such rules have the force and effect of statutory law by virtue of Article VIII, Section 8 of the Judicial Reorganization Amendment.... Prior to the adoption of the Judicial Reorganization Amendment, there may have been some question as to this Court's supervisory powers over lower courts. It is now quite clear under the Judicial Reorganization Amendment that considerable supervisory powers have been conferred upon this Court. There was also some confusion prior to the Judicial Reorganization Amendment as to what further action a disqualified judge could take in the case. This arose partly out of the fact that there was no clear authority in the Supreme Court to temporarily assign judges in such situations.
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> Consequently, the disqualified judge had either to initiate the election of a special judge pursuant to W.Va. Code, 51-2-10, or to attempt to transfer the case to another circuit court in accordance with W.Va. Code, 56-9-2.
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> The statute relating to disqualification of judges contained a proviso permitting the judge "... to enter a formal order designed merely to advance the cause towards a final hearing and not requiring judicial action involving the merits of the case." W.Va. Code, 51-2-8....
>
> Undoubtedly, one of the reasons behind the Judicial Reorganization Amendment was to provide a more simplified system of handling the problem of securing a replacement judge where the original judge is disqualified. The former procedures were cumbersome at best. Special judge elections were constantly attacked and in many instances overturned because of some technical failure to follow W.Va. Code, 51-2-10.
>
> ****282** ***136** The administrative rule promulgated by this Court now controls the procedure for selection of a temporary judge where a disqualification exists as to a circuit court judge. Under Article VIII, Section 8 of the West Virginia Constitution, it operates to supersede the existing statutory provisions found in W.Va. Code, 51-2-9 and -10, and W.Va. Code, 56-9-2, insofar as they relate to the selection of special judges or the assignment of the case to another circuit judge when a circuit judge is disqualified.

Stern, 160 W. Va. at 572-575, 236 S.E.2d at 225-227. [31]

In the final analysis, the foregoing discussion instructs this Court that statutory laws that are repugnant to the constitutionally promulgated rules of this Court are void. With these legal principles in full view, we turn to the merits of the issue presented.

Two of the Articles of Impeachment brought against the Petitioner, Article IV and Article VI, charge her with overpaying senior-status judges in violation of the maximum payment allowed under W.Va. Code § 51-9-10. The Articles of Impeachment also state that the overpayments

violated W.Va. Code § 51-2-13, W.Va. Const. Art. VIII, § 7, an administrative order of the Supreme Court and Canon I and II of the West Virginia Code of Judicial Conduct. The Articles also allege that the overpayments "potentially" violate two criminal statutes: W.Va. Code § 61-3-22 (falsification of accounts) and W.Va. Code § 61-3-24 (obtaining money by false pretenses).[32] The viability of all of the alleged violations in the two Articles hinge upon whether the Petitioner overpaid senior-status judges. The determination of overpayment is controlled by W.Va. Code § 51-9-10, which limits the payment to senior-status judges. The full text of W.Va. Code § 51-9-10 provides as follows:

> The West Virginia supreme court of appeals is authorized and empowered to create a panel of senior judges to utilize the talent and experience of former circuit court judges and supreme court justices of this state. The supreme court of appeals shall promulgate rules providing for said judges and justices to be assigned duties as needed and as feasible toward the objective of reducing caseloads and providing speedier trials to litigants throughout the state: Provided, That reasonable payment shall be made to said judges and justices on a per diem basis: Provided, however, That *the per diem and retirement compensation of a senior judge shall not exceed the salary of a sitting judge*, and allowances shall also be made for necessary expenses as provided for special judges under articles two and nine of this chapter.[33] (Emphasis added.)

The Petitioner does not dispute that she authorized the payment of senior-status judges, when necessary, in excess of the limitation imposed by the statute. Although the Petitioner has advanced several arguments as to why her conduct was valid, we need only address one of her arguments. That argument centers on an administrative order promulgated by the Chief Justice on May 17, 2017.[34] The order expressly authorized the payment of senior-status judges in excess of the limitation imposed by W.Va. Code § 51-9-10. The order stated that it was being promulgated under the authority of Article III, §§ 3, 8, and 17. The order also stated the reason for the decision to authorize payment in excess of the statutory limitation:

> In the vast majority of instances, the statutory proviso [W.Va. Code § 51-9-10] does not interfere with providing essential services. However, in certain exigent circumstances involving protracted illness, lengthy suspensions due to ethical violations, ****283** ***137** or other extraordinary circumstances, it is impossible to assure statewide continuity of judicial services without exceeding the payment limitation imposed by the statutory proviso.

The Petitioner provided an illustration of a situation where it was necessary to pay a senior-status judge in excess of the statutory limitation:

> For example, in 2017, the Supreme Court of Appeals suspended a newly elected circuit court judge of Nicholas County for two years because of violations of the code of judicial ethics in certain campaign advertisements. *In re Callaghan*, 238 W.Va. 495, 503, 796 S.E.2d 604, 612, cert. denied sub. nom., *Callaghan v. W. Virginia Judicial Investigation Comm'n*, —— U.S. ——, 138 S.Ct. 211, 199 L.Ed.2d 118 (2017). Because the newly elected Judge was suspended for two years, and because Nicholas County is a single judge judicial circuit, an extraordinary need for temporary judicial services arose in order to provide the people of Nicholas

> County with court services and to avoid the unconstitutional denial of access to the speedy administration of justice. The Chief Justice appointed senior status Judge James J. Rowe to serve as the temporary circuit judge of Nicholas County. Judge Rowe travels from his home in Lewisburg each day to perform this service. Judge Rowe serves the people of Nicholas County effectively, attending to the cases on the circuit court's docket. Using one senior status judge, rather than parading multiple judges through the courthouse, allows for the efficient and consistent adjudication of the matters pending in Nicholas County.

Prior to the Reorganization Amendment, "the Supreme Court of Appeals had no constitutionally derived administrative authority over the lower tribunals of the State. Instead, the Legislature had substantial authority, including the power to create laws concerning special judges." *State ex rel. Crabtree v. Hash*, 180 W. Va. 425, 427, 376 S.E.2d 631, 633 (1988). This authority is evident in W.Va. Code § 51-9-10 which, as noted, was enacted in 1949. We have observed as a general matter that "[t]he 1974 Judicial Reorganization Amendment to our State Constitution also recognized that previously enacted laws repugnant to it were voided." *Carey v. Dostert*, 170 W. Va. 334, 336, 294 S.E.2d 137, 139 (1982). See W.Va. Const. Art. VIII, § 13 ("Except as otherwise provided in this article, such parts of the common law, and of the laws of this state as are in force on the effective date of this article *and are not repugnant thereto*, shall be and continue the law of this state until altered or repealed by the Legislature.") (emphasis added). West Virginia Code § 51-9-10, in its entirety, is repugnant to Article VIII, § 3 and § 8. The statute seeks to control a function of the judicial system, appointing senior-status judges for temporary service, when Article VIII, § 8 has expressly given that function exclusively to the Supreme Court. Moreover, the statute's limitation on payment to senior-status judges is void and unenforceable, because of the administrative order promulgated on May 17, 2017. [35] See Syl. pt. 4, *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421 (1973) ("The judiciary department has the inherent power to determine what funds are necessary for its efficient and effective operation."). Finally, as we have long held, "[l]egislative enactments which are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers." *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 424, 306 S.E.2d 233, 235 (1983). To be clear, and we so hold, West Virginia Code § 51-9-10 (1991) violates the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and ****284** § 8 of the West Virginia Constitution. ***138** Consequently, W.Va. Code § 51-9-10, in its entirety, is unconstitutional and unenforceable. [36]

In light of our holding, the Petitioner did not overpay any senior-status judge as alleged in Article IV and Article VI of the Articles of Impeachment, therefore the Respondents are prohibited from further prosecution of the Petitioner under those Articles.

C.

The Supreme Court has Exclusive Jurisdiction to Determine whether a Judicial Officer's Conduct Violates a Canon of the Code of Judicial Conduct

The Petitioner next contends that Article XIV of the Impeachment Articles is invalid because it is based upon alleged violations of the West Virginia Code of Judicial Conduct, which, she contends, is constitutionally regulated by the Supreme Court. [37] To be ****285** ***139** blunt, Article XIV is an unwieldy compilation of allegations that culminate with the accusation that the Petitioner's conduct, with respect to the allegations, violated Canon I [38] and Canon II [39] of the Code of Judicial Conduct. [40] We agree with the Petitioner that this Court has exclusive constitutional jurisdiction over conduct alleged to be in violation of the Code of Judicial Conduct.

The controlling constitutional authority is set out under Article VIII, § 8 of the Constitution of West Virginia. We have held that "[p]ursuant to article VIII, section 8 of the West Virginia Constitution, this Court has the inherent and express authority to 'prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of

regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof [.]' " Syl. pt. 5, *Committee on Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994). The relevant text of Section 8 provides as follows:

> Under its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the state, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substituted retirement system for justices, judges and magistrates of this state) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the supreme court of appeals, continue to serve as a justice, judge or magistrate.
>
> * * *
>
> When rules herein authorized are prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict.

This Court's express constitutional authority to adopt rules of judicial conduct and discipline is obvious from the language of Section 8. Pursuant to this express authority, we have adopted the Code of Judicial Conduct and the Rules of Judicial Disciplinary Procedure. Under Rule 4.10 and Rule 4.11 of the Rules of Judicial Disciplinary Procedure, this Court has the exclusive authority to determine whether a justice, judge, or magistrate violated the Code of Judicial Conduct. The record does not disclose that this Court has found that the Petitioner violated Canon I or Canon II, based upon the allegations alleged in Article XIV of the Articles of Impeachment. Moreover, even if the record had disclosed that the Petitioner was previously found to have violated the Canons in question, those violations could not have formed the basis of an impeachment charge. This is because of the ****286 *140** limitations imposed upon the scope of a Canon violation that is found by this Court. The following is provided in Item 7 of the Scope of the Code of Judicial Conduct:

> The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

It is quite clear that Item 7 prohibits a Canon violation from being used as the "basis" of a civil or criminal charge and, thus, could not be used as a basis for impeaching the Petitioner.[41] This Court observed in *In re Watkins*, 233 W. Va. 170, 757 S.E.2d 594 (2013):

> Just as the legislative branch has the power to examine the qualifications of its own members and to discipline them, this Court has the implicit power to discipline members of the judicial branch. The Court has this power because it is solely responsible for the protection of the judicial branch, and because the power has not been constitutionally granted to either of the other two branches.

Watkins, 233 W. Va. at 177, 757 S.E.2d at 601.

It is quite evident to this Court that the impeachment proceedings under Article XIV of the Articles of Impeachment requires the Court of Impeachment to make a determination that the Petitioner violated Canon I and Canon II. Such a determination in that forum violates the separation of powers doctrine, because pursuant to Article VIII, § 8 of the Constitution of West Virginia, this Court has the exclusive authority to determine whether the Petitioner violated either of those Canons. In other words, and we so hold, this Court has exclusive authority and jurisdiction under Article VIII, § 8 of the West Virginia Constitution and the rules promulgated thereunder, to sanction a judicial officer for a violation of a Canon of the West Virginia Code of Judicial Conduct.

Therefore, the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution prohibits the Court of Impeachment from prosecuting a judicial officer for an alleged violation of the Code of Judicial Conduct.

The Respondents have argued that "to hold that the Legislature cannot consider the Code of Judicial Conduct in its deliberation of impeachment proceedings against a judicial officer would have the absurd result of prohibiting removal from office for any violations of the Code of Judicial Conduct." This argument misses the point. Unquestionably, the Legislature can consider in its deliberations whether there was evidence showing that this Court found a judicial officer violated a Canon. However, the Canon violation itself cannot be the basis of the impeachment charge—at most it could only act as further evidence for removal based upon other valid charges of wrongful conduct.

In light of our holding, the Court of Impeachment does not have jurisdiction over the alleged violations set out in Article XIV of the Articles of Impeachment, therefore the Respondents are prohibited from further prosecution of the Petitioner under that Article as written. [42]

**287 *141 D.

The Articles of Impeachment were Filed in Violation of Provisions of House Resolution 201

Although we have determined that the Petitioner is entitled to relief based upon the foregoing, we believe that the remaining issues involving the failure to comply with two provisions of House Resolution 201 are not moot. This Court set forth a three-prong test to determine whether we should rule on the merits of technically moot issues in syllabus point 1 of *Israel by Israel v. West Virginia Secondary Schools Activities Commission*, 182 W.Va. 454, 388 S.E.2d 480 (1989):

> Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

We believe that there may be collateral consequences in failing to address the issues, the issues are of great public importance, and the issues may present themselves again. *State ex rel. McKenzie v. Smith*, 212 W. Va. 288, 297, 569 S.E.2d 809, 818 (2002) ("Because of the possibility that the Division's continued utilization of this system may escape review at the appellate level, we address the merits of this case under the ... exception to the mootness doctrine.").

The Petitioner has argued that House Resolution 201 required the House Committee on the Judiciary to set out findings of fact in the Articles of Impeachment and required the House of Delegates adopt a resolution of impeachment. The Petitioner contends that neither of these required tasks were performed and that her right to due process was violated as a consequence. We agree.

We begin by noting that "[t]he threshold question in any inquiry into a claim that an individual has been denied procedural due process is whether the interest asserted by the individual rises to the level of a 'property' or 'liberty' interest protected by Article III, Section 10 of our constitution." *Clarke v. West Virginia Board of Regents*, 166 W.Va. 702, 709, 279 S.E.2d 169, 175 (1981). [43] See Syl. Pt. 1, *Waite v. Civ. Serv. Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against state action which affects a liberty or property interest."). We have held as a general matter that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." *State ex rel. Wilson v. Truby*, 167 W. Va. 179, 188, 281 S.E.2d 231, 236 (1981). The Petitioner has both a liberty [44] and property [45] interest in

having the impeachment rules followed. ****288 *142** The Petitioner has a liberty interest in not having her reputation destroyed in the legal community and public at-large by being impeached and removed from office; and she has a property interest in obtaining her pension when she chooses to retire.

We begin by noting the record supports the Petitioner's contention that House Resolution 201 required the Judiciary Committee to set out findings of fact, and that this was not done. Rule 3 and 4 of Resolution 201 required the Judiciary Committee to do the following:

> 3. To make findings of fact based upon such investigation and hearing(s);
>
> 4. To report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact which the Committee may deem proper.

The record demonstrates that the Judiciary Committee was aware that it failed to carry out the above duties, but refused to correct the error. The following exchange occurred during the proceedings in the House regarding the failure to follow Rules 3 and 4:

> MINORITY VICE CHAIR FLUHARTY: Thank you, Mr. Chairman. Counsel, I was going through these Articles. Where are the findings of fact?
>
> MR. CASTO: Well, there—there are no findings of fact there. The Committee—
>
> MINORITY VICE CHAIR FLUHARTY: Where?
>
> MR. CASTO: I said, sir, there are no findings of fact.
>
> MINORITY VICE CHAIR FLUHARTY: There are no findings of fact? All right. Have you read House Resolution 201?
>
> MR. CASTO: I have sir, but I have not read it today.
>
> MINORITY VICE CHAIR FLUHARTY: Well, do you know that we're required to have findings of fact?
>
> MR. CASTO: I think, sir, that my understanding is—based upon the Manchin Articles—that the term "findings of fact" which was used at the same time, that the profferment of these Articles is indeed equivalent to a findings of fact. The—but that, again, is your interpretation, sir.
>
> MINORITY VICE CHAIR FLUHARTY: So based upon the clear wording of House Resolution 201, it says we're "To make findings of fact based upon such investigation and hearings;" and "To report to the Legislature its findings of facts and any recommendations consistent with those findings of facts which the Committee may deem proper." I mean, you're—you're aware how this works in the legal system. You draft separate findings of fact. I'm just wondering why we haven't done that.
>
> MR. CASTO: Because, sir, that is not the manner in which impeachment is done.
>
> MINORITY VICE CHAIR FLUHARTY: Well, findings of fact in House Resolution 201 are referenced separate from proposed Articles of Impeachment. Am I wrong in that observation?
>
> MR. CASTO. I don't believe that you're wrong in that.

The record also discloses that the Judiciary Committee was warned by one of its members of the consequences of its failure to follow its own rules:

> MINORITY CHAIR FLEISCHAUER: Thank you, Mr.—thank you, Mr. Chairman. I think the gentleman has raised a valid point. If we look at the Resolution that empowers this Committee to act, it—it says that we are to make findings of fact based upon such investigation and hearing and to report to the House of Delegates its findings of fact and any recommendations consistent with those findings, of which the Committee may deem proper.
>
> * * *
>
> And I'm just a little concerned that if we don't have findings of fact that there could be some flaw that could mean that the final Resolution by the House would be deemed to be not valid.
>
> * * *
>
> So I think we—if there—there would be some wisdom in trying to track the language of the Resolution, and it would be consistent with any other proceeding that we have in West Virginia that when there are requirements of findings of fact and—in this case, it's not conclusions of law, but it's recommendations—that we should follow that.

****289 *143** As previously stated, the Petitioner has also asserted that the House of Delegates failed to adopt a resolution of impeachment. Rule 2 of the last Further Resolved section of Resolution 201 provides as follows:

> Further resolved ... that the House of Delegates adopt a resolution of impeachment and formal articles of impeachment as prepared by the Committee; and that the House of Delegates deliver the same to the Senate in accordance with the procedures of the House of Delegates, for consideration by the Senate according to law.

A review of the Articles of Impeachment that were submitted to the Senate unquestionably shows that the House of Delegates failed to include language indicating that the Articles were adopted by the House.

We are gravely concerned with the procedural flaws that occurred in the House of Delegates. Basic due process principles demand that governmental bodies follow the rules they enact for the purpose of imposing sanctions against public officials. This right to due process is heightened when the Legislature attempts to impeach a public official. Therefore we hold, in the strongest of terms, that the Due Process Clause of Article III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedures that it creates to impeach a public officer. Failure to follow such rules will invalidate all Articles of Impeachment that it returns against a public officer.

We must also point out that the Petitioner was denied due process because none of the Articles of Impeachment returned against her contained a statement that her alleged wrongful conduct amounted to maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor, as required by Article IV, § 9 of the Constitution of West Virginia. This is the equivalent of an indictment failing to allege the essential elements of wrongful conduct. See Syl. pt. 1, *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d 115 (1966) ("In order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment.").

V.

CONCLUSION

We have determined that prosecution of Petitioner for the allegations set out in Article IV, Article VI and Article XIV of the Articles of Impeachment violates the separation of powers doctrine. The Respondents do not have jurisdiction over the alleged violations in Article IV and Article VI. The Respondents also do not have jurisdiction over the alleged violation in Article XIV as drafted. In addition, we have determined that the failure to set out findings of fact, and to pass a resolution adopting the Articles of Impeachment violated due process principles. Consequently, the Respondents are prohibited from proceeding against the Petitioner for the conduct alleged in Article IV and Article VI, and in Article XIV as drafted. The Writ of Prohibition is granted. The Clerk is hereby directed to issue the mandate contemporaneously forthwith.

Writ granted.

ACTING JUSTICE LOUIS H. BLOOM concurs in part and dissents in part and reserves the right to file a separate opinion.

ACTING JUSTICE JACOB E. REGER concurs in part and dissents in part and reserves the right to file a separate opinion.

CHIEF JUSTICE WORKMAN is disqualified.

JUSTICE ALLEN H. LOUGHRY II suspended, therefore not participating

JUSTICE ELIZABETH WALKER is disqualified.

JUSTICE PAUL T. FARRELL sitting by temporary assignment is disqualified.

JUSTICE TIM ARMSTEAD did not participate.

JUSTICE EVAN JENKINS did not participate.

ACTING JUSTICE RUDOLPH J. MURENSKY, II, and ACTING JUSTICE RONALD E. WILSON sitting by temporary assignment.

Bloom, J. and Reger, J., concurring in part and dissenting in part:

**290 *144 In this proceeding the Court was called upon to decide whether three Articles of Impeachment against the Petitioner, Article IV, Article VI, and Article XIV, were constitutionally valid. The majority opinion concluded that all three Articles of Impeachment were constitutionally invalid and therefore prohibited the Respondents from prosecuting the Petitioner on those charges. We concur in the resolution of those three Articles of Impeachment. Even though the dispositive issues in this case were resolved when it was determined that all three Articles of Impeachment were invalid, the majority opinion chose to address another issue that was not necessary for the resolution of the case. For the reasons set out below, we dissent from the majority decision to address that issue. [1]

Prefatory Remarks

Before we address the substantive issues of our concurring opinion, we feel that it is imperative that we make clear that it is our belief that the Legislature has absolute authority to impeach a judicial officer or any State public officer for wrongful conduct. Through the State Constitution the people of West Virginia provided that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others...." W.Va. Const. Art. 5, § 1. It has been observed that "[t]he doctrine of separation of powers 'is at the heart of our Constitution.' " *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 471 (D.C. Cir. 1982). The objective of that doctrine has been eloquently and concisely stated as follows:

> The doctrine of the separation of powers was adopted ... not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21, 84, 71 L.Ed. 160 (1926) (Brandeis, J., dissenting).

The State Constitution, Article IV, § 9, invests absolute authority in the Legislature to bring impeachment charges against a public officer and to prosecute those charges. Pursuant to Article IV, § 9 "[t]he House of Delegates has the sole power of impeachment, and the Senate the sole power to try impeachments." *Slack v. Jacob*, 1875 W.L. 3439, 8 W. Va. 612, 664 (1875). Courts around the country have long recognized that the Legislature has "exclusive jurisdiction in impeachment matters or matters pertaining to impeachment of impeachable officers[.]" *State v. Chambers*, 220 P. 890, 892 (Okla. 1923). Of course "that authority is not unbounded and legislative encroachment upon other constitutional principles may, in an appropriate case, be subject to judicial review." *Office of Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 574, 858 A.2d 709, 730 (2004). Even so, judicial intervention in an impeachment proceeding should be extremely rare, and only in the limited situation where an impeachment charge is prohibited by the Constitution.

Courts have observed that the "political question doctrine" is part of the separation of powers doctrine. "[T]he political question doctrine is essentially a function of the separation of powers, ... existing to restrain courts from inappropriate interference in the business of the other branches of Government, ... and deriving in large part from prudential concerns about the respect we owe the political departments." *Nixon v. United States*, 506 U.S. 224, 252-253, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (Souter, J., concurring) (internal quotation marks and citations omitted). The United States Supreme Court has summarized the political question doctrine as follows:

> **291 *145 Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of

> a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L.Ed. 2d 663 (1962). In the final analysis, "if the text of the constitution has demonstrably committed the disposition of a particular matter to a coordinate branch of government, a court should decline to adjudicate the issue to avoid encroaching upon the powers and functions of that branch." *Horton v. McLaughlin*, 149 N.H. 141, 143, 821 A.2d 947, 949 (2003). See *Smith v. Reagan*, 637 F. Supp. 964, 968 (E.D.N.C. 1986), rev'd on other grounds, 844 F.2d 195 (4th Cir. 1988) ("The courts have often recognized that this doctrine calls for the exercise of judicial restraint when the issues involve the resolution of questions committed by the text of the Constitution to a coordinate branch of government.").

As we demonstrate below, the political question doctrine precluded the majority from addressing two procedural flaws in the impeachment proceeding.

1.

Resolution of the Procedural Flaws in the Impeachment Proceeding Should have been Resolved by the Court of Impeachment

The majority opinion correctly determined that the judiciary has a limited role in impeachment proceedings, that extend to protecting the constitutional rights of an impeached official. However, the majority opinion went beyond that limited role. Specifically, the majority opinion determined that it had authority to decide that two alleged procedural errors invalidated the entire impeachment proceedings. Those alleged errors involved the House of Delegates failure to include findings of fact in the Articles of Impeachment, and in failing to pass a resolution adopting the Articles of Impeachment.

The United States Supreme Court has observed, and we agree, that there should not be "judicial review to the procedures used by the [Legislature] in trying impeachments[.]" *Nixon v. United States*, 506 U.S. 224, 236, 113 S. Ct. 732, 739, 122 L.Ed. 2d 1 (1993). It is the exclusive province of the Legislature to determine what, if any, consequences should follow from its failure to adhere to an impeachment procedure. In this case, as we mentioned, the House of Delegates are alleged to have failed to make findings of facts and to adopt a resolution of impeachment. The impact of both of those alleged errors on the impeachment proceedings was a matter for the House of Delegates to resolve and, in the absence of the matter being resolved by the House, it should have been presented to the Court of Impeachment for the Senate to resolve. See *Hastings v. United States*, 837 F. Supp. 3, 5 (D.D.C. 1993) ("Thus, the Senate's procedures for trying an impeached individual cannot be subject to review by the judiciary."); *Alabama House of Representatives Judiciary Comm. v. Office of the Governor of Alabama*, 213 So. 3d 579 (Ala. 2017) ("[T]he method of impeachment of the governor rests in the legislature, courts are required to refrain from exercising judicial power over this matter. The exercise of such power would infringe upon the exercise of clearly defined legislative power."); *Mecham v. Gordon*, 156 Ariz. 297, 303, 751 P.2d 957, 963 (1988) ("[T]he Constitution gives the Senate, rather than this Court, the power to determine what rules and procedures should be followed in the impeachment trial."). Ultimately, the House or the Senate could have determined that the alleged errors were harmless and did not affect the substantial rights of the Petitioner. See *State v. Swims*, 212 W.Va. 263, 270, 569 S.E.2d 784, 791 (2002) ("Error is harmless when it is trivial, ****292** ***146** formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the outcome of the trial."); Syl. pt. 14, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998) ("Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.").

Even if we agreed that the procedural issues were properly before this Court, the longstanding practice of this Court is not to address an issue that is not necessary in order to grant the litigant the relief he or she seeks. See *State ex rel. Am. Elec. Power Co. v. Swope*, 239 W. Va. 470, 476 n.9, 801 S.E.2d

485, 491 n.9 (2017) ("Because this case can be resolved on the first issue presented, the applicability of the public policy exception, we need not address the remaining issues presented by Petitioners."); *Littell v. Mullins*, No. 15-0364, 2016 WL 1735234, at *5 n.6 (W. Va. 2016) ("Because our resolution of the first issue raised by Mr. Littell is dispositive of the case sub judice, we need not address his remaining assignments of error[.]"); *State v. Stewart*, 228 W. Va. 406, 419 n.13, 719 S.E.2d 876, 889 n.13 (2011) ("Because we have found the issues discussed dispositive, we need not address the defendant's remaining assignments of error."); *Gibson v. McBride*, 222 W. Va. 194, 199 n.17, 663 S.E.2d 648, 653 n.17 (2008) ("Because we affirm the granting of the writ on the issue of prison garb and shackles, we need not address the remaining issues[.]"); State ex rel. Pritt v. Vickers, 214 W. Va. 221, 227 n.21, 588 S.E.2d 210, 216 n.21 (2003) ("Because of our resolution of the scheduling order motion, we need not address the remaining issues presented by Ms. Pritt."); *Am. Tower Corp. v. Common Council of City of Beckley*, 210 W. Va. 345, 350 n.14, 557 S.E.2d 752, 757 n.14 (2001) ("As a result of our resolution of this issue, we need not address further the Council's remaining assignments of error."). It is clear that when the majority opinion resolved the substantive issues in Article IV, Article VI, and Article XIV, the Petitioner had obtained the relief she sought. Thus, there was no need to address the remaining issues raised.

By addressing the non-dispositive procedural issues, the majority decision is rendering an advisory opinion on those issues. It is a fundamental principle that "this Court is not authorized to issue advisory opinions[.]" *State ex rel. City of Charleston v. Coghill*, 156 W.Va. 877, 891, 207 S.E.2d 113, 122 (1973) (Haden, J., dissenting). The Court has observed that "[s]ince President Washington, in 1793, sought and was refused legal advice from the Justices of the United States Supreme Court, courts—state and federal—have continuously maintained that they will not give 'advisory opinions.' " *Harshbarger v. Gainer*, 184 W.Va. 656, 659, 403 S.E.2d 399, 402 (1991). See *Mainella v. Bd. of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185, 27 S.E.2d 486, 487-488 (1943) ("Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes."). Specifically, this Court has expressly held "that the writ of prohibition cannot be invoked[ ] to secure from th[is] Court ... an advisory opinion [.]" *F.S.T., Inc. v. Hancock Cty. Comm'n*, No. 17-0016, 2017 WL 4711427, at *3 (W. Va. 2017) (internal quotation marks and citation omitted). More importantly, the advisory opinion on the two issues has a lethal consequence—it has invalidated the impeachment trials of the two remaining judicial officers.

2.

The Legislature May Seek to Impeach the Petitioner again Based upon Some of the Allegations in Article XIV of the Articles of Impeachment

It is clear that the Legislature cannot seek to impeach the Petitioner once again on the charges set out in Article IV and Article VI. However, we believe the Legislature has the right to seek to institute new impeachment proceedings to craft a constitutionally acceptable impeachment charge based upon the allegations set out in Article XIV.

It has been recognized that "[i]mpeachment is in the nature of an indictment by a grand jury." *State v. Leese*, 55 N.W. 798, 799 (Neb. 1893). See *Brumbaugh v. Rehnquist*, 2001 WL 376477, at *1 (N.D. Tex. Apr. 13, 2001) ("This process produces articles of impeachment ****293** ***147** resembling an indictment which trigger the 'sole Power' of the Senate to 'try all Impeachments.' "); *Ferguson v. Wilcox*, 119 Tex. 280, 297, 28 S.W.2d 526, 534 (Tex. 1930) ("The House of Representatives first acts in the capacity of a grand jury, and it must, in effect, return the indictment, to wit, the articles of impeachment."); *State v. Buckley*, 54 Ala. 599, 618 (1875) (recognizing "articles of impeachment are a kind of bill of indictment."). The law in this State is clear in holding that a defective indictment may be amended by a court in limited circumstances, and may be resubmitted to a grand jury to correct a defect. This principle of law was set out in syllabus point 3 of *State v. Adams*, 193 W.Va. 277, 456 S.E.2d 4 (1995) as follows:

> Any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An "amendment of form" which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is

> not subjected to any added burden of proof, and is not otherwise prejudiced.

Consistent with *Adams*, we believe that the Legislature has absolute discretion in seeking to re-impeach the Petitioner on the allegations contained in Article XIV.

In view of the foregoing, we concur in part and dissent in part.

All Citations

241 W.Va. 105, 819 S.E.2d 251

Footnotes

1 It will be noted that the Petitioner failed to name as a respondent the Acting Chief Justice, the Honorable Justice Paul T. Farrell, that is presiding over the impeachment proceeding that she seeks to halt. Ordinarily the judicial officer presiding over a proceeding that is being challenged is named as a party in a proceeding in this Court. However, the omission of Acting Chief Justice Farrell as a named party in this matter is not fatal to the relief that is being requested. Pursuant to rules adopted by the Senate to govern the impeachment proceedings, the Acting Chief Justice was stripped of his judicial authority over motions, objections and procedural questions. This authority was removed under Rule 23(a) of Senate Resolution 203 as follows:

> All motions, objections, and procedural questions made by the parties shall be addressed to the Presiding Officer [Acting Chief Justice], who shall decide the motion, objection, or procedural question: Provided, That a vote to overturn the Presiding Officer's decision on any motion, objection, or procedural question shall be taken, without debate, on the demand of any Senator sustained by one tenth of the Senators present, and an affirmative vote of a majority of the Senators present and voting shall overturn the Presiding Officer's decision on the motion, objection, or procedural question.

As a result of Rule 23(a) Acting Chief Justice Farrell is not an indispensable party to this proceeding.

2 We are compelled at the outset to note that this Court takes umbrage with the tone of the Respondents brief, insofar as it asserts "that a constitutional crisis over the separation of powers between the Legislature and Judicial Branches" would occur if this Court ruled against them. This Court is the arbiter of the law. Our function is to keep the scales of justice balanced, not tilted in favor of a party out of fear of retribution by that party. We resolve disputes based upon an unbiased application of the law.

3 This Court is aware that transparency is important. However, the Respondents have closed the door on themselves by declining to have oral arguments and taking the untenable position of not responding to the merits of the arguments. This Court would have appreciated well-researched arguments from the Respondents on the merits of the issues.

4 The Auditor's office issued a second report involving the Petitioner, Justice Robin Davis and Justice Elizabeth Walker. That report did not recommend an ethics investigation of those Justices.

5 Additional charges were later brought against Justice Loughry. He was suspended from office.

6 On July 11, 2018 Justice Ketchum resigned/retired effective July 27, 2018. As a result of his decision the Judiciary Committee did not consider impeachment offenses against him.

7 Justice Walker was named in 1 Article; Justice Davis was named in 4 Articles; and Justice Loughry was named in 7 Articles.

8 Justice Davis retired from office on August 13.

9 The text of the Article is set out in the Discussion section of the opinion.

10 The text of the Article is set out in the Discussion section of the opinion.

11 The text of the Article is set out in the Discussion section of the opinion.

12 The Board of Managers are "a group of members of the House of Delegates authorized by that body to serve as prosecutors before the Senate in a trial of impeachment." Rule 1, Senate Resolution 203.

13 One of the arguments made by the Respondents is that this Court should not address the merits of the Petitioner's arguments, because she has raised a similar challenge to the Articles of Impeachment in the proceeding pending before them that has not been ruled upon. Ordinarily this Court would defer to a lower tribunals ruling on a matter before this Court will address it. However, we have carved out a narrow exception to this general rule. In this regard, we have held that "[a] constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case." Syl. pt. 2, *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005). See *Simpson v. W. Virginia Office of Ins. Com'r*, 223 W. Va. 495, 504, 678 S.E.2d 1, 10 (2009) ("Nevertheless, we may consider this constitutional issue for the first time on appeal because it is central to our resolution of this case."); *State v. Allen*, 208 W. Va. 144, 151 n.12, 539 S.E.2d 87, 94 n.12 (1999) ("this Court may, under the appropriate circumstances, consider an issue initially presented for consideration on appeal."). We exercise our discretion to address the merits of the constitutional issues presented in this matter. See also, *State ex rel. Bd. of Educ. of Kanawha Cty. v. Casey*, 176 W. Va. 733, 735, 349 S.E.2d 436, 438 (1986) (recognizing that exhaustion of an alternative remedy is not required "where resort to available procedures would be an exercise in futility.").

14 "Prior to the Judicial Reorganization Amendment [of 1974], the Justices of the Court were referred to as 'Judges' and the Chief Justice was referred to as 'President.' " *State v. McKinley*, 234 W. Va. 143, 150 n.3, 764 S.E.2d 303, 310 n.3 (2014).

15 The Constitution of West Virginia grants authority to the Legislature to provide appellate jurisdiction to this Court for areas of law that are not set out in the constitution. See W.Va. Const. Art. VIII, § 3 ([The Supreme Court] "shall have such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law.").

16 Article VIII, § 3 of the Constitution of West Virginia provides that "[t]he supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari."

17 It must be clearly understood that the Law and Evidence Clause is not superfluous language. Under the 1863 Constitution of West Virginia the impeachment provision was set out in Article III, § 10. The original version of the impeachment provision did not contain a Law and Evidence Clause. The 1863 version of the impeachment provision read as follows:

> Any officer of the State may be impeached for maladministration, corruption, incompetence, neglect of duty, or any high crime or misdemeanor. The house of delegates shall have the sole power of impeachment. The senate shall have the sole power to try impeachments. When sitting for that purpose, the senators shall be on oath or affirmation; and no persons shall be convicted without the concurrence of two-thirds of

> the members present. Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold any office of honor, trust or profit, under the State; but the party convicted shall, nevertheless, be liable and subject to indictment, trial judgment, and punishment according to law. The Senate may sit during the recess of the legislature, for the trial of impeachments.

The Law and Evidence Clause was specifically added to the impeachment provision in the constitution of 1872. The affirmative creation and placement of the Law and Evidence Clause in the new constitution supports the significance this Court has given to that clause. A similar Law and Evidence Clause appears in the impeachment laws of 11 states. See Ariz. Const. Art. VIII, Pt. 2 § 1 (1910); Colo. Const. Art. XIII, § 1 (1876); Kan. Const. Art. II, § 27 (1861); Md. Const. Art. III, § 26 (1867); Miss. Const. Art. 4, § 49 (1890); Nev. Const. Art. VII, § 1 (1864); N.D. Cent. Code Ann. § 44-09-02 (1943); Ohio Const. Art. II, § 23 (1851); Utah Const. Art. VI, § 18 (1953); Wash. Const. Art. V, § 1 (1889); Wyo. Const. Art. III, § 17 (2016). There does not appear to be any judicial decisions from those jurisdictions addressing the application of the Law and Evidence Clause. It is also worth noting that under the 1863 Constitution of West Virginia there was no provision for a presiding judicial officer. The 1872 Constitution of West Virginia added the provision requiring a judicial officer preside over an impeachment proceeding. This requirement is further evidence that an impeachment proceeding was not beyond the jurisdiction of this Court, insofar as it solidified the quasi-judicial nature of the proceeding.

18 The Respondents have argued in a footnote of their brief that "the Impeachment Clause vests absolute discretion in the context of impeachment in the Legislature." The Respondents cite to the decision in *Goff v. Wilson*, 32 W. Va. 393, 9 S.E. 26 (1889) as support for that proposition. *Goff* does not support the proposition and is not remotely relevant to this case. In *Goff* the petitioner wanted this Court to declare that he received the highest number of votes for the office of governor, before the Legislature carried out its duties in certifying the results of the election. We declined to intervene because no authority permitted this Court to intervene. Contrary to the Respondents' assertion, that the Legislature has absolute discretion in impeachment matters, the Law and Evidence Clause of the constitution strips the Legislature of "absolute" discretion in such matters.

19 This is not the first time that we have permitted access to this Court, under our original jurisdiction, when no right of appeal existed from a quasi-judicial proceeding. For example, a litigant in the former Court of Claims had no right to appeal a decision from that tribunal. However, this Court found that constitutional principles permitted access to this Court under our original jurisdiction:

> [T]his Court obviously may review decisions of the court of claims under the original jurisdiction granted by article VIII, section 2 of our Constitution, through proceedings in mandamus, prohibition, or certiorari. Review in this fashion is necessary because the court of claims is not a judicial body, but an entity created by and otherwise accountable only to the Legislature, and judicial recourse must be available to protect basic principles of separation of powers.

G.M. McCrossin, Inc. v. W. Virginia Bd. of Regents, 177 W. Va. 539, 541 n.3, 355 S.E.2d 32, 33 n.3 (1987). See Syl. pt. 3, *City of Morgantown v. Ducker*, 153 W. Va. 121, 121, 168 S.E.2d 298, 299 (1969) ("Mandamus is the proper remedy to require the State Court of Claims to assume jurisdiction of a monetary claim against the Board of Governors of West Virginia University."). The Court of Claims was renamed in 2017 and is now called the "West Virginia Legislative Claims Commission." See W. Va. Code § 14-2-4 (2017).

20 The Respondents cited to this case three times in their brief, but did not provide any discussion of the case.

21 Even the Respondents have conceded in their brief that "West Virginia's Impeachment Clause is significantly broader than its counterpart in the United States Constitution."

22 The Respondents have argued that intervention in the impeachment proceeding violates the Guarantee Clause of the federal constitution. This clause provides as follows: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Conts. Art. IV, § 4. The Respondents contend that the Guarantee Clause requires that a state have "separate and coequal branches" of government. In a convoluted manner the Respondents contend that this Court's intervention in this matter would destroy the "separate and coequal branches" of government. The Respondents have not cited to an opinion by any court in the country that supports the proposition that issuance of a writ against another branch of government violates the Guarantee Clause. See *New York v. United States*, 505 U.S. 144, 184, 112 S.Ct. 2408, 2432, 120 L.Ed.2d 120 (1992) ("In most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine."). We find no merit in the contention. Further, the issue of the separation of powers doctrine is fully addressed in the Discussion section of this opinion.

23 It was previously noted in this opinion that the Respondents chose not to address the merits of the issues presented. Even though the Respondents have not presented any sufficiently briefed legal arguments against the merits of Petitioner's arguments, they have referenced in general as to why certain claims by the Petitioner are not valid.

24 Under the 1863 Constitution of West Virginia the separation of powers doctrine was found in Article I, § 4. The doctrine was worded slightly differently in its original form as follows:

> The legislative, executive and judicial departments of the government shall be separate and distinct. Neither shall exercise the powers properly belonging to either of the others. No person shall be invested with or exercise the powers of more than one of them at the same time.

The 1872 Constitution of West Virginia rewrote the separation of powers doctrine and placed it in its present location.

25 Although federal courts recognize the separation of powers doctrine, "the federal Constitution has no specific provision analogous to [Article V, § I]." Bastress, *West Virginia State Constitution*, at 141.

26 The text of Article IV was set out as follows:

> That the said Chief Justice Margaret Workman, and Justice Robin Davis, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, and at various relevant times individually each Chief Justice of the Supreme Court of Appeals of West Virginia unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, commencing in or about 2012, did knowingly and intentionally act, and each subsequently oversee in their capacity as Chief Justice, and did in that capacity as Chief Justice severally sign and approve the contracts necessary to facilitate, at each such relevant time, to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code § 51-2-13 and W.Va. Code § 51-9-1 0, and, in violation of an Administrative Order of the Supreme Court of Appeals, in potential violation of 15 the provisions of W.Va. Code § 61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code § 61-3-24,

relating to the crime of obtaining money, property and services by false pretenses, and, all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

27 The text of Article VI was set out as follows:

That the said Justice Margaret Workman, being at all times relevant a Justice of the Supreme Court of Appeals of West Virginia, and at certain relevant times individually Chief Justice of the Supreme Court of Appeals of West Virginia, unmindful of the duties of her high offices, and contrary to the oaths taken by her to support the Constitution of the State of West Virginia and faithfully discharge the duties of her office as such Justice, while in the exercise of the functions of the office of Justice, in violation of her oath of office, then and there, with regard to the discharge of the duties of her office, did in the year 2015, did in her capacity as Chief Justice, sign certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges "shall receive the salaries fixed by law" and the provisions of W.Va. Code § 51-2-13 and W.Va. Code § 51-9-10; her authorization of such overpayments was a violation of the clear statutory law of the state of West Virginia, as set forth in those relevant Code sections, and, was an act in potential violation of the provisions set forth in W.Va. Code § 61-3-22, relating to the crime of falsification of accounts with intent to enable or assist any person to obtain money to which he was not entitled, and, in potential violation of the provisions set forth in W.Va. Code § 61-3-24, relating to the crime of obtaining money, property and services by false pretenses, and all of the above are in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

28 "The Judicial Reorganization Amendment was ratified on November 5, 1974." *State ex rel. Dunbar v. Stone*, 159 W. Va. 331, 333, 221 S.E.2d 791, 792 (1976).

29 The authority of the Court to promulgate rules is also contained in Article VIII, § 8. This provision is discussed in the next section of this opinion.

30 This statute was subsequently repealed.

31 It will be noted that the Legislature repealed W.Va. Code §§ 51-2-9 and 10 in 1992. Although W.Va. Code § 56-9-2, which was enacted in 1868 and last amended 1923, was invalidated by *Stern* the Legislature has not repealed it.

32 We must note that "potentially" violating a criminal statute is not wrongful impeachable conduct. Therefore the language in the Articles of Impeachment that state that W.Va. Code § 61-3-22 and W.Va. Code § 61-3-24 were "potentially" violated are meaningless allegations.

33 This statute was originally enacted in 1949 and was amended in 1975 and 1991.

34 The Chief Justice at that time was Justice Loughry.

35 It is not relevant that the administrative order was entered several years after the Petitioner's authorized payments. The statute was void at the time in which the Respondents sought to impeach her.

36 We summarily dispense with the Articles of Impeachment's reference to the Salary Clause of Article VIII, § 7 as a source of legislative authority for regulating payments to senior-status judges. This clause does not provide such authority. The Salary Clause provides as follows:

> Justices, judges and magistrates shall receive the salaries fixed by law, which shall be paid entirely out of the state treasury, and which may be increased but shall not be diminished during their term of office, and they shall receive expenses as provided by law. The salary of a circuit judge shall also not be diminished during his term of office by virtue of the statutory courts of record of limited jurisdiction of his circuit becoming a part of such circuit as provided in section five of this article.

It is clear from the plain text of the Salary Clause that it only applies to salaries of judges "during their term of office." See Syl. pt. 1, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953) ("If a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court must apply and not interpret the provision."). Senior-status judges are retired judges and do not hold an office. Therefore, the Salary Clause does not provide the Legislature with authority to regulate the per diem payment of senior-status judges.

37 The text of Article XIV was set out as follows:

> That the said Chief Justice Margaret Workman, Justice Allen Loughry, Justice Robin Davis, and Justice Elizabeth Walker, being at all times relevant Justices of the Supreme Court of Appeals of West Virginia, unmindful of the duties of their high offices, and contrary to the oaths taken by them to support the Constitution of the State of West Virginia and faithfully discharge the duties of their offices as such Justices, while in the exercise of the functions of the office of Justices, in violation of their oaths of office, then and there, with regard to the discharge of the duties of their offices, did, in the absence of any policy to prevent or control expenditure, waste state funds with little or no concern for the costs to be borne by the tax payers for unnecessary and lavish spending for various purposes including, but without limitation, to certain examples, such as: to remodel state offices, for large increases in travel budgets-including unaccountable personal use of state vehicles, for unneeded computers for home use, for regular lunches from restaurants, and for framing of personal items and other such wasteful expenditure not necessary for the administration of justice and the execution of the duties of the Court; and, did fail to provide or prepare reasonable and proper supervisory oversight of the operations of the Court and the subordinate courts by failing to carry out one or more of the following necessary and proper administrative activities:
>
> A) To prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the Justices from said policies, and subjected subordinates and employees to a greater burden than the Justices;
>
> B) To report taxable fringe benefits, such as car use and regular lunches, on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations, and further subjected subordinates and employees to a greater burden than the Justices, in this regard, and upon notification of such violation, failed to speedily comply with requests to make such reporting consistent with applicable law;
>
> C) To provide proper supervision, control, and auditing of the use of state purchasing cards leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases;
>
> D) To prepare and adopt sufficient and effective home office policies which would govern the Justices' home computer use, and which led to a lack of oversight which encouraged the conversion of property;

E) To provide effective supervision and control over record keeping with respect to the use of state automobiles, which has already resulted in an executed information upon one former Justice and the indictment of another Justice.

F) To provide effective supervision and control over inventories of state property owned by the Court and subordinate courts, which led directly to the undetected absence of valuable state property, including, but not limited to, a state-owned desk and a state owned computer;

G) To provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds.

The failure by the Justices, individually and collectively, to carry out these necessary and proper administrative activities constitute a violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct.

38 Canon I states the following:

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

39 Canon II states the following:

A judge shall perform the duties of judicial office impartially, competently, and diligently.

40 We will note that Article IV and Article VI of the Articles of Impeachment also contained allegations that Canon I and Canon II were violated.

41 It has long been recognized that an impeachment proceeding is civil in nature. See *Skeen v. Craig*, 31 Utah 20, 86 P. 487, 487-488 (1906) ("The question as to whether [impeachment] proceedings of this kind to remove from office a public official are civil or criminal has been before the courts of other states, and, while the decisions are not harmonious, yet the great weight of authority, and as we think the better reasoned cases hold that such actions are civil.").

42 We must also note that even if Article XIV of the Articles of Impeachment had set out a valid basis for impeachment, it would still not pass constitutional muster on due process grounds, because it is vague and ambiguous. See *State v. Bull*, 204 W. Va. 255, 261, 512 S.E.2d 177, 183 (1998) ("Claims of unconstitutional vagueness in [charging instruments] are grounded in the constitutional due process clauses, U.S. Const. amend. XIV, Sec. 1, and W.Va. Const. art. III, Sec. 10."). As drafted, the Article failed to specify which Justice committed any of the myriad of conduct allegations. The Petitioner had a constitutional right to be "adequately informed of the nature of the charge[.]" *State v. Hall*, 172 W. Va. 138, 144, 304 S.E.2d 43, 48 (1983). See Single Syllabus, *Myers v. Nichols*, 98 W. Va. 37, 126 S.E. 351 (1925) ("While charges for the removal of a public officer need not be set out in the strict form of an indictment, they should be sufficiently explicit to give the defendant notice of what he is required to answer.").

43 Article III, § 10 of the Constitution of West Virginia provides as follows:

No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

44 See Syl. pt. 2, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 154, 241 S.E.2d 164, 165 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("The 'liberty interest' includes an individual's right to freely move about, live and work at his chosen vocation, without the burden of an unjustified label of infamy. A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities.").

45 See Syl. pt. 3, *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 154, 241 S.E.2d 164, 165 (1977), overruled on other grounds *West Virginia Dep't of Educ. v. McGraw*, 239 W. Va. 192, 800 S.E.2d 230 (2017) ("A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.").

1 It will also be noted that we believe the Court should have exercised its authority and set the case for oral argument, even though the Respondents waived oral argument. Many of the issues presented are related to transparency. Not having oral argument eliminates the opportunity for a more thoughtful discussion with the parties and perhaps greater illumination of the issues for the Court. Also in a case both constitutionally and politically charged, transparency better serves the parties, the court and the public interest.

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On the Imperative of Civil Discourse: Lessons from Alexander Hamilton and Federalist No. 1

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ON THE IMPERATIVE OF CIVIL DISCOURSE: LESSONS FROM ALEXANDER HAMILTON AND *FEDERALIST NO. 1*

DONALD J. KOCHAN*

INTRODUCTION

There is great fragility in the maintenance of civil discourse. History tells us that it can, and will, fracture, counseling vigilance in its defense. And, that commitment requires revisiting from time to time valuable insights from great minds of the past who have pondered why civil discourse is so vital to productive political debate and healthy social growth. This Essay takes on that charge, exploring one source of such wisdom—the thoughts of Alexander Hamilton in *Federalist No. 1*,[1] published on October 27, 1787, as the first essay in what would become known as *The Federalist Papers*. It is an especially relevant source to revisit when so much of the polarized debate in today's society involves topics discussed in other parts of *The Federalist Papers*, leading to invocation of those very papers in many current debates. The collected essays are getting new readers as politicians and citizens more regularly invoke them as authoritative sources on the meanings of impeachment, high crimes and misdemeanors, emoluments, separation of powers, and other constitutional concepts of resurging importance.

Quite often, political and legal discussions risk falling prey to tribal positioning and highly polarized rhetoric. While these bugs have undoubtedly infected discourse and poisoned civility since the beginning of time, some see them as more intense and rising in recent years. Precisely

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1. THE FEDERALIST NO. 1 (Alexander Hamilton). An electronic version of Federalist No. 1 is available as part of The Avalon Project at Yale Law School at https://avalon.law.yale.edu/18th_century/fed01.asp [https://perma.cc/NK4Z-QHYT].

because the loss of civility and the risk of non-serious discourse are not new threats to reasoned debate and social cohesion, it makes sense to search for wisdom from the past to provide a window to help us weather the winds of the present.

Although less than 1600 words, Hamilton's *Federalist No. 1* packs a powerful anti-polarization punch. In it, Hamilton offers profound lessons on civil discourse as an imperative to serious debate, the importance of respect for the opinions of others, the necessity of adopting a presumption of good faith on the part of others, and generally what I will call an "avoidance of demonization" principle that should guide our characterization of the views of others.

This Essay is not designed to rehash or resolve the questions regarding whether we are polarized or less civil in our discourse than in times past, nor is it intended to propose specific solutions. Instead, it is designed to add Alexander Hamilton to the discussion and to remind readers about the lessons he had when polarized politics surrounding the discussion on the necessity and framing of the U.S. Constitution risked uncivil discourse at the Founding.

I. A BRIEF CANVASS OF THE STATE OF CIVIL DISCOURSE AND POLARIZATION IN TODAY'S POLITICAL AND LEGAL DEBATES

Although a deep dive into the literature on civility and polarization is outside the scope of this Essay, a brief survey is nonetheless helpful. Thus, before we get to some of the specifics of Hamilton's essay, taking a picture of the present state of civil discourse can help us understand why Hamilton's words are relevant and could be deployed effectively to advance civility today.

A widely-cited October 2019 Pew Research Center study reported the results of an intense survey of attitudes on politics and partisanship, titled *Partisan Antipathy: More Intense, More Personal*.[2] Among its findings, Pew reports that "[t]hree years ago, Pew Research Center found that the 2016 presidential campaign was 'unfolding against a backdrop of intense partisan division and animosity.' Today, the level of division and animosity—including negative sentiments among partisans toward the members of the opposing party—has only deepened."[3]

2. PEW RESEARCH CTR., PARTISAN ANTIPATHY: MORE INTENSE, MORE PERSONAL (Oct. 10, 2019), https://www.people-press.org/2019/10/10/partisan-antipathy-more-intense-more-personal/?utm_source=link_newsv9&utm_campaign=item_268982&utm_medium=copy [https://perma.cc/3LFU-K6JB].

3. *Id.* at 5. *See also* Chris Cillizza, *14 Key Political Trends from the 2018 Exit Polls*, CNN (Nov. 14, 2018), https://edition.cnn.com/2018/11/13/politics/2018-exit-polls/index.html

A broad array of academic literature also supports these survey findings. In a lengthy *New York Times* opinion piece in March 2018, Thomas Edsall, a journalist and former professor at the Columbia Graduate School of Journalism, provided a quick but useful survey of that literature, leading to his conclusion that "[h]ostility to the opposition party and its candidates has now reached a level where loathing motivates voters more than loyalty."[4]

Among the literature, Stanford political scientists Shanto Iyengar and Masha Krupenkin published a study in February 2018 with their findings summarized as follows:

> Partisanship continues to divide Americans. Using data from the American National Election Studies (ANES), we find that partisans not only feel more negatively about the opposing party, but also that this negativity has become more consistent and has a greater impact on their political participation. We find that while partisan animus began to rise in the 1980s, it has grown dramatically over the past two decades. As partisan affect has intensified, it is also more structured; ingroup favoritism is increasingly associated with outgroup animus. Finally, hostility toward the opposing party has eclipsed positive affect for ones' [sic] own party as a motive for political participation.[5]

And, there are claims that the declining state of civil discourse and the risks of paralyzing polarization is not limited to the United States. Thomas Carothers, senior vice president for studies at the Carnegie Endowment for International Peace and director of its Democracy, Conflict, and Governance Program, as well as the author of *Democracies Divided*, has described polarization as a global illness, and he has opined that "[p]erhaps most fundamentally, polarization shatters informal but crucial norms of tolerance and moderation . . . that keep political competition within bounds."[6] And, the

[https://perma.cc/EN4L-4DW3] (reporting that the exit polls in the November 2018 election revealed that "one place where most people (76[percent]) agree is that the country is growing more divided. Just 9[percent] said we were getting more united . . . and 13[percent] said we aren't changing in any meaningful way when it comes to partisanship"); Frank Newport, *The Impact of Increased Political Polarization*, GALLUP (Dec. 5, 2019), https://news.gallup.com/opinion/polling-matters/268982/impact-increased-political-polarization.aspx [https://perma.cc/G2EG-4H2G] (reporting by Gallup senior scientist on the October 2019 Pew study, concluding that "deep partisanship [is] one of the defining aspects of our American society today").

4. Thomas B. Edsall, *What Motivates Voters More Than Loyalty? Loathing*, N.Y. TIMES (Mar. 1, 2018), https://www.nytimes.com/2018/03/01/opinion/negative-partisanship-democrats-republicans.html?auth=login-email&login=email [https://perma.cc/B9LZ-X2SB].

5. Shanto Iyengar & Masha Krupenkin, *The Strengthening of Partisan Affect*, 39 ADVANCES IN POL. PSYCHOL. 201 (2018), https://onlinelibrary.wiley.com/doi/abs/10.1111/pops.12487 [https://perma.cc/D9BF-7XXG].

6. Thomas Carothers & Andrew O'Donohue, *How to Understand the Global Spread of Political Polarization* CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 1, 2019), https://carnegieendowment.org/2019/10/01/how-to-understand-global-spread-of-political-polarization-pub-79893 [https://perma.cc/U234-3JEB].

effects bleed beyond politics. "Polarization also reverberates throughout the society as whole, poisoning everyday interactions and relationships."[7]

Even a very quick research effort will reveal that there is no shortage of academic or expert work from a variety of disciplines studying the state of discourse today and across history. That alone is a strong signal that we take very seriously the health of our discourse in society. Anecdotally too, many participants in, or observers of, our ongoing debates on political and legal issues have opinions on the state of civil discourse. And, looking around popular media and other sources, it is not hard to find people bemoaning the state of affairs in civil discourse and decrying the risks of a polarized populous.[8] Consider, for example, recent commentary claiming that, "[t]oo often, calls for civility are shelved in the heat of battle, occasionally with the defense that passionate engagement or authenticity requires *incivility.*"[9]

These opinions not only come from pundits or policy wonks, but you can find alarms raised on the state of civil discourse from several U.S. Supreme Court Justices, traditionally reserved in their commentary on the social or political climate. For example, on February 7, 2020, just after the U.S. Senate voted to acquit President Donald Trump in his impeachment trial, when questioned regarding threats to the rule of law at an event held by the World Jurist Association and the World Law Foundation, Justice Ruth Bader Ginsburg pointed to "a loss of the willingness to listen to people with views other than one's own" as an example and also acknowledged "the problems of indifference, of tribal-like loyalties, lack of observance of the golden rule, 'Do unto others,' " as contributing to political intolerance.[10] Justice Ginsburg continued to explain that echo chambers are in part to blame, positing that this unwillingness to listen "is facilitated by electronic means, to associate with only one's—you could call it one's own home crowd, and to tune out other voices."[11] Nonetheless, Justice Ginsburg explained she is hopeful that "people of goodwill in both of our parties will say, 'We have had enough of dysfunction. Let's work together for the good of all of the people who compose the nation.' "

Perhaps Justice Ginsburg's optimism is fueled by her own positive

7. *Id.*

8. Charles J. Sykes & Carolyn J. Lukensmeyer, *Civility Is Now a Foreign Concept in Americans Politics. How Did We Get Here — and How Do We Fix It?*, NBC NEWS (May 11, 2018, 11:26 AM), https://www.nbcnews.com/think/opinion/civility-now-foreign-concept-americans-politics-how-did-we-get-ncna873491 [https://perma.cc/5KP5-Q5V5].

9. *Id.* (emphasis added).

10. Caroline Kelly, *Ruth Bader Ginsburg: Senate Exemplifies Trend of Sticking with 'One's Own Home Crowd'*, CNN (Feb. 7, 2020), https://www.cnn.com/2020/02/07/politics/ruth-bader-ginsburg-senate-partisan-polarization/index.html [https://perma.cc/E4ND-TJYY].

11. *Id.*

experiences respecting the views of others and having her views respected in return. One well-publicized example of her experiences with reciprocal respect comes from her friendship with Justice Antonin Scalia, with whom she regularly disagreed on questions of law, judicial philosophy, and politics. The relationship between Justices Scalia and Ginsburg provides a valuable lesson on how open exchange is possible among opposites while maintaining a separate level of friendship and respect not dependent on philosophical agreement or alignment.[12] As Professor JoAnn Koob recounts, "Justice Scalia famously said, 'I don't attack people. I attack ideas.' "[13] That anti-personalization philosophy made it possible for what Koob describes as "a long friendship" with Justice Ginsburg that lasted "not because they agreed on most cases, but because they respected each other, relished robust debates, and enjoyed each other's humor,"[14] and because they spent humanizing time together.

In May 2019 remarks while accepting the American Law Institute's Friendly Medal in honor of Second Circuit Judge Henry Friendly, retired Justice Anthony Kennedy warned that "[c]ivility . . . has never been needed more than it is today,"[15] in crucial part because "[d]emocracy presumes that there will be a consensus based on thoughtful debate."[16] This was not the first or last time that Justice Kennedy has addressed the topic.[17] For example, at a 2017 summit on civic education in California schools, he remarked that, "[i]n recent years, our civic discourse has all too often become intemperate, irrational, hostile, divisive, insulting, unprincipled."[18] Consequently, Kennedy explained that we must find ways to combat this state of affairs, because "[w]e have a duty to show that democracy works through a discourse that's exciting and admirable, that's inspiring."[19]

12. The relationship is recounted in the news story from George Mason University's Antonin Scalia Law School: JoAnn Koob, *The Need for Civil Discourse Is Greater than Ever,* GEO. MASON U.: ANTONIN SCALIA SCH. OF L., https://www.law.gmu.edu/news/2020/the_need_for_civil_discourse_is_greater_than_ever [https://perma.cc/PKB6-ZGMN].

13. *Id.*

14. *Id.*

15. *Speaker Videos—Friendly Medal Presentation: Anthony M. Kennedy*, AM. L. INST., 18:10, https://www.ali.org/annual-meeting-2019/videos-speakers [https://perma.cc/JK5J-8T7C].

16. *Id.* at 19:24.

17. *See, e.g.*, Kathleen Ronayne, *Kennedy Warns of Dangers to Democracy, Won't Talk Kavanaugh*, ASSOCIATED PRESS (Sept. 28, 2018), https://apnews.com/c9c39fedd46f4b00bb642ef8c7b34624/Kennedy-warns-of-dangers-to-democracy,-won't-talk-Kavanaugh [https://perma.cc/WAH4-JNG7] (reporting on comments by Justice Kennedy that, when we were working to export democracy around the world over the past several decades that "Perhaps we didn't do too good a job teaching the importance of preserving democracy by an enlightened civic discourse").

18. Alexei Koseff, *Anthony Kennedy Worries that Civic Discourse Has Become Too 'Hostile' and 'Divisive'*, SACRAMENTO BEE (Feb. 14, 2017), https://www.sacbee.com/news/politics-government/capitol-alert/article132765559.html [https://perma.cc/7NQL-TYBA].

19. *Id.*

In his 2019 book, *A Republic, If You Can Keep It*, Justice Neil Gorsuch sounded a similar alarm. Gorsuch stated that he "worr[ies] that, just as we face a civics crisis in this country today, we face a civility crisis too."[20] Similarly, during a speech at the October 2019 National Conference on Civic Education and the Federal Courts, Justice Gorsuch remarked that "I think we are facing a crisis," because "[w]e have lost the art of how to talk to one another."[21]

In his book, Justice Gorsuch explained that, "[a]ccording to a study called Civility in America, nearly 70 percent of Americans believe the country has a 'major civility problem.' "[22] Moreover, "[n]early 60 percent say they pay less attention to politics today because of its incivility . . . . More than half think civility in our country is likely to decline even further."[23] Justice Gorsuch observed that "[those] figures should concern us all. Without civility, the bonds of friendship in our communities dissolve, tolerance dissipates, and the pressure to impose order and uniformity through public and private coercion mounts."[24] Gorsuch's view is based on his recognition that civil discourse where we respect even those with whom "we vigorously disagree"[25] enriches the quality of discussion and ensures that the debates over crucial civic issues will have the robustness that true democratic deliberation requires.[26]

While some say that polarization is the worst it has ever been, others question whether we can rely on the data some use to support those claims. At least one group of political scientists believe, for example, that some of the regularly invoked survey results are less indicative of polarization than they are reflective of a general distaste for political discussion entirely.[27]

20. JUSTICE NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 31 (2019).

21. Tom McParland, *Gorsuch, Sotomayor Boost 2nd Circuit Efforts to Engage Communities, Revive Civic Education*, LAW.COM (Oct. 31, 2019, 5:44PM), https://www.law.com/newyorklawjournal/2019/10/31/gorsuch-sotomayor-boost-2nd-circuit-efforts-to-engage-communities-revive-civic-education [https://perma.cc/Y5PM-5ALG].

22. GORSUCH, *supra* note 20, at 31.

23. *Id.*

24. *Id.*

25. *Id.*

26. *See* Adam J. White, *A Republic, If We Can Keep It,* ATLANTIC (Feb. 4, 2020), https://www.theatlantic.com/ideas/archive/2020/02/a-republic-if-we-can-keep-it/605887 [https://perma.cc/H6K7-A7GT] ("For Gorsuch, civic virtue requires civility. . . . Gorsuch's book calls for civility not to stifle disagreements on public matters, but to facilitate them.").

27. *See, e.g.*, Sumara Klar et al., *Is America Hopelessly Polarized, or Just Allergic to Politics?*, N.Y. TIMES (Apr. 12, 2019) https://www.nytimes.com/2019/04/12/opinion/polarization-politics-democrats-republicans.html [https://perma.cc/V46W-P2LR] (arguing evidence shows commenters may be "overstating the divide" because it "might not be with polarization. It might just be that most people really don't like politics. Americans are open to people with all sorts of political and partisan opinions, our research shows — as long as they keep those opinions to themselves.").

Perhaps polarization is truly more intense and civil discourse is in decline. Perhaps not. Whatever the case, neither polarization nor threats to civility are new.

II. ALEXANDER HAMILTON AND *FEDERALIST NO. 1* ON CIVIL DISCOURSE, MUTUAL RESPECT, AND AVOIDANCE OF DEMONIZATION OF OPPOSING VIEWS

Can Alexander Hamilton's words on civil discourse in *Federalist No. 1*,[28] published on October 27, 1787, help us raise the level of discursive civility in the highly polarized and tribal politics of 2020? It is worth revisiting Hamilton's thoughts to give his wisdom a modern audience.

With *Federalist No. 1,* writing under the pseudonym Publius that he would share with John Jay and James Madison across the next several months, Hamilton launched their project to defend the structure and purposes of the proposed new U.S. Constitution. *Federalist No. 1* was an essay heralding a true time for choosing. Hamilton argued that the new Constitution was "the safest course for your liberty, your dignity, and your happiness"[29] and he proposed to discuss the particulars of why "in a series of papers" we now know as *The Federalist Papers*.[30]

Although *The Federalist Papers* are most often read for its lessons on constitutional interpretation, *Federalist No. 1* actually had an additional purpose. Hamilton wanted his readers to understand the imperative of civility in discourse, a presumption of good faith applied to one's political opponents, and the importance of respecting different opinions when engaging in the most important, often contentious, conversations of the day. Reading the passages of Hamilton set forth below, one can expect that he would likely agree with Justice Gorsuch's commentary that "a government of and by the people rests on the belief that the people should and can govern themselves—and do so in peace, with mutual respect. . . . We must, as well, be able to talk to one another respectfully; debate and compromise; and strive to live together tolerantly."[31]

To Hamilton, serious times called for serious thought. As Hamilton wrote in *Federalist No. 1* of the decision whether to adopt the new Constitution, "[t]he subject seaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many

28. THE FEDERALIST NO. 1, at 3–7 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
29. *Id.* at 6.
30. *Id.*
31. GORSUCH, *supra* note 20, at 20.

respects the most interesting in the world."[32]

Today, there are similar warnings that present day polarization could keep us from effectively dealing with the serious matters that confront society. For example, Frank Newport, senior scientist at Gallup, opined in a December 2019 article after reviewing these multiple sources of evidence that polarization and incivility risk problem-solving paralysis. He described "the sociological impact of polarization and increasing disapprobation of one's political opposites" which risks leading to "skeptical views of institutions and social structures [that] skew us toward distrust, anger and internal infighting—not actionable efforts to fix problems and address threats."[33]

Hamilton warned that deliberation over the new Constitution would be heated and that the country needed to understand the risks from the fiery debate that was certain to follow. Presaging debates to come, Hamilton warned readers that he who is loudest is not necessarily he who is right. Hamilton warned again in that first *Federalist* paper that some "mutually hope to evince the justness of their opinions, and to increase the number of their converts by the loudness of their declamations and the bitterness of their invectives."[34]

Perhaps one of the most important lessons in *Federalist No. 1* was Hamilton's caution against appeals to extremes. These will often not be appeals to reason upon which even wise persons may differ. Instead, these are appeals to emotion. For example, Hamilton contemplated that "a dangerous ambition . . . often lurks behind the specious mask of zeal for the rights of the people,"[35] and advised that "[h]istory will teach us" that those making zealous appeals to populist themes "has been found a much more certain road to the introduction of despotism . . . and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing Demagogues, and ending Tyrants."[36]

Hamilton worried the debate on the Constitution that was about to consume the young nation in 1787 would "let loose" a "torrent of angry and malignant passions," where "opposite parties" would undoubtedly believe they could win their argument and "increase the number of their converts by the loudness of their declamations and the bitterness of their invectives"

32. THE FEDERALIST NO. 1, *supra* note 28, at 3.
33. Newport, *supra* note 3.
34. THE FEDERALIST NO. 1, *supra* note 28, at 6.
35. *Id.*
36. *Id.*

rather than through reasoned debate.[37] Unfortunately, the "illjudged" and "intolerant spirit which has, at all times, characterised political parties"[38] that Hamilton warned about in *Federalist No. 1* has only increased these tendencies and helped drive our immoderation of thought in even everyday politics today.

Consequently, Hamilton called for civility in debate and warned that we must not cast off opposing views with mean-spirited attacks. Understanding the context within which Hamilton was offering this imperative—contested constitutional times—is especially important, because it is often observed today that the most important debates are the ones that evoke the greatest communicative hostilities and usher forth the greatest losses of adherence to civility.[39]

Hamilton's rules for civil discourse described in *Federalist No. 1* advised that all serious positions be taken seriously, opposing opinions be respected and considered before receiving a response, and debate be used as a means of testing arguments thereby allowing the best ideas to rise to the top in a marketplace of thought. For example, Hamilton called for "establishing good government from reflection and choice."[40] Key aims involved searching for truth and the public good by respecting the purposes of debate and moving beyond bias and spin. In Hamilton's words, "[h]appy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good."[41]

Hamilton warned of the risks that advocates and opponents alike would be self-interested in their opinions and called for the People to interrogate the arguments of all with that risk of bias in mind. He framed the purposes of his warnings toward the end of the essay, stating: "I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare, by any impressions other than those which may result from the evidence of truth."[42]

Hamilton requested that we use "candor" to admit that those with differing views really "may be actuated by upright intentions" and opposing views may "spring from sources, blameless at least, if not respectable."[43]

37. *Id.* at 5.
38. *Id.*
39. *See, e.g.*, Sykes & Lukensmeyer, *supra* note 8.
40. THE FEDERALIST NO. 1, *supra* note 28, at 3.
41. *Id.* at 3–4.
42. *Id.* at 6.
43. *Id.* at 4.

Couldn't we start with a presumption that our opponents are sincere in their beliefs, yet they could just be committing what Hamilton described as "honest errors of minds led astray"?[44]

Today, we so often ascribe ill motives or character flaws in those who adopt different political beliefs. As one commentator explained in 2019, "interpersonal intolerance is metastasizing into something much darker: A 2019 study found that just over 42[percent] of both parties [in the United States] view the opposition as not just mistaken but 'downright evil.' "[45] That statistic reflects the observations of others, for example that "[t]oo many Americans refuse to entertain the possibility that an opponent might be a decent human being despite being wrong about an issue. So instead of conversations that might change minds, we reduce our debates to toxic confrontations."[46]

Even if we believe others with whom we disagree are in error, flawed ideas do not make one's opponents flawed people. Hamilton asked that we separate an individual's ideas from judgment about that individual's character. We should not assume improper motives or evil intentions by those with whom we disagree.[47] For one thing, he explained that, "it would be disingenuous to resolve indiscriminately the opposition of any set of men . . . into interested or ambitious views."[48] And, perhaps most importantly, good men and good women can differ. For discourse to be civil, for respect to flourish, and for knowledge to advance, we must adopt in practice and principle the avoidance of demonization.

On this point, Hamilton reminded us of an important lesson that should prove equally true in all times of political debate. Hamilton called for a principle of mutual respect for the opinions of others and for avoiding ascribing bad motives to others, instructing that, "[s]o numerous indeed and so powerful are the causes which serve to give a false bias to the judgment, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society."[49]

44. *Id.*

45. John Avlon, *Polarization Is Poisoning America. Here's an Antidote*, CNN (Nov. 1, 2019) https://www.cnn.com/2019/10/30/opinions/fractured-states-of-america-polarization-is-killing-us-avlon/index.html [https://perma.cc/EMK5-GAB8]; *see also* Carothers & O'Donohue, *supra* note 6 ("Partisan conflict takes a heavy toll on civil society as well, often leading to the demonization of activists and human rights defenders.").

46. Sykes & Lukensmeyer, *supra* note 8 ("Civility also means having empathy for your fellow Americans.").

47. GORSUCH, *supra* note 20, at 37 ("[D]emocracy depends on our willingness, each one of us, to hear and respect even those with whom we disagree strongly.")

48. THE FEDERALIST NO. 1, *supra* note 28, at 4.

49. *Id.*; *see also* GORSUCH, *supra* note 20, at 31 (explaining importance of "tolerating those who don't agree with us, or whose ideas upset us; giving others the benefit of the doubt about their motives;

Furthermore, if we accept this fact that exogenous factors make all humans capable of error, shouldn't we have greater skepticism and humility about the correctness of our own beliefs rather than so quickly become entrenched in our ideological camps? As Hamilton counsels again, recognizing the risks of our own intellectual fallibility should "furnish a lesson of moderation to those who are ever so much persuaded of their being in the right in any controversy."[50]

In fact, each of us might take responsibility to carefully evaluate our own beliefs about "truth," because we too are prone to biases as much as our opponents, as our those who agree with us. Here too Hamilton understood the human condition. He explained that, "[a]mbition, avarice, personal animosity, party opposition, and many other motives not more laudable than these, are apt to operate as well upon those who support as those who oppose the right side of a question."[51]

Today, we live in a world with a lot of noise and too little adherence to these lessons about the necessity of civility in political discourse embraced in Hamilton's words. If we choose to embrace the noise, all of the merits of all sides of the cacophonous debate get lost, and none get truly tested.

CONCLUSION

Read as a whole, Hamilton's biggest concern in *Federalist No. 1* seemed to be that human tendencies toward uncivil discourse might have a very damning impact. The biggest risk was that no serious debate would be had at all. Civil discourse is an imperative because it is a prerequisite to the meaningful reasoning that is necessary for progress.

Although the importance of civil discourse seems almost too obvious to justify devoting this entire Essay to it, civility in debate is so often left unrealized that it seems there are still many ears and eyes that are available targets for reminders of the values in it. As already seen here, there are many voices today echoing Alexander Hamilton's teachings, much as Hamilton himself was repeating the teachings of wise forebearers of the wisdom he memorialized in *Federalist No. 1*. For example, when receiving the Liberty Medal from the National Constitution Center in October 2019, Justice Kennedy posited that "[w]e have a duty to show by our civic discourse that we can be a rational, thoughtful, tolerant, decent, kind people."[52] Justice

listening and engaging with the merits of their ideas rather than dismissing them because of our own preconceptions about the speaker or topic").

50. THE FEDERALIST NO. 1, *supra* note 28, at 4–5.

51. *Id.* at 5.

52. Claudia Vargas, *Liberty Medal Awarded to Former Supreme Court Justice Anthony Kennedy*, PHILA. INQUIRER (Oct. 27, 2019), https://www.inquirer.com/news/philadelphia/liberty-medal-anthony-

Gorsuch has advised that, "[i]n a government by and for the people, we have to remember that those with whom we disagree, even vehemently, still have the best interests of the country at heart. We have to remember that democracy depends on our ability to reason and work with those who hold very different convictions and beliefs than our own."[53] Finally, commenting on her friendship with Justice Scalia, Justice Ginsburg has written that "[i]f our friendship encourages others to appreciate that some very good people have ideas with which we disagree, and that, despite differences, people of goodwill can pull together for the well-being of the institutions we serve and our country, I will be overjoyed, as I am confident Justice Scalia would be."[54] This is consistent with another basic lesson Justice Ginsburg once offered: " 'As long as we live and listen,' she said, 'we can learn.' "[55] Civil discourse is what makes listening possible. Listening is what makes learning possible. And, learning is what makes it all worthwhile.

It is perhaps hopeful that the 2019 Pew Research Center study also found that the majority of people are aware of and uncomfortable with trends away from civil discourse and toward polarization. As the Pew study reports, 78 percent of Americans surveyed said partisan divisions are increasing, and 81 percent said they were "very or somewhat concerned about divisions between Republicans and Democrats, including nearly half (46[percent]) who say they are very concerned about the growing divide."[56] Those numbers may reflect public receptivity to calls for greater civility. Indeed, this awareness and concern indicate the public might just be willing to seek the benefits of revisiting Hamilton's guiding thoughts in *Federalist No. 1*.

kennedy-philadelphia-20191028.html [https://perma.cc/T9GF-248Z].

53. GORSUCH, *supra* note 20, at 37.

54. Justice Ruth Bader Ginsburg, *Foreword* to ANTONIN SCALIA, SCALIA SPEAKS (Christopher J. Scalia & Edward Whelan eds., 2017).

55. Ann E. Marimow, *Justice Ruth Bader Ginsburg Says Congress Is Culpable for Polarizing Judicial Process*, WASH. POST (Oct. 25, 2018), https://www.washingtonpost.com/local/public-safety/justice-ruth-bader-ginsburg-blames-congress-for-the-polarization-of-the-judicial-confirmation-process/2018/10/24/d43122c8-d79d-11e8-83a2-d1c3da28d6b6_story.html [https://perma.cc/GJ69-SVR3].

56. PEW RESEARCH CENTER, *supra* note 2 ("There is a widespread belief in both [Republican and Democrat] parties that partisan divisions in the country are increasing. Among the public overall, 78[percent] say divisions between Republicans and Democrats in this country are increasing, while just 6[percent] say they are decreasing and 16[percent] say they are staying the same.").

2020

Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being

Jarrod F. Reich

CAPITALIZING ON HEALTHY LAWYERS: THE BUSINESS CASE FOR LAW FIRMS TO PROMOTE AND PRIORITIZE LAWYER WELL-BEING

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This Article is the first to make the business case for firms to promote and prioritize lawyer well-being. For more than three decades, quantitative research has demonstrated that lawyers suffer from depression, anxiety, and addiction far in excess of the general population. Since that time, there have been many calls within and outside the profession for changes to be made to promote, prioritize, and improve lawyer well-being, particularly because many aspects of the current law school and law firm models exacerbate mental health and addiction issues, as well as overall law student and lawyer distress. These calls for change, made on moral and humanitarian grounds, largely have been ignored; in fact, over the years the pervasiveness of mental health and addiction issues within the profession have persisted, if not increased. This Article argues that these moral- and humanitarian-based calls for change have gone unheeded because law firms have not had financial incentives to respond to them.

In making the business case for change, this Article argues that systemic changes designed to support and resources to lawyers will avoid costs associated with lawyer mental health and addiction issues and, more importantly, create efficiencies that will increase firms' long-term financial stability and growth. It demonstrates that this business case is especially strong now in light of not only societal and generational factors, but also changes within the profession itself well. As firms have begun to take incremental steps to promote lawyer well-being, lasting and meaningful change will further benefit firms' collective bottom lines as it will improve: (1) performance, as clients are demanding efficiency in the way their matters are staffed and billed; (2) retention, as that creates efficiencies and the continuous relationships demanded by clients; and (3) recruitment, particularly as younger millennial and Generation Z lawyers—who prioritize mental health and well-being—enter the profession.

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INTRODUCTION

GABRIEL MacConaill was a partner in the bankruptcy group of the international law firm Sidley Austin LLP.[1] Resident in the firm's Los Angeles office, "he felt like he was doing the work of three people" and worked so hard on a bankruptcy filing that "he was in distress and . . . work[ed] himself to exhaustion"; however, he refused to go to the emergency room, because, as he told his wife: "You know, if we go, this is the end of my career."[2] Then, on the morning of Sunday, October 14, 2018, he received an email and "had to go" to the office to "put something together."[3] He drove to his office, "taking his gun with him, and shot himself in the head in the sterile, concrete parking structure of his high-rise office building."[4] He was forty-two.

In an open letter written one month after his death, his wife wrote simply: "'Big Law' killed my husband."[5]

In July 2015, Peter, a partner at the Silicon Valley office of the law firm Wilson Sonsini Goodrich & Rosati LLP, "died a drug addict, felled by a systemic bacterial infection common to intravenous users."[6] He "lived in a state of heavy stress," as he "obsessed about the competition, about his compensation, about the clients, their demands, and his fear of losing them. He loved the intellectual challenge of his work but hated the combative nature of the profession, because it was at odds with his own nature."[7] His last phone call was for work: "vomiting, unable to sit up, slipping in and out of consciousness, [he] had managed, somehow, to dial into a conference call."[8]

As he was being eulogized during his memorial service, "[q]uite a few" of his colleagues "were bent over their phones, reading and tapping

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1. Joanna Litt, *'Big Law Killed My Husband': An Open Letter from a Sidley Partner's Widow*, AM. LAW. (Nov. 12, 2018, 9:00 AM), https://www.law.com/americanlawyer/2018/11/12/big-law-killed-my-husband-an-open-letter-from-a-sidley-partners-widow/ [https://perma.cc/6PD5-RZNQ].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* While MacConaill's wife acknowledged that "Big Law" did not directly kill him, as he "had a deep, hereditary mental health disorder and lacked essential coping mechanisms," she observed that "these influences, coupled with a high-pressure job and a culture where it's shameful to ask for help, shameful to be vulnerable, and shameful not to be perfect, created a perfect storm." *Id.*

6. Eilene Zimmerman, *The Lawyer, the Addict*, N.Y. TIMES (July 15, 2017), https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html [https://perma.cc/B7MA-SDSH]. Ms. Zimmerman, Peter's ex-wife, declined to use Peter's surname in her article to "protect the privacy of [their] children and Peter's extended family." *Id.*

7. *Id.*

8. *Id.*

out emails. Their friend and colleague was dead, and yet they couldn't stop working long enough to listen to what was being said about him."[9]

These two harrowing stories are hardly unique. Indeed, for more than thirty years, a significant number of studies, articles, and reports have demonstrated the prevalence of depression, anxiety, and addiction in the legal profession.[10] Throughout this time, there have been just as many calls for the profession to make changes to promote, prioritize, and improve lawyer well-being,[11] particularly as many aspects of the current law firm model exacerbate mental health and addiction issues,[12] as well as overall lawyer unhappiness and dissatisfaction.[13]

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9. *Id.*; *see also generally* EILENE ZIMMERMAN, SMACKED: A STORY OF WHITE-COLLAR AMBITION, ADDICTION, AND TRAGEDY (2020).

10. *See, e.g.*, Connie J.A. Beck, et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1 (1995); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233 (1990) [hereinafter Benjamin et al., The *Prevalence of Depression*]; Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016); *see also* William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1085 tbl.3 (1990). Similar scholarship over this time period also demonstrates the widespread mental health and addiction issues among law students. *See infra* Section II.B.

11. *See, e.g.*, Benjamin et al., *The Prevalence of Depression*, *supra* note 10, at 245 ("The national United States and the regional state Bar Associations should avoid the phenomenon of institutional denial and attempt to reach their members before symptoms lead to malpractice or unethical practice."); *see also, e.g.*, Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265 (1997); Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531 (2008).

12. *See infra* Section II.C.

13. There is a myriad of scholarship that refers to "happiness" (or, more particularly, a lack thereof) within the legal profession. *See, e.g.*, NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW (2010); Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554 (2015) [hereinafter Krieger & Sheldon, *What Makes Lawyers Happy?*]; Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999); Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33 (2001). This scholarship, to which this Article cites, examines "happiness" in the context of lawyer mental health, addiction, distress, or a deeper level of lawyer satisfaction (such as subjective well-being as that is understood under the tenets of self-determination theory—see *infra* notes 123–127 and accompanying text) rather than mere notions of transient happiness or job "satisfaction."

Empirical studies demonstrate the distinctions between the former and the latter. With respect to the latter, studies assessing levels of abstract "happiness" and job "satisfaction" suggest that "[a]s a general matter, lawyers are relatively satisfied with their job/careers." *See* Jerome M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L.J. 225, 261–62 (2011); *see also id.* at 261 (concluding that, upon an analysis of studies from the prior twenty-five years, an average of 78.8% of lawyers describe themselves as "satisfied"). As one example, in a thirty-

Despite these calls for change, the pervasiveness of mental health and addiction issues among lawyers has persisted, if not increased.[14] Recognizing that this pervasiveness "can no longer be ignored,"[15] in a 2017 report entitled *The Path to Lawyer Well-Being*, the American Bar Association's National Task Force on Lawyer Well-Being issued a "call to action" for the profession to "get serious about the substance use and mental health of ourselves and those around us."[16] Partially in response to the report, the profession has made some inroads in addressing these problems. For example, some law firms have begun to take proactive steps to improve their lawyers' well-being,[17] and as of May 2020, 133 law firms signed a pledge to support the ABA's campaign to address mental health and addiction issues in the profession—which the ABA hoped that "all legal employers" would sign by January 1, 2019.[18]

Notwithstanding the recognized need and these calls for change, the majority of firms have "turned a blind eye to widespread health problems" that pervade the profession.[19] This Article argues that this "blind eye" exists in large part because firms have not had a financial incentive to address the problem. Law firms have increasingly moved from being "central players in a noble profession to a collection of profit-maximizing enterprises," and this pursuit of profits has come at the expense of the well-

year longitudinal study of 1990 University of Virginia Law School graduates, 77.4% of respondents reported being satisfied with their decision to become a lawyer and nearly 91% reported being satisfied with their lives generally. John Monahan & Jeffrey Swanson, *Lawyers at the Peak of Their Careers: A 30-Year Longitudinal Study of Job and Life Satisfaction*, 16 J. LEGAL EMPIRICAL STUD. 4, 19, 21–22 (2019). However, the results of these studies, while helpful, do not speak to and are not inconsistent with the empirical, scientifically validated evidence of widespread lawyer mental health and addiction issues. *See* David L. Chambers, *Overstating the Satisfaction of Lawyers*, 39 L. & SOC. INQUIRY 313, 315, 330 (2014) ("[O]nly a small proportion of attorneys hold negative views overall about their jobs or careers . . . [but] to the extent that the negative literature reports large numbers of beleaguered lawyers who feel unhappy or ambivalent about many aspects of their work, nothing in the survey literature, properly viewed, should be seen as inconsistent."); *cf.* LEVIT & LINDER, *supra*, at 32 ("Claiming that you're happy . . . appears to be nearly universal, as long as you're not living in a war zone, on the street, or in extreme emotional or physical pain." (internal quotation marks omitted) (quoting Sue M. Halperin, *Are You Happy?*, N.Y. REV. BOOKS (Apr. 3, 2008), https://www.nybooks.com/articles/2008/04/03/are-you-happy/ [https://perma.cc/PS6D-CMQV])).

14. *Compare infra* notes 25–43 and accompanying text, *with infra* notes 59–67 and accompanying text.

15. NAT'L TASK FORCE ON LAWYER WELL-BEING, AM. BAR ASS'N, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 11 (2017), https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf [https://perma.cc/B3WH-DDTF] [hereinafter THE PATH TO LAWYER WELL-BEING].

16. *Id.* at 10.

17. *See infra* notes 298–303 and accompanying text.

18. *See infra* notes 292–297 and accompanying text.

19. The PATH TO LAWYER WELL-BEING, *supra* note 15, at 12.

being of the lawyers who generate them.[20] As firms' short-term goal of maximizing annual profits has become their principal long-term goal, lawyer distress has risen along with partner profits. Put differently, the commodification of the legal profession is an "unambiguous contributor" to the pervasiveness of lawyer distress.[21] Additionally, many law firms also are reticent to change in part because of the stigma surrounding mental health or addiction issues—all of which can affect the bottom line.[22]

Since the moral- and humanitarian-based cases for firms to promote and prioritize lawyer well-being in the literature largely have been ignored, this Article is the first to make the business case to do so. In particular, this Article argues that systemic changes designed to provide support and resources to firm lawyers will avoid costs associated with lawyer mental health and addiction issues and, more importantly, create efficiencies that will increase firms' long-term financial stability and growth. Further, this Article argues that, given a confluence of societal, industrial, and generational factors, now is the time for firms to focus on the health and well-being of their lawyers.

Part I of this Article provides an overview of the studies of the last three-plus decades demonstrating the prevalence of depression, anxiety, and other mental health concerns as well as substance abuse in the legal profession. It shows that lawyers have consistently suffered from these issues in much greater proportion than the general population. It also demonstrates that the profession has long understood the need to change the paradigm to support lawyers struggling with mental illness and addiction, but it has largely remained silent in the face of calls for such change.

Part II examines the personal and professional risk factors that negatively affect mental health and addiction as well as lawyer distress generally. In particular, it addresses whether and to what extent there exists a lawyer "personality" that is inherently predisposed to mental illness and addiction. Further, relying largely on self-determination theory and related research, this Part explores how both law school and law practice can contribute to and exacerbate lawyer mental illness, addiction, and mental distress.

Part III sets out why law firms have turned a "blind eye" to lawyer well-being. Appeals to law firms—made largely on moral and humanitarian grounds—to provide support and resources to their lawyers and to make systemic changes to their practices largely have not resulted in meaningful change, and this Part analyzes why firms have had little incentive—both financial and cultural—to change their models.

Finally, Part IV makes the business case for law firms to promote and prioritize lawyer well-being. This Part first analyzes the different direct

20. STEVEN J. HARPER, THE LAWYER BUBBLE: A PROFESSION IN CRISIS 70 (2013).

21. *Id.* at 96–97; *see also generally infra* notes 200–232 and accompanying text.

22. Sara Randazzo, *Law Firms Tackle a Taboo—On-Site Psychologists for Lawyers Become More Common; Some Bristle at the Idea*, WALL ST. J., May 22, 2017, at B2.

and indirect costs that firms face in failing to address lawyer mental health and addiction issues, from a rise in malpractice claims and sanctions to a decline in productivity to costs associated with high lawyer attrition. This Part also argues that now is the time for the law firm paradigm to shift to one that prioritizes lawyer well-being.

I. MENTAL ILLNESS AND ADDICTION IN THE LEGAL PROFESSION: AN EMPIRICAL OVERVIEW

The first major studies identifying lawyer mental health and substance abuse problems were conducted thirty years ago.[23] These studies showed "significant elevated levels of depression" and a high percentage of "problem drinkers" among lawyers, particularly as compared with both members of other professions and the general population.[24] In the three decades since, not much has changed.

In 1990, Andrew Benjamin, Elaine Darling, and Bruce Sales published an empirical study about lawyers in the State of Washington who suffered from depression, alcoholism, and cocaine abuse.[25] This study followed a 1986 study of Arizona law students by Benjamin, Sales, and others, which found that "law students and lawyers suffered from depression at a rate twice to four times what would be expected in the general population."[26]

Confirming the findings of the 1986 study, the 1990 study found "no statistical differences" between the levels of depression among Arizona law students, young lawyers, and Washington lawyers.[27] Specifically, the Washington study found that 19% of lawyers "suffered from statistically significant elevated levels of depression," with "most . . . experiencing suicidal ideation."[28] The study also found that 18% of lawyers were "problem drinkers"—approximately twice the alcohol abuse or dependency rates for

23. *See* Benjamin et al., *The Prevalence of Depression*, *supra* note 10; Eaton et al., *supra* note 10.

24. Benjamin et al., *The Prevalence of Depression*, *supra* note 10, at 240–41; *see also* Eaton et al., *supra* note 10, at 1085 tbl.3 (demonstrating that lawyers have the highest odds ratio for major depressive disorder among 104 professions at a rate of 3.6 times the general population).

25. Benjamin et al., The *Prevalence of Depression*, *supra* note 10, at 235–36.

26. *Id.* at 234 (citing G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 11 AM. B. FOUND. RES. J. 225 (1986) [hereinafter Benjamin et al., *Role of Legal Education*]); *see also id.* at 247 (finding that "17-40% of law students and alumni in [the] study suffered from depression, while 20-45% of the same subjects suffered from other elevated symptoms"). For a detailed discussion of this study, *see infra* notes 118–121 and accompanying text.

27. Benjamin et al., The *Prevalence of Depression*, *supra* note 10, at 240.

28. *Id.* at 240–41.

adults in the United States.[29] Depression rates remained the same across lawyers' length of practice, but the rate of problem drinkers increased.[30]

Also in 1990, researchers at Johns Hopkins University studied the rates of major depressive disorder[31] among individuals across 104 professions.[32] While 3%–5% of the adult population suffers from major depressive disorder, these researchers found that 10% of lawyers do so.[33] Moreover, when adjusted for sex, race, education, and current employment, lawyers have the highest odds ratio for major depressive disorder among the professions studied—at a rate 3.6 times the general population.[34]

Five years later, Benjamin, Sales, and Connie Beck published results of a study returning to the data and subjects of Benjamin and Sales's 1990 study.[35] They further analyzed the earlier data by: (1) considering additional demographic variables and analyzing how they may correlate with levels of distress and alcohol use; (2) analyzing all types of distress; and (3) "using sequential canonical analysis," determining "the degree of relationship of the predictor variables to the different categories of psychological distress, a global measure of psychological distress, and current and lifetime alcohol-related problems."[36]

Their in-depth analysis yielded findings that further supported Benjamin and Sales's earlier studies as well as the Hopkins study. For instance, they concluded that 20% of female lawyers were above the clinical cutoff

29. *Id.* at 241 (citation omitted). For purposes of the study, "problem drinkers" are defined as those "likely [to be] abusive of or dependent on alcohol." *Id.* at 237.

30. *Id.* Specifically, the rate of problem drinkers rose from approximately 18% of those who practiced between two and twenty years to 25% of those who practiced twenty years or more. *Id.* The study notes that this likely is because "[a]lcohol abuse and dependency is a chronic and progressive disease[, and] it can take years to become evident in some cases. As a result, those who have practiced longer appear to be more susceptible to developing problem drinking." *Id.*

31. A person has "major depressive disorder" if: (a) they have five or more of the following symptoms over the same two-week period: (i) "[d]epressed mood"; (ii) "[m]arkedly diminished interest or pleasure in all, or almost all, activities most of the day"; (iii) "[s]ignificant weight loss . . . or weight gain"; (iv) "[i]nsomnia or hyperinsomnia"; (v) "[p]sychomotor agitation or retardation"; (vi) "fatigue or loss of energy"; (vii) "[f]eelings of worthlessness or excessive or inappropriate guilt . . . nearly every day"; (viii) "[d]iminished ability to think or concentrate, or indecisiveness, nearly every day"; and (ix) "[r]ecurrent thoughts of death . . . or suicidal ideation"; (b) "[their] symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of function"; and (c) the symptoms are not attributable to effects of a substance or another medical or psychological condition. AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 160–61 (5th ed. 2013).

32. Eaton et al., *supra* note 10, at 1079.

33. *Id.* at 1081–82 tbl.2.

34. *Id.* at 1085 tbl.3.

35. Beck et al., *supra* note 10.

36. *Id.* at 12.

for anxiety and 16% were above the clinical cutoff for depression,[37] and male lawyers were above the clinical cutoffs for these distresses at 28% and 20%, respectively.[38] As they observe: "The percentage of lawyers scoring above the cutoff is alarming in that the expected percentage of people scoring above the benchmark is only 2.27%."[39] Further, these numbers do not change markedly over the course of a lawyer's career.[40] Similarly, they report an "astounding number of lawyers [have] a high likelihood of developing alcohol-related problems,"[41] with "[a]pproximately 70% of lawyers . . . likely to develop alcohol problems over their lifetime," a figure that both is "consistent across all years," and is more than five times greater than the 13.7% rate of lifetime prevalence of alcohol abuse or dependence for the general population.[42] As a result of their study, they ultimately conclude that "psychological distress, in its many forms, is likely to affect newly practicing lawyers in a similar manner regardless of the state in which they practice," and that "throughout their career span, a large percentage of practicing lawyers are experiencing a variety of significant psychological distress symptoms well beyond that expected in a normal population."[43]

Other studies reached similarly striking conclusions. For instance, a 1987 study performed as part of a doctoral dissertation found that 32% of Florida lawyers "reported feeling depressed at least once a week,"[44] and a

37. *Id.* at 23 tbl.4 & 25. They also concluded that approximately 27% of female lawyers scored above the clinical cutoff for interpersonal sensitivity, 20% for social alienation and isolation, 15% for obsessive-compulsiveness, and 11% for hostility. *Id.*

38. *Id.* at 23 & tbl.4. They also concluded that approximately 30% of male lawyers scored above the clinical cutoff for interpersonal insensitivity, 25% for social alienation and isolation, 20% for obsessive-compulsiveness, 14% for paranoid ideation, 7% for phobic anxiety, and 7% for hostility. *Id.* at 23 tbl.4.

39. *Id.* at 23.

40. *See id.* at 46–48 & tbls.12 & 13.

41. *Id.* at 50–51.

42. *Id.* at 51.

43. *Id.* at 57. They also conclude:

> A picture emerges that does not bode well for harmonious family life. Lawyers have been slowly increasing the number of hours they work over time and taking only two weeks or less of annual vacation. The percentage of lawyers who report that they do not have enough time for themselves or their families has increased 33% from 1984 to 1990. Although this study's findings indicate limited differences in feelings of stress between lawyers and the general population, another researcher has found that 32.5% of his sample of lawyers indicate that they use alcohol regularly as a coping mechanism to reduce stress. That a critical member of the family is working more, taking less time off, spending less time with the family, and potentially using alcohol to cope with high degrees of psychological distress suggests an impending major crisis for lawyers' family life.

Id. at 58–59 (footnotes omitted).

44. G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 114 (1992) [hereinafter Benjamin et al., *Comprehensive Lawyer Assistance Programs*] (citing Allan McPeak, Lawyer

1988 study performed as part of another doctoral dissertation found that 79% of lawyers in Wisconsin "used alcohol regularly or sometimes to reduce stress."[45] Further, a 1991 report by the North Carolina Bar Association reported that over 24% of that state's lawyers suffer from depression, more than 25% display "anxiety symptoms," and over 22% have been diagnosed with a "stress-related disease" such as ulcers, hypertension, or coronary artery disease.[46] Shockingly, 11% of North Carolina lawyers surveyed "admitted they consider taking their lives once a month."[47]

Additionally, studies published during this time have found a correlation between substance abuse and lawyer discipline, concluding that a disproportionate number of "major attorney disciplinary cases" were a result of lawyer substance abuse.[48] For instance, a report cited by the American Association of Law Schools in its 1993 *Report on Problems of Substance Abuse in Law Schools* found that substance abuse was "involved" in 50% to 75% of such cases.[49] An earlier survey conducted by the American Bar Association in New York and California found that "50-70 percent of all disciplinary cases involved alcoholism."[50]

Occupational Stress (1987) (unpublished Ph.D. dissertation, Florida State University)).

45. *Id.* at 115 (citing Dennis W. Kozich, An Analysis of Stress Levels and Stress Management Choices of Attorneys in the State of Wisconsin (1988) (unpublished Ph.D. dissertation, University of Wisconsin-Madison)).

46. N.C. BAR ASS'N, REPORT OF THE QUALITY OF LIFE TASK FORCE AND RECOMMENDATIONS 4 (1991), https://www.nclap.org/wp-content/uploads/2014/07/1991_QoL_summary.pdf [https://perma.cc/F9R2-X7B9].

47. SUSAN SWAIM DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES 8 (2004) (internal quotation marks omitted) (citation omitted).

48. AM. ASS'N OF LAW SCHOOLS, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35, 36 (1994).

49. *Id.* Additionally, Benjamin and his colleagues noted in their 1990 report that the ABA determined that "27 percent of the discipline cases in the United States involved alcohol abuse." Benjamin et al., *The Prevalence of Depression*, *supra* note 10, at 243. However, they opine that the actual figure "may actually be much higher, however, because not all state and county bar associations report their disciplinary cases. In addition, under-reporting has occurred because state bar associations were unable to identify alcohol abusing lawyers who became part of the disciplinary process. Until very recently, very few bar associations considered the causes for the lawyer infractions." *Id.* at 244.

50. Benjamin et al., *Comprehensive Lawyer Assistance Programs*, *supra* note 44, at 118.

In response to the pervasiveness of mental distress and addiction in the legal profession, many practitioners[51] and scholars[52] have called for changes to the profession. Among the largest changes was the development and expansion of lawyer assistance programs.[53] These programs generally provide support services to lawyers and legal professionals with mental health and substance abuse issues.[54] Currently, all fifty states and the District of Columbia have some sort of lawyers assistance program,[55] most of which were established in the last thirty years.[56]

Notwithstanding these calls for change, such change has been hard to come by. In the intervening years, articles and books have highlighted lawyers' struggles with unhappiness and mental health and addiction issues,[57] with one such article asking simply: "Why are lawyers killing themselves?"[58]

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51. *See, e.g.*, J. Nick Badgerow, *Apocalypse at Law: The Four Horsemen of the Modern Bar—Drugs, Alcohol, Gambling and Depression*, 18 PROF. L. 2, 2 (2007); G. Andrew H. Benjamin, *Reclaim Your Practice, Reclaim Your Life*, TRIAL, Dec. 2008, at 30, https://depts.washington.edu/petp/Reclaim_Your_Practice_%20Reclaim_Your_Life.pdf [https://perma.cc/QJ8G-FUAA]; Ted David, *Can Lawyers Learn to Be Happy?*, PRACTICAL LAW., Aug. 2011, at 29; Linda M. Rao, *Time for an Ideality Check: If You Had Your Ideal Job, Would You Be Satisfied?*, 22 BARRISTER 13 (1995).

52. *See, e.g.*, Allan, *supra* note 11; Ariram Elwork & G. Andrew H. Benjamin, *Lawyers in Distress*, 23 J. PSYCHIATRY & L. 205 (1995); Schiltz, *supra* note 13.

53. *See* AM. BAR ASS'N, COMM'N ON LAWYER ASSISTANCE PROGRAMS, 2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS (2015), https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/is/colap_2014_comprehensive_survey_of_laps.authcheckdam.pdf [https://perma.cc/R36Y-Z3HF] [hereinafter ABA SURVEY OF LAWYER ASSISTANCE PROGRAMS].

54. *See generally id.*

55. *Id.* at 1–2, A-3, A-4. The ABA's report only identifies forty-eight states and the District of Columbia in its survey, as programs from neither Nevada nor North Dakota replied. However, Nevada's Lawyer Assistance Program was established in 2013, see STATE BAR OF NEVADA, NEVADA LAWYERS ASSISTANCE PROGRAM (NLAP), http://www.nvbar.org/member-services-3895/nlap/ [https://perma.cc/G3TY-E89Z] (last visited May 7, 2020), and North Dakota's in 2004, see N.D. ADMIN CODE 49 (2004).

56. Although the first few Lawyers Assistance Programs (LAPs) were founded in the mid-1970s, thirty-two LAPs were founded since 1990. *See* ABA SURVEY OF LAWYER ASSISTANCE PROGRAMS, *supra* note 53, at 3 fig.1; *see also* N.D. ADMIN. CODE 49; NEVADA LAWYERS ASSISTANCE PROGRAM (NLAP), *supra* note 55.

57. *See, e.g.*, BRIAN CUBAN, THE ADDICTED LAWYER: TALES OF THE BAR, BOOZE, BLOW, AND REDEMPTION (2017); HARPER, *supra* note 20; DOUGLAS LITOWITZ, THE DESTRUCTION OF YOUNG LAWYERS: BEYOND ONE L (2006); JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS (2005); Patrick Krill, *Why Lawyers Are Prone to Suicide*, CNN (Jan. 21, 2014, 10:15 AM), https://www.cnn.com/2014/01/20/opinion/krill-lawyers-suicide/index.html [https://perma.cc/RLF5-C45T]; Zimmerman, *supra* note 6.

58. Rosa Flores & Rose Marie Acre, *Why Are Lawyers Killing Themselves?*, CNN (Jan. 20, 2014), http://www.cnn.com/2014/01/19/us/lawyer-suicides/index.html [https://perma.cc/7HZW-9KT3]. Among other things, Flores and Acre noted that Kentucky had fifteen known lawyer suicides over a four-year period, South Carolina had six known lawyer suicides over an eighteen-month period in 2007–2008, and Oklahoma had one known lawyer suicide per month in 2004. *Id.*

A comprehensive 2016 study confirmed that not much, if anything, has changed in a quarter-century. This study, conducted by Patrick R. Krill, Ryan Johnson, and Linda Albert for the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation (the Krill Study),[59] found numbers consistent with—and in some cases, more troubling than—the earlier studies. The Krill Study surveyed nearly 13,000 practicing lawyers across the country and across varying demographics and types of legal practice.[60] It found that "rates of problematic drinking" were "generally consistent" with those reported in Benjamin, Sales, and Beck's 1990 study, with 20.6% to 36.4% of those surveyed qualifying as problem drinkers.[61]

However, the Krill Study found "considerably higher rates of mental health distress" than those found in the earlier studies.[62] In particular, it found 28.3% of lawyers surveyed suffer from some level of depression, 19.3% suffer from some level of anxiety, and 22.7% suffer from some level of stress.[63] Further, 45.7% of surveyed lawyers reported concerns with depression at some point in their career, and 61.1% reported concerned with anxiety at some point in their career.[64] An additional 11.5% of participants reported suicidal thoughts at some point during their career.[65] Moreover, the study found that lawyers have the highest rates of both problem drinking and depression in their first ten years of practice as compared with later years, and those working in private practice also have higher rates of both than those in other work environments.[66] In particu-

59. Krill et al., *supra* note 10.

60. *See id.* at 47 & tbl.1, 48 tbl.2.

61. *Id.* at 51; *see also id.* at 49 tbl.3. The Krill Study evaluated alcohol use using the Alcohol Use Disorders Identification Test, a ten-item "self-report developed by the World Health Organization (WHO) to screen for hazardous use, harmful use, and the potential for alcohol dependence." *Id.* at 47.

62. *Id.* at 51. The Krill Study evaluated depression, anxiety, and stress by utilizing the Depression Anxiety Stress Scales-31, a "self-report instrument consisting of three 7-item subscales assessing symptoms" of each. *Id.* at 48.

63. *Id.* at 50 tbl.4. These findings are not unique to American lawyers. For example, a 2014 study of Australian lawyers found that 37% of those sampled experienced moderate to extremely severe depressive symptoms, 31% experienced moderate to extremely severe anxiety symptoms, and 49% experienced moderate to extremely severe stress symptoms; further 35% of those lawyers sampled qualified as hazardous or harmful drinkers. Adele J. Bergin & Nerina L. Jimmieson, *Australian Lawyer Well-Being: Workplace Demands, Resources & the Impact of Time-Billing Targets*, 21 PSYCHIATRY, PSYCHOL. & L. 427, 434 (2014). Additionally, a 2009 study of over 900 Australian solicitors and over 750 Australian barristers found that 31% of solicitors and 16.7% of barristers suffer from high or very high distress, as compared with 13% of the general population. NORM KELK ET AL., BRAIN & MIND RESEARCH INST., U. SYDNEY, COURTING THE BLUES: ATTITUDES TOWARDS DEPRESSION IN AUSTRALIAN LAW STUDENTS AND LEGAL PROFESSIONALS 12 (2009), https://law.uq.edu.au/files/32510Courting-the-Blues.pdf [https://perma.cc/GV7M-GARN].

64. Krill et al., *supra* note 10, at 50.

65. *Id.*

66. *Id.* at 51.

lar, the study found that 32% of lawyers under thirty are problem drinkers.[67]

In light of, among other things, the Krill Study and a similar 2016 study of law students,[68] in August 2016, entities within and outside the ABA created the National Task Force on Lawyer Well-Being (the Task Force).[69] The Task Force recognized that the prevalence of mental health and addiction issues in the profession "are incompatible with a sustainable legal profession," and argued that "[t]o maintain confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now."[70]

To that end, the Task Force issued a report in August 2017, concluding that "lawyer well-being issues can no longer be ignored."[71] The report, entitled *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, issued a "call to action" for the profession to "get serious about the substance use and mental health of ourselves and those around us."[72] It provided "three reasons to take action": (1) "organizational effectiveness"; (2) "ethical integrity"; and (3) "humanitarian concerns."[73] First, the report concludes (as this Article demonstrates)[74] that "lawyer well-being contributes to organizational success," as "lawyer health is an important form of human capital that can provide a competitive advantage."[75] Second, the report concludes that "lawyer well-being influences ethics and professionalism," with "40 to 70 percent of disciplinary proceedings and

67. *Id.* at 49 tbl.3; *id.* at 51.

68. *See* 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. LEGAL EDUC. 116 (2016). This study, resulting from a survey of over 3,300 law students, found that "consumption of alcohol among law students appears to have become more prevalent than two decades ago," *id.* at 127, and 32% of respondents have used illegal drugs or prescription drugs without a prescription in the prior twelve months. *Id.* at 145. Further, the study found that 17% of law students experienced some level of depression, 37% reported some level of anxiety, and 6% reported suicidal ideation within the last twelve months. *Id.* at 136–39.

69. The Task Force is a "collection of entities within and outside the ABA"; it was "conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers," and created in August 2016. Bree Buchanan & James C. Coyle, *National Task Force on Lawyer Well-Being: Creating a Movement to Improve Well-Being in the Profession*, AM. B. ASS'N (Aug. 14, 2017), https://www.americanbar.org/content/dam/aba/images/abanews/ThePathTo LawyerWellBeingReportFINAL.pdf [https://perma.cc/W8ES-NRUB].

70. THE PATH TO LAWYER WELL-BEING, *supra* note 15.

71. *Id.* at 7.

72. *Id.* at 10.

73. *Id.* at 8.

74. *See infra* Section IV.C.

75. THE PATH TO LAWYER WELL-BEING, *supra* note 15, at 8 (footnote omitted); *see also id.* at 1 ("To be a good lawyer, one has to be a healthy lawyer.").

malpractice claims against lawyers involv[ing] substance use or depression, and often both."[76] Finally, the report concludes that "from a humanitarian perspective, promoting well-being is the right thing to do."[77]

The report goes on to make various recommendations for a series of "stakeholders"—judges,[78] regulators,[79] legal employers,[80] law schools,[81] bar associations,[82] lawyers' professional liability carriers,[83] and lawyers assistance programs[84]—to combat the "blind eye" that the legal profession has turned "to widespread health problems."[85] The recommendations to all stakeholders include "buy-in and role modeling" from the top down and taking steps to minimize the stigma of mental health and substance abuse disorders and to facilitate and encourage employees to seek and attain appropriate help.[86]

By its own admission, the report "makes a compelling case that the legal profession is at a crossroads," as the "current course" of "widespread disregard for lawyer well-being and its effects[] is not sustainable."[87] It concludes that the profession has "ignored this state of affairs long enough," and that "[a]s a profession, we have the capacity to face these challenges and create a better future for our lawyers" that is both "sustainable" and in pursuit of "the highest professional standards, business practices, and ethical ideals."[88]

II. WHY THIS HAPPENS: PROFESSIONAL RISK FACTORS AFFECTING MENTAL HEALTH AND ADDICTION

There is no one answer for why lawyers disproportionately suffer from mental health and addiction problems compared to the general population. Yet the fact remains that they do. This Article does not minimize the existence of biological, chemical, and genetic conditions that predispose individuals to mental illness or addiction. These cannot, and should not, be discounted or overlooked by individuals with such predispositions. Nevertheless, what this Article does argue, and what is beyond dispute, is that lawyer distress is systemic—that there exists a strong correlation between the legal profession and lawyer distress that can no longer be ig-

76. *Id.* at 8 (footnote omitted).
77. *Id.* at 9.
78. *Id.* at 22–24.
79. *Id.* at 25–30.
80. *Id.* at 31–34.
81. *Id.* at 35–40.
82. *Id.* at 41–42.
83. *Id.* at 43–44.
84. *Id.* at 45–46.
85. *Id.* at 12.
86. *Id.* at 12–13.
87. *Id.* at 47.
88. *Id.*

nored.[89] Some of the potential systemic sources of lawyer distress include: (1) the possible existence of an inherent "lawyer personality"; (2) the law school experience; and (3) several aspects of law practice.[90]

A. *"Lawyer Personality"*

It has long been assumed that the legal profession is composed of individuals who are inherently predisposed to being "pessimistic, unhappy, and more prone to destructive addictions than other occupational groups."[91] Indeed, accounts of the "depressing character of legal study" date back to at least the Middle Ages.[92] Yet the question of whether lawyers as a group are inherently prone to struggles with mental illness and addiction is far from settled, and the most recent research suggests that the stereotypical "lawyer personality" does not exist.

Early studies support the view that there are inherent qualities in individuals who seek to become or who are successful lawyers. These studies conclude that "personality traits most common among lawyers are not those associated with happy people,"[93] and that lawyers exhibit "several personality traits which tend to intensify lawyers' stress levels," such as low self-esteem, egotism, inflexibility, workaholism, cynicism, and aggression.[94]

For instance, in an influential 2001 article, Martin Seligman, Paul Verkuil, and Terry Kang argue that lawyers are more successful when they

89. *See* LITOWITZ, *supra* note 57, at 19.

> Let us be very clear on the question of causality: the legal profession makes lawyers unhappy. We must reject any suggestion that lawyers are unhappy *prior* to their immersion in the legal system, that these unhappy people somehow self-select their own unhappiness by subconsciously placing themselves in a depressing profession. . . . We did not bring a cloud of depression to the profession; we discovered the cloud when we got here. In other words, the problems affecting young lawyers are predominately systemic, not personal.

Id.

90. When discussing these as factors that affect lawyer mental health and addiction issues, that is only to suggest, as noted above, the existence of correlations between these factors and such issues and not scientific conclusions of cause and effect. Rather, the studies and other works discussed in this section establish correlations and apparent effects of these factors on lawyer distress. *Cf.* Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 559 n.8 (explaining how their findings "provide substantial confidence in apparent causal relationships" despite the limitation of its study focusing on correlations, particularly because of "the large sample sizes and the consistency of [their] findings with similar findings in previous related studies").

91. Margaret L. Kern & Daniel S. Bowling III, *Character Strengths and Academic Performance in Law Students*, 55 J. RES. IN PERSONALITY 25, 25 (2014).

92. *See* PETER GOODRICH, OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW 1–7 (1995).

93. LEVIT & LINDER, *supra* note 13, at 75.

94. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1417 (1997) (discussing AMIRAM ELWORK, STRESS MANAGEMENT FOR LAWYERS 15 (1995)).

have a "pessimistic 'explanatory style,'"[95] meaning they have a "tendency to interpret the causes of negative events in stable, global, and internal ways."[96] Also known as "prudence," this perspective "requires caution, skepticism, and 'reality-appreciation,'" and "enables a good lawyer to see snares and catastrophes that might conceivably occur in any given transaction."[97] This ability to anticipate problems and "issue-spot" is an essential quality for effective lawyering.[98]

Although this kind of pessimism is a quality of a good lawyer, it also correlates to mental distress, as it is well-documented as a major factor for depression and distress.[99] Lawyers who are pessimistic in practice often have that pessimism spill into their personal lives. For instance, lawyers who spend their working hours searching for, anticipating, and agonizing over problems tend to see the worst for themselves both inside and outside of the office.[100] They may also have a more negative or pessimistic view of their work and their lives and can focus on, or even catastrophize, problems in both.[101] Accordingly, as Seligman, Verkuil, and Yang conclude, "pessimism that might be adaptive in the profession also carries the risk of depression and anxiety in the lawyer's personal life."[102]

Beyond this penchant for pessimism, Susan Daicoff has attempted to quantify the "lawyer personality."[103] In reviewing studies done on lawyer characteristics, she concluded that on the Myers-Briggs Type Indicator personality assessment measure, lawyers disproportionately represent the "Thinking" rather than the "Feeling" type when compared to the general population.[104] She concluded further that, in contrast to most of the pop-

95. Seligman et al., *supra* note 13, at 39; *see also* Jason M. Satterfield et al., *Law School Performance Predicted by Explanatory Style*, 15 BEHAV. SCI. & L. 95, 100–04 (1995) (determining, in a study of nearly 400 University of Virginia Law School students, that pessimistic students were more successful in law school than optimistic ones).

96. Seligman et al., *supra* note 13, at 39.

97. *Id.* at 41.

98. *See id.* ("The ability to anticipate a whole range of problems that nonlawyers do not see is highly adaptive for the practicing lawyer.").

99. *See id.*; *cf.* Beck et al., *supra* note 10, at 57 ("[T]he basic pattern of distress may represent the traits necessary to be a successful lawyer (obsessive-compulsiveness, interpersonal sensitivity, and anxiety) and the costs associated with those success (depression and social alienation and isolation).").

100. Seligman et al., *supra* note 13, at 41.

101. *See, e.g.*, Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 358, 400 (2009); *see also* SHAWN ACHOR, THE HAPPINESS ADVANTAGE: HOW A POSITIVE BRAIN FUELS SUCCESS IN WORK AND LIFE 92–93 (2010).

102. Seligman et al., *supra* note 13, at 41.

103. *See, e.g.*, SUSAN SWAIM DAICOFF, LAWYER KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES (2004).

104. *See id.* at 32–36.

> Thinkers prefer "logical analysis, principles and impersonal reasoning and cost/benefit analyses" and are "more tolerant of conflict and criticism" . . . [while] [f]eelers prefer "harmonizing, building relationships,

ulation,[105] a majority of lawyers are introverts rather than extroverts;[106] intuitors rather than sensors;[107] and judgers rather than perceivers.[108] Based on her analysis, Daicoff contends that the "definable lawyer personality" is one

> conceptually coalesced into two groups of five traits: (a) a drive to achieve . . . ; (b) dominance, aggression, competitiveness, and masculinity; (c) emphasis on rights and obligations over emotions, interpersonal harmony, and relationships; (d) materialistic, pragmatic values over altruistic goals; and (e) higher than normal psychological distress.[109]

However, a 2014 empirical study by Margaret Kern and Daniel Bowling casts doubt on whether there are personality traits inherent within those in and choosing to enter the legal profession. Challenging the notion that there is some inherent "lawyer personality,"[110] they recognize that early studies support the vicious cycle of lawyers' success coming from pessimism, which leads to unhappiness in life, but note that those studies have not been replicated.[111] Their study revisited lawyer personalities by assessing twenty-four positive characteristics from the Values in Action Classification of Character Strengths (VIA-IS), because the selected traits "were seen as relatively universal, fulfilling to the individual, morally valued by individuals and societies, trait-like, distinctive, and measurable."[112] The study measured the strengths of nearly 300 law students against a sample of U.S. lawyers and six samples of non-lawyers.[113] They found that the

> pleasing people, making decisions on the basis of [their own] . . . personal likes and dislikes, and being attentive to the personal needs of others" and like to avoid conflict and criticism.

Id. at 33.

105. *Id.* at 32–36; *see also id.* at 34 tbl.2.1.

106. *Id.* at 32–33. Introverts are those who "focus on their inner world and [who] often feel drained if they spend too much time with other people," whereas extroverts are those who "focus on the outer world and feel energized by contacts with other people." *Id.*

107. *Id.* at 33. Intuitors are those who "would rather think about the big picture, abstract ideas, and global themes, learn new things, and solve complex problems," whereas sensors are those who "attend to concrete, real world things and enjoy working with real facts and details." *Id.*

108. *Id.* at 32–36; *see also id.* at 34 tbl.2.1. Judgers are those who "prefer structure, schedules, closure on decisions, planning, follow through, and a 'cut-to-the-chase' approach," whereas perceivers are those who "prefer a 'go with the flow and see what develops' approach." *Id.*

109. *Id.* at 41 & exh. 2.1.

110. Kern & Bowling, *supra* note 91, at 29.

111. *Id.* at 25 (citing, *inter alia*, Seligman et al., *supra* note 13).

112. *Id.* These characteristics are: "appreciation of beauty, authenticity, bravery, creativity, curiosity, fairness, forgiveness, gratitude, hope, humor, kindness, leadership, capacity for love, love of learning, modesty, open-mindedness, persistence, perspective, prudence, self-regulation, social intelligence, spirituality, teamwork, and zest." *Id.*

113. *Id.* at 26–27 tbl.1.

law students surveyed "demonstrated a normal range of characteristics, similar to other intelligent, highly educated samples."[114] Consequently, they conclude "that the supposed presence of a negative 'lawyer personality' might be overstated."[115]

If it is true that there is no such "negative 'lawyer personality'"[116]—that it is untrue that "lawyers are . . . unhappy people [who] somehow self-select their own unhappiness by subconsciously placing themselves in a depressing profession," but rather it is "the legal profession [that] makes lawyers unhappy"[117]—a question remains whether and to what extent law school and the profession itself contributes to lawyer distress. These are discussed in turn below.

B. *Law School*

A significant, decades-long body of scholarship demonstrates that law school poisons the well of prospective lawyers' well-being. For instance, in a 1986 empirical study of law students in Arizona, Andrew Benjamin and his colleagues found that law students were as psychologically healthy as the general population when they enter law school, but within six months "average scores on *all* symptom indices changed from initial values within the normal range to scores two standard deviations above normative expectation."[118] These elevated symptoms "significantly worsened" throughout law school, and they "did not lessen significantly between the spring of third year and the next two years of legal practice."[119] They found that, depending on the group, 17%–40% of the student-subjects "suffered significant levels of depression," with 20%–40% reporting "other significantly elevated symptoms, including obsessive-compulsive, interpersonal sensitivity, anxiety, hostility, paranoid ideation, and psychoticism (social alienation and isolation)."[120] These elevated symptoms were not dependent on

114. *Id.* at 28.

115. *Id.* at 29; *see also* Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 621 ("Simply stated, there is nothing . . . to suggest that attorneys differ from other people with regard to their prerequisites for feeling good and feeling satisfied with life. . . . In order to thrive, we need the same authenticity, autonomy, close relationships, supportive teaching and supervision, altruistic values, and focus on self-understanding and growth that promotes thriving in others.").

116. Kern & Bowling, *supra* note 91, at 29. Daicoff argues that "evidence suggests that humanistic, people-oriented individuals do not fare well, psychologically or academically, in law school or in the legal profession." Daicoff, *supra* note 94, at 1405. However, evidence exists to the contrary—i.e., that students and lawyers who rely on their strengths and act according to their own intrinsic motivations and values perform better and are less distressed. *See, e.g.*, Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 576–85; Peterson & Peterson, *supra* note 101, at 412–16; Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAVIORAL SCI. & L. 261, 281 (2004) [hereinafter Sheldon & Krieger, *Undermining Effects*].

117. LITOWITZ, *supra* note 57, at 19.

118. Benjamin et al., *The Role of Legal Education*, *supra* note 26, at 240.

119. *Id.* at 241.

120. *Id.* at 236.

any demographic or descriptive differences, including undergraduate or law school GPA; hours devoted to undergraduate or law school studies or to work after graduation; bar examination passage; or size of law practice.[121]

In the mid-2000s, Lawrence Krieger and Kennon Sheldon authored two influential studies of the negative effect law school has on the subjective well-being of law students.[122] Krieger and Sheldon based their research on the "self-determination theory of optimal motivation and human thriving," or "SDT," which "focuses on the contextual and personality factors that cause positive and negative motivation, with corresponding positive and negative performance and subjective well-being (SWB) outcomes."[123] As Krieger and Sheldon describe elsewhere, there are essentially three central tenets of SDT relevant here. First is "that all human beings have certain basic psychological needs—to feel competent/effective, autonomous/authentic, and related/connected with others"; these experiences produce well-being, while their absence correlates to distress.[124] Second, SDT posits that an individual's "values, goals, and motivations" form the basis of their behavior, and "intrinsic values and internal motivations are more predictive of well-being than their extrinsic and external counterparts."[125] Finally, SDT posits that supervisors, teachers or

121. *Id.* at 246.

122. Sheldon & Krieger, *Undermining Effects*, *supra* note 116; Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883 (2007) [hereinafter Sheldon & Krieger, *Longitudinal Test of Self-Determination Theory*]. Elsewhere, Krieger and Sheldon define "subjective well-being" as "the sum of life satisfaction and positive affect, or mood (after subtracting negative affect), utilizing established instruments for each factor." Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 562. They continue:

> These affect and satisfaction factors provide data on complementary aspects of personal experience. Although moods are experienced as transient, they have been found to persist over time in stable ways. Positive and negative affect are purely subjective, straightforward experiences of "feeling good" or "feeling bad" that many people would interpret as happiness or its opposite. Life satisfaction, on the other hand, includes a personal (subjective) evaluation of objective circumstances—such as one's work, home, relationships, possessions, income, and leisure opportunities. Th[is] measure of life satisfaction . . . is validated by its use in previous social science research and is broader than the concept of career or job satisfaction . . . .

Id. at 562–63.

123. Sheldon & Krieger, *Undermining Effects*, *supra* note 116, at 263.

124. Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 564.

125. *Id.* at 564–65. As Krieger and Sheldon explain "[v]alues or goals such as personal growth, love, helping others, and building community are considered 'intrinsic,' while 'extrinsic' values include affluence, beauty, status, and power." *Id.* at 564. Additionally, "motivation for behavior is distinguished based on the locus of its source, either 'internal' (the behavior is inherently interesting and enjoyable, or it is meaningful because it furthers one's own values) or 'external' (behavior is compelled by guilt, fear, or pressure, or chosen to please or impress others)." *Id.* at 564–65.

mentors who provide "autonomy support" to their subordinates "enhance[] their [subordinates'] ability to perform maximally, fulfill their psychological needs, and experience well-being."[126] Put simply, SDT research posits that: (1) why a person acts—i.e., for internal satisfaction or external factors; (2) what a person seeks through their actions—i.e., intrinsic goals such as personal growth and community or extrinsic goals such as fame and money; and (3) the level of autonomy support one has from their superiors, all have "significant consequences for [their] satisfaction and performance," as well as their overall SWB.[127]

In their first study, Krieger and Sheldon found that law students enter law school with a higher positive SWB compared with undergraduates.[128] Yet, one year into law school, students suffered a decline in SWB and an increase in physical and mental health problems.[129] These declines in well-being and increases in health problems continued throughout law school.[130]

In particular, they found that these increases in mental and physical distress corresponded with decreases in positive affect and overall life satisfaction.[131] They found further that these increases in distress also corresponded with shifts in their reasons for becoming lawyers—from internal purposes (such as interest and meaning) to external ones (such as money and recognition)[132]—as well as decreases in values of all kinds after the first year.[133]

Krieger and Sheldon conclude that students' "endorsement of intrinsic values" declined over the first year, with a shift toward the extrinsic "appearance and image values."[134] Additionally, students' goals and motivations moved from the internal—"reasons of interest and enjoyment"—to the external, notably "pleasing or impressing others."[135] Strikingly, Krieger and Sheldon also found that this shift was not limited to the first year, as "neither the losses in SWB nor in relative intrinsic value orienta-

126. *Id.* at 565. Krieger and Sheldon describe "autonomy support" as when authorities or superiors "support and acknowledge their subordinates' initiative and self-directness." Sheldon & Krieger, *Longitudinal Test of Self-Determination Theory*, *supra* note 122, at 884. When they do so, "those subordinates discover, retain, and enhance their intrinsic motivations and at least internalize nonenjoyable but important extrinsic motivations. In contrast, when authorities are controlling or deny self-agency of subordinates, intrinsic motivations are undermined and internalization is forestalled." *Id.*

127. Sheldon & Krieger, *Undermining Effects*, *supra* note 116, at 264; Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 565.

128. Sheldon & Krieger, *Undermining Effects*, *supra* note 116, at 271.

129. *Id.* at 272.

130. *Id.* at 280.

131. *Id.* at 270–72.

132. *Id.* at 272 tbl.3.

133. *Id.* at 273.

134. *Id.* at 281.

135. *Id.*

tion rebounded" during law school;[136] in fact, during the second and third years of law school, all types of valuing decreased.[137]

Krieger and Sheldon did find, however, that students who acted "for intrinsic and self-determined reasons" tended to "perform more persistently, flexibly, creatively, and effectively," and therefore attained a higher GPA.[138] However, they note the "potential irony" to this finding, because although such students with intrinsic motivations and values performed well academically, such high-performing students "tended to shift toward more lucrative, high-prestige career preferences."[139] And, as discussed below,[140] the values associated with these positions "tend to contribute to decreased health, SWB, and career satisfaction over time."[141]

In a 2007 study, Krieger and Sheldon further investigated the negative effects of law school on students' SWB.[142] It adds to the first study by examining the more nuanced components of SDT—the level of satisfaction of the students' psychological needs for autonomy, competence, and relatedness to others[143]—as well as the autonomy support students receive from faculty at two different schools, one whose faculty has a "traditional," scholarly focus, and one whose faculty is "less traditional" and focused more on teaching and practical skills for students.[144] As is relevant here, the study confirmed the findings of their first study, particularly that students' SWB and internal motivation decreased and their distress increased throughout law school.[145] In particular, they found that these negative outcomes resulted from decreases in students' satisfaction in their needs for autonomy, competence, and relatedness since entering law school.[146]

Thus, these studies, among others,[147] have demonstrated that law students suffer disproportionately high levels of distress and suggest that this

136. *Id.*

137. *Id.* at 282. Krieger and Sheldon observe that this finding is "consistent with the common stereotype that lawyers 'have no values'—that they are hired guns willing to represent any position that promises to pay." *Id.*

138. *Id.* at 281; *cf.* Peterson & Peterson, *supra* note 101, at 411 (reporting results of survey of George Washington University Law School students that revealed "students who use their strengths on a regular basis report higher satisfaction with life and lower levels of stress and depression.").

139. Sheldon & Krieger, *Undermining Effects*, *supra* note 116, at 281.

140. *See infra* Section II.C.

141. Sheldon & Krieger, *Undermining Effects*, *supra* note 116, at 281.

142. Sheldon & Krieger, *Longitudinal Test of Self-Determination Theory*, *supra* note 122.

143. *Id.* at 886–87.

144. *Id.*

145. *Id.* at 889.

146. *See id.* at 893–94. Additionally, students at the law school with the "less traditional" faculty reported a more autonomy-supportive environment and fared better in all other measured outcomes—well-being, grade performance, and career motivation—than students at the school with the "traditional," and less autonomy-supportive, faculty. *Id.* at 890–91 & tbls.2 & 3.

147. *See, e.g.*, AM. ASS'N OF LAW SCHOOLS, *supra* note 48; JESSIE AGATSTEIN ET AL., FALLING THROUGH THE CRACKS: A REPORT ON MENTAL HEALTH AT YALE LAW

distress correlates to law school itself. These elevated levels of mental health and addiction issues among law students remain high today. In 2014, Jerome Organ, David Jaffe, and Katherine Bender surveyed more than 3,300 students across fifteen law schools to assess mental health and substance abuse issues among students as well as whether and to what extent students seek help for these issues.[148] They found that 17% of respondents screened positive for depression,[149] 37% screened positive for anxiety,[150] 43% reported binge-drinking at least once in the prior two weeks,[151] 25% were at risk for alcoholism,[152] and 35% used illicit street drugs or prescription drugs without a prescription.[153] Additionally, a 2014 non-empirically validated survey of students at Yale Law School found that up to 70% of its students suffer from some form of self-identified mental distress while in school.[154]

The reasons why law school causes such declines in well-being and rises in mental health and substance abuse among its students is beyond the scope of this Article, but suffice it to say that as a result of the law school model, students experience many of the same distress, mental health, and addiction issues that pervade the legal profession,[155] and it may lay the groundwork for that very pervasiveness.[156]

C. *Law Practice*

In 2015, Krieger and Sheldon conducted an empirical study of nearly 8,000 lawyers throughout the United States across all areas of practice to determine the contributors to lawyer well-being and life satisfaction, as well as distress and dissatisfaction.[157] In designing their study, they mea-

SCHOOL (2014), https://law.yale.edu/sites/default/files/area/department/studentaffairs/document/falling_through_the_cracks.pdf [https://perma.cc/38N2-9B8N]; Mathew M. Dammeyer & Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 L. & HUM. BEHAVIOR 55 (1999); Lawrence Silver, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201 (1968).

148. Organ et al., *supra* note 68, at 122–26. For a discussion of the barriers to treatment, see *infra* Section II.B.

149. Organ et al., *supra* note 68, at 136.

150. *Id.* at 137–38.

151. *Id.* at 128–29 & tbl.2.

152. *Id.* at 131–32 & tbl.5. Further, the authors noted that "consumption of alcohol among law students appears to have become more prevalent than two decades ago." *Id.* at 127.

153. *Id.* at 133–36.

154. AGATSTEIN ET AL., *supra* note 147.

155. *See, e.g.*, STEFANCIC & DELGADO, *supra* note 57, at 62–63; *see also, e.g.*, LITOWITZ, *supra* note 57, at 29–51 (discussing "the trouble with law school"); Dammeyer & Nunez, *supra* note 147, at 61; Peterson & Peterson, *supra* note 101, at 358.

156. Debra S. Austin, *Killing Them Softly: Neuroscience and Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOY. L. REV. 791, 793–94 (2013) ("Stress in legal education may . . . set the stage for abnormally high rates of anxiety and depression among lawyers.").

157. Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13.

sured the SWB metrics (need satisfaction, values, and motivations) as well as depression and alcohol consumption.[158]

Consistent with their prior studies of law students, Krieger and Sheldon found that internal values and motivations—the very factors that erode during law school—and psychological need satisfaction were most strongly predictive of lawyer well-being, whereas "the external factors emphasized in law school and by many legal employers were, at best, only modestly associated with lawyer well-being."[159] The strongest predictors of well-being were the psychological needs of autonomy, relatedness to others, and competence, as well as motivation.[160] They determined that the correlations between psychological needs and lawyer well-being were "exceptionally strong," and that these needs were strongly inversely correlated with depression[161] as well as inversely correlated with quantity of drinking.[162]

Accordingly, aspects of the profession that inhibit these psychological needs, and foster external values and motivations, can contribute to lawyer mental health and addiction issues. While a myriad of such aspects certainly exists, three critical areas are: (1) lack of autonomy; (2) lack of relatedness; and (3) extrinsic values and motivation.

1. *Lack of Autonomy*

Autonomy is one of the key metrics for lawyer happiness,[163] and its absence in "high-pressure, low decision latitude" positions of law firm associates render associates "likely candidates for negative health effects"[164] such as depression.[165] While there are many areas of the profession that engender a lack of autonomy, this Article focuses on two: the reliance on the billable hour as a measure of productivity and compensation and the low decision latitude of particularly junior lawyers.

a. Reliance on the Billable Hour

The prevailing business model for law firms over the last several decades is the billable hour, by which they charge their clients an hourly rate

158. *Id.* at 569.

159. *Id.* at 585; *see id.* at 583 fig.1, 584–85.

160. *Id.* at 585. In fact, psychological need satisfaction measured "relationships to well-being approximately . . . 3.5 times stronger than that of income." *Id.* at 579.

161. *Id.* at 579.

162. *Id.* at 586–87.

163. *Id.* at 582–84 & figs.1 & 2; *see also* Eaton et al., *supra* note 10, at 1086 ("[P]eople in occupations that involve individual autonomy, control over the environment, and direction and planning of the flow of work will be protected against depression.")

164. Seligman et al., *supra* note 13, at 42.

165. Eaton et al., *supra* note 10, at 1086 ("Occupations involving little or no direction or control contribute to a relatively stable personality configuration linked to learned helplessness, which has been implicated in depression.").

for each hour each lawyer works. As law firms have commodified over the last thirty-five years,[166] hour expectations have increased. For instance, in the early 1980s, few law firms had minimum billable hour requirements, but in recent years "most large law firms expressly set them at 1,900 to 2,000,"[167] with some firms expecting much more.[168]

Billable hours as a benchmark of productivity is counterintuitive, as "the behavior that maximizes hours is antithetical to true productivity."[169] While "[p]roductivity [generally] is the 'relative measure of the efficiency of a person . . . in converting inputs into useful outputs,'" the general benchmark of lawyer productivity—the total time spent on a task without regard to the quality or utility of the work product—is a measure of anything but productivity.[170] Indeed, more hours spent on a task is an indication of unproductivity, as workers are less productive and efficient the longer they toil on a task.[171] Put differently, the billable hour system rewards unproductivity and inefficiency.

Notwithstanding this inherent inefficiency, billable hours are the standard measure of work, and law firm associates understand that their futures depend on this measure of output, and their success at the firm requires them to bill much more than the firm's stated billable hour target.[172] Moreover, a lawyer must "work" many more hours to hit their billable target.[173] For instance, Yale Law School calculated that a lawyer must

166. *See generally* HARPER, *supra* note 20. Although billable hours can bear on autonomy and relatedness satisfaction (as well as motivation), see Krieger & Sheldon, *supra* note 13, at 596, but is included as related to "competence" because it rewards inefficiency. *Cf.* DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 13 (2015) ("[T]he hourly billing system pegs profits more to the quantity of time spent than to the efficiency of its use, and profits have become the dominant concern. High billable hour quotas also screen out individuals with competing values. A willingness to work long hours functions as a proxy for commitment.").

167. HARPER, *supra* note 20, at 79; *Update on Associate Hours Worked*, NALP BULL. (2016), https://www.nalp.org/0516research [https://perma.cc/7499-TKEQ] (reporting that nearly 60% of law firms require that lawyers bill at least 1,900 hours). *But see* CTR. FOR THE STUDY OF THE LEGAL PROFESSION, GEORGETOWN LAW & LEGAL EXEC. INST., 2019 REPORT ON THE STATE OF THE LEGAL MARKET 7 fig.8 (2019), http://ask.legalsolutions.thomsonreuters.info/LEI_2019-State_of_Legal_Mkt [https://perma.cc/MDQ6-V9F8] (reporting that the average lawyer at 161 U.S.-based law firms surveyed billed 122 hours per month in 2018, or 1,464 hours per year).

168. *See, e.g.*, Ingo Forstenlechner & Fiona Lettice, *Well Paid but Undervalued and Overworked: The Highs and Lows of Being a Junior Lawyer in a Leading Law Firm*, 30 EMP. REL. 640, 642 (2008) (noting that although the international law firm studied had no official billable hour target, "there [was] an unofficial target of 2,400 hours").

169. HARPER, *supra* note 20, at 77.

170. *Id.* at 78–79.

171. *Id.* (noting the effort spent "on the fourteenth hour of a day can't be as valuable as that exerted during hour six").

172. *Id.* at 79.

173. *See, e.g.*, *DLA Piper LLP–U.S. Firmwide: Hours and Work Arrangements*, NALP DIRECTORY OF LEGAL EMP'RS (2019), http://nalpdirectory.com/employer_profile?FormID=11656&QuestionTabID=39&SearchCondJSSe=%7B%22SearchEmployer

be at work 2,420 hours to bill 1,800, and that 2,200 billable hours requires an lawyer be "at work" 3,048 hours.[174]

It is no wonder, then, as the ABA's Commission on Women in the Profession warned nearly twenty years ago, that "[e]xcessive workloads are a leading cause of lawyers' disproportionately high rates of reproductive dysfunction, stress, substance abuse, and mental health difficulties."[175] As one lawyer put it, billable hours are "the biggest reason lawyers are so depressed."[176]

b. Low Decision Latitude

Beyond the number of hours worked, many lawyers—particularly junior lawyers[177]—experience distress because they lack autonomy in the work that they do. Associates have little say over their work, limited inter-

Name%22%3A%22dla%20piper%22%7D [https://perma.cc/TTJ9-ZNM5] (last visited May 7, 2020) (noting that, on average, associates firm-wide in 2018 billed 1,860 hours yet worked 2,343).

174. *The Truth About the Billable Hour*, YALE L. SCH. (July 2017), https://law.yale.edu/sites/default/files/area/department/cdo/document/billable_hour.pdf [https://perma.cc/ZF2E-2LWF]; *see also* Colin James, *Legal Practice on Time: The Ethical Risk and Inefficiency of the Six-Minute Unit*, 42 ALT. L.J. 61, 62 (2017) (finding, that for Australian solicitors, "time-billing may record 50 to 70 per cent of the actual hours worked").

175. DEBORAH L. RHODE, AM. BAR ASS'N, COMM'N ON WOMEN IN THE PROFESSION, BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE 12 (2001); *cf.* Debra Austin & Rob Durr, *Emotion Regulation for Lawyers: A Mind Is a Challenging Thing to Tame*, 16 WYO. L. REV. 387, 401 (2016) ("A lawyer subjected to chronic stress can experience emotional disorders such as anxiety, panic attacks, or depression, and physical problems such as irritability, breathlessness, dizziness, abdominal discomfort, muscle tension, sweating, chills, heart palpitations, chest pain, and/or increased blood pressure.").

176. Joshua E. Perry, *The Ethical Costs of Commercializing the Professions: First-Person Narratives from the Legal and Medical Trenches*, 13 PENN. J.L. & SOC. CHANGE 169, 184 n.57 (2009). *But see* Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 596 (finding that while "important psychological predictors of well-being decreased" with increased billable hours, such increases only led to "slightly less happiness"); Bergin & Jimmieson, *supra* note 63, at 437 (finding that high billing lawyers "experienced greater anxiety, more stress, more job dissatisfaction and less work/life balance," but that their study "did not provide evidence that having high billing targets was related to greater levels of depression and drinking, compared with lawyers with low-to-moderate billing targets or no billing targets").

177. However, despite their higher status and 62% greater pay than senior associates, junior partners "experience[] no greater happiness than the associates." Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 597–98; *cf.* Jonathan Koltai et al., *The Status-Health Paradox: Organizational Context, Stress Exposure, and Well-Being in the Legal Profession*, 59 J. HEALTH & SOC. BEHAVIOR 20, 31 (2018) (finding that "higher status lawyers have a mental health disadvantage relative to their peers in the public sector, and are no better off in terms of health"). In the words of one law firm partner: "[T]he hours don't get any better for partners; partners have even more pressure than associates do." Kimberly Kirkland, *Ethics in Large Law Firms: The Principles of Pragmatism*, 35 U. MEM. L. REV. 631, 683 (2005).

action with senior partners, and little to no client contact.[178] With this lack of autonomy also comes isolation, as firms have "little mentoring, training, or firm citizenship behaviors," and there is little institutional incentive to engage in them.[179] Consequently, lawyers feel alienated from their work and cannot see how it matters beyond being a billable deliverable.[180] As an illustration, in one survey of associates at an international law firm, approximately 86% said they have non-interesting work, approximately 88% said they do not have interaction with partners, and approximately 77% said they are not "being shown appreciation for their work" by senior associates or partners.[181]

Junior lawyers have expressed "angst over pressures to bill exorbitant amounts of money to clients to whom they felt no meaningful connection."[182] They also have expressed frustration over the conflict between "their presumed role as autonomous professionals who" establish and maintain client relationships "and their more subservient role as employees who" exist to generate partner revenue.[183]

Additionally, with advances in technology, lawyers are increasingly on-demand around the clock. Lawyers are expected to be reachable at all times, and in effect are constantly on call.[184] With this, lawyers have less autonomy support—that is, superiors do not acknowledge the lawyers' perspective or preferences, or provide them with meaningful choices about when and where to work and how to balance their lives. While technology makes it possible for lawyers to work from home, it also makes it virtually impossible *not* to work from home; consequently, "[p]ersonal lives get lost in the shuffle."[185] This "effective monitoring" of lawyer work at all times is true not only of junior lawyers, but also for senior lawyers who fear losing clients for being unresponsive on demand.[186]

178. Seligman et al., *supra* note 13, at 42.

179. Anne M. Brafford, Building a Positive Law Firm: The Legal Profession at Its Best 13 (Apr. 1, 2014) (unpublished Master of Applied Positive Psychology (MAPP) thesis, University of Pennsylvania), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=mapp_capstone [https://perma.cc/2TTX-L435]; *see also* Schiltz, *supra* note 13, at 934–38 (discussing how "the vaunted training of big firms does not exist").

180. LEVIT & LINDER, *supra* note 13, at 63 ("Lawyers become alienated from the nature of their work, and they do not see how their work matters.").

181. Forstenlechner & Lettice, *supra* note 168, at 647 & tbl.v.

182. Perry, *supra* note 176, at 198.

183. *Id.*

184. Forstenlechner & Lettice, *supra* note 168, at 643; *see also* RHODE, *supra* note 166, at 13 ("In some ways, technology has made a bad situation worse by accelerating the pace of practice and placing lawyers perpetually on call.").

185. RHODE, *supra* note 166, at 13.

186. Forstenlechner & Lettice, *supra* note 168, at 643; *see also* RHODE, *supra* note 166, at 13 ("It is not uncommon to hear of a client who e-mails on New Year's Eve and fires a firm for being insufficiently responsive on a Sunday morning."); Caroline Spiezio, *Constantly on Call: The Client's Role in the Legal Profession's Mental Health Crisis*, CORP. COUN. (July 14, 2019), https://www.law.com/corpcounsel/2019/07/14/constantly-on-call-the-clients-role-in-the-legal-professions-mental-health-

2. *Lack of Relatedness: Adversarial System*

The practice of law is inherently adversarial, which itself is inherently stressful by nature.[187] To thrive in the adversarial system, lawyers are trained to be competitive and aggressive because the goal is to "win."[188] Such training is "fueled by negative emotions," and as a consequence "can be a source of lawyer demoralization, even if it fulfills a social function."[189] Consequently, when the practice of law is reduced to many zero-sum disputes, it can "produce predictable emotional consequences for the practitioner, who will be anxious, angry, and sad much of [their] professional life."[190] Moreover, dealing with difficult opponents, clients, and colleagues can often leave lawyers feeling "emotionally shattered."[191]

3. *Extrinsic Values and Motivations*

Lawyers often enter a firm culture "that is hostile to [their] values."[192] As Judge (then-Professor) Patrick Schiltz observed:

> The system does not want you to apply the same values in the workplace that you do outside of work . . . ; it wants you to replace those values with the system's values. The system is obsessed with money, and it wants you to be, too. The system wants you—it needs you—to play the game.[193]

As a result of this "game," law is no longer seen by many as a calling,[194] but as "just a job with ridiculous hours, stress, and unpaid law

crisis/ [https://perma.cc/5S9D-PSVR] ("Client demands for fast turnaround times, even on non-urgent matters, can leave outside counsel in constant crisis mode. That stress can lead to . . . mental health issues such as depression, addiction, and anxiety . . . .").

187. Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 599.

188. *See* Seligman et al., *supra* note 13, at 47. A recent study of American and Canadian lawyers revealed that lawyers at large firms experience higher rates of "depressive symptoms and risk of poor health" than those in smaller firms or the public sector, including because such lawyers have "higher levels of overwork" and work-life conflict. Koltai et al., *supra* note 177, at 31–32.

189. Seligman et al., *supra* note 13, at 47.

190. *Id.*

191. ANGUS LYON, LAWYER'S GUIDE TO WELLBEING AND MANAGING STRESS 97 (2015).

192. Schiltz, *supra* note 13, at 912.

193. *Id.*

194. There are essentially three different mindsets people have about their work: jobs, careers, and callings. *See, e.g.*, Amy Wrzesniewski et al., *Jobs, Careers, and Callings: People's Relations to Their Work*, 31 J. RES. PERSONALITY 21, 22 (1997). Briefly, a job "is a means that allows individuals to acquire the resources needed to enjoy their time away from" it. *Id.* A career is a position in which one has "a deeper personal investment in their work and mark their achievements not only though monetary gain, but through advancement within the occupational structure," which "often brings higher social standing, increased power within the scope of one's occupation, and higher self-esteem for the worker." *Id.* A calling is a position one "works not for financial gain or [c]areer advancement, but instead for the

school debt,"[195] and a primary focus on generating revenue for the firm. This "loss of purpose beyond making money" contributes greatly to lawyer dissatisfaction,[196] and it should come as no surprise that along with well-being, lawyers believe legal professionalism is in decline as well.[197] As a consequence, there has been a call for a return to more traditional notions of law practice, ones that prioritizes integrity, civility, and community.[198] More generally, if lawyers "re-discover *why* they became lawyers in the first place and rededicate themselves to those intrinsic goals" and motivations that initially led them to law school, it will lead to a "happier, healthier, and more ethical profession."[199]

III. IGNORING THE MORAL CASE FOR LAWYER WELL-BEING

Notwithstanding the existence and the profession's knowledge of the widespread prevalence of lawyer mental health and addiction issues, as well as some obvious costs associated with them, law firms (and the profession at large) have ignored the pleas for change. These pleas, largely resting on moral grounds, have gone unheeded largely for two reasons: (1) firms have cared primarily about their bottom lines; and (2) the stigma associated with mental health and addiction issues, as well as other barri-

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fulfillment that doing the work brings for the individual." *Id.* Individuals who view their work as callings generally have "greater life, health, and job satisfaction and . . . better health" than those who view their work as mere jobs or careers. *See id.* at 29, 30–31; *see also id.* at 27 tbl.3. A person can find their calling within any occupation. *See id.* at 22; *cf. id.* at 31 (finding each mindset represented in nearly equal thirds among sample administrative assistants, concluding that "[s]atisfaction with life and with work may be more dependent on how an employee sees his or her work than on income or occupational prestige").

195. Daniel S. Bowling, III, *Lawyers and Their Elusive Pursuit of Happiness: Does It Matter?*, 7 DUKE F. L. & SOC. CHANGE 37, 49 (2015) (footnotes omitted).

196. BARRY SCHWARTZ & KENNETH SHARPE, PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING 216–17 (2010). Moreover, increased compensation does not contribute to lawyer subjective well-being. *See* Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 583 fig.1, 597–98. In fact, public interest lawyers responding to Krieger and Sheldon's survey reported greater subjective well-being than their highly-paid "elite" and "prestige" lawyers at private firms. *Id.* at 590–91, 593 tbl.1.

197. Bowling, *supra* note 195, at 48; *see also* Krieger & Sheldon, *What Makes Lawyers Happy?*, *supra* note 13, at 612 (noting that survey respondents "has a positive view of neither the justice in the justice system nor the professional behavior of professionals in the system").

198. Susan Daicoff, *Asking Lawyers to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 582 (1998) (noting the call for a "return to more traditional, gentlemanly law practice," in which lawyers "abandon these [financial and competitive] motivations and instead adopt a moral system that values integrity, honesty, community service, pro bono work, courteousness, civility, cooperation with others, and sensitivity to interpersonal concerns").

199. Bowling, *supra* note 195, at 49–50.

ers to treatment. As set forth below, each inhibits, undermines, and puts at risk, lawyer well-being.

A. *The Profit-Centered Practice: Commodification of Law Firms*

Over the past thirty-plus years, firms have moved from the idea of the "noble profession" and toward the profit-maximizing "business model" dominating private practice today.[200] As a result of the *American Lawyer* first publishing its annual list of firms' revenues and profits-per-partner in 1985, lawyers were able to discover how much their colleagues were making elsewhere, and earning a high spot on the "Am Law 100," or firms with the top 100 revenues nationwide, was a coveted honor.[201] In response, firms adopted management techniques aimed at moving them up in the annual rankings.[202] As a consequence, total gross revenue for Am Law 100 firms has gone from $7 billion in 1985 to $71 billion in 2010—a 9.71% compound annual growth rate[203]—to $98.75 billion in 2018.[204]

Moreover, "[m]anaging partners admit publicly that they run their firms to maximize instant profits for the relatively few"—the partners.[205] And, to that end, their practices have been successful: while in 1985 the average profits-per-partner for the top fifty firms on AmLaw's inaugural list was $300,000, that figure for the top fifty firms in the Am Law 100 in 2011 had risen to $1.6 million,"[206] and to $2.54 million in 2018.[207]

Partner profits are maximized through the so-called "Cravath model,"[208] which focuses on high leverage, high hourly rates, and high billable hours.[209] Taking each in turn, first, a firm's leverage refers to the ratio of its salaried lawyers (i.e., associates, counsel, and non-equity partners) to equity partners.[210] The higher the leverage, the more money the firm's equity partners make.[211] To achieve higher leverage, firms hire

200. HARPER, *supra* note 20, at 70.

201. *Id.* at 72.

202. *Id.*

203. BRUCE MACEWEN, GROWTH IS DEAD: NOW WHAT? LAW FIRMS ON THE BRINK 15 (2013).

204. *The Am Law 100 2019*, AM. LAW. (May 2019).

205. HARPER, *supra* note 20, at 76.

206. *Id.* at 72.

207. *The Am Law 100 2019*, *supra* note 204. Average profits-per-partner was calculated using data listed for the top fifty firms by total revenue.

208. Under the "Cravath model," firms "hire a large number of associates . . . so that only the most brilliant legal minds ascended to its partnership. (Historically, about one in twelve associates make partner.). . . . [Meanwhile,] the firm ma[kes] a killing by billing [associates] out at top-of-the-market rates." Noam Scheiber, *The Last Days of Big Law: You Can't Imagine the Terror When the Money Dries Up*, NEW REPUBLIC, https://newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries [https://perma.cc/TC96-P5BA].

209. *See* HARPER, *supra* note 20, at 76–79. Harper refers to leverage, hourly rates, and billable hours as a "three-legged stool." *See id.*

210. *Id.* at 77.

211. *Id.*

many more associates than they expect will be promoted to equity partnership (or even remain with the firm beyond a few years).[212] Put simply, it is in firms' interest to hire many associates with the expectation to make few, if any, partner, because more associates means more profits for partners, and fewer partners means a larger share for each.[213] This practice has yielded considerable results. Since the creation of the Am Law 100, leverage ratios have grown considerably: in 1985, the average leverage ratio for the top fifty Am Law-ranked firms was 1.76; it doubled to 3.54 in 2010,[214] and it rose to 4.47 in 2018,[215] with, as noted above, the average profits per equity partner at $2.54 million.[216]

Second, firms' hourly rates have risen steadily both before and after the Great Recession of the late 2000s, with many firms raising their billing rates by 5% annually after the recession, and the top twelve firms raising rates more than 7%.[217] Finally, the third component of the Cravath model is high billable hour expectations. As discussed in Section II.C.1.a above, as law firms have commodified over the last thirty-five years, hour expectations have increased from no minimum billable hour requirements in the early 1980s to at or above 2,000 hours today.[218]

Thus, as a result of the Cravath model, a firm achieves its success—i.e., maximizing revenue and profits per partner—by hiring large classes of associates each year and requiring them to work long hours for the years preceding their eligibility for partnership.[219] This model not only keeps equity partner wealth growing by the continuous influx of new junior associates but also leads to significant attrition such that few associates last long enough even to be considered for equity partner.[220] As firms have adopted the Cravath model, they have reinvented themselves as profit-generating businesses by which only a few partners at the top truly benefit.[221]

Even though firms produce considerable revenue, partners are not content with their existing wealth; they think they should be making more

212. *Id.*

213. Schiltz, *supra* note 13, at 901 (citing Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 584 (1989)).

214. HARPER, *supra* note 20, at 82.

215. *Am Law 100 2019*, *supra* note 204 (average leverage ratio of top fifty firms by total revenue).

216. *Id.*

217. HARPER, *supra* note 20, at 77.

218. *See supra* notes 166–168 and accompanying text.

219. HARPER, *supra* note 20, at 85–86; *cf. id.* at 90 (noting that the Cravath model "create[s] conditions that decrease opportunities for advancement and are hostile to any attorney's search for a balanced life").

220. *Id.*

221. *Id.*

money.[222] Consequently, firms' short-run focus on the maximization of annual profits has also become their "most important long-run goal."[223]

As partner profits and firm revenue have increased so too has lawyer distress and dissatisfaction. While firms and their equity partners have achieved staggering wealth, it has come at considerable costs as lawyer mental health and addiction issues have become pervasive.[224] The added income (as well as the client expectations arising from higher billing rates) brings an assumed obligation to work longer hours, often at the expense of lawyers' health and personal lives.[225] In other words, as set out in Section II.C above, law firms in general are undermining their lawyers' internal values and motivations that foster subjective well-being in favor of prioritizing the external values and motivations that correlate to emotional distress.[226]

It is likely that a "disturbingly large number" of Big Law lawyers would acknowledge that their exorbitant salaries have not brought them happiness.[227] In fact, some likely would be willing to take less salary if it meant a more balanced life.[228]

Since money—profit generation and maximization—is at the heart of much of the distress and dissatisfaction within the profession,[229] the answer to addressing such distress and dissatisfaction is not to provide addi-

222. MACEWEN, *supra* note 203, at 21 ("Partners of all classes and genders [are] united on one front: They all think they should be making more money."). In one survey, "[f]ifty-eight percent of all partners said they should be better paid, and among that group, an overwhelming majority wants something more than a token raise. Ninety percent of the survey's respondents thought that their compensation should be increased by more than 10 percent, while 1 percent thought their pay should be doubled." *Id.* *But see* AM. BAR ASS'N COMM'N ON BILLABLE HOURS, ABA COMMISSION ON BILLABLE HOURS REPORT 2001–2002, at ix (2002), http://ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4_ABABillableHours2002.pdf [https://perma.cc/MQ7D-248D] (finding an increasing number of lawyers would prefer a pay cut to increase quality of life rather than continuing to rely on the billable hour).

223. HARPER, *supra* note 20, at 96.

224. *Id.* ("[P]artner profits and attorney [depression and job] dissatisfaction have risen in tandem as big firms' lawyers make more money and enjoy it less. Those twin developments are not coincidental.").

225. *Id.* at 97.

226. *See supra* Section II.C.

227. HARPER, *supra* note 20, at 97.

228. *Id.* (arguing lawyers would accept a lower salary because "their work remains a persistently depressing experience, largely because it seems unfulfilling, unrelenting, or both"). *But see* Schiltz, *supra* note 13, at 904–05 ("Lawyers could enjoy a lot more life outside of work if they were willing to accept relatively modest reductions in their incomes. . . . But many of them do take the money. [They] choose to give up a healthy, happy, well-balanced life for a less healthy, less happy life dominated by work. And they do so merely to be able to make seven or eight times the national median income instead of five or six times the national income.").

229. *See* Schiltz, *supra* note 13, at 903 ("Money is at the root of virtually everything that lawyers don't like about their profession: the long hours, the commercialization, the tremendous pressure to attract and retain clients, the fiercely

tional financial incentives.[230] Studies abound demonstrating that money, at a certain level below the median lawyer salary, does not increase happiness.[231] Nevertheless, firms have done just that: they have responded in recent years to increased lawyer distress, dissatisfaction, and attrition by increasing salaries. This has continued even in the wake of the Krill Study and the ABA's *The Path to Lawyer Well-Being*: in Summer 2018, many firms began to raise their starting salary for a first-year associate to $190,000 (if not higher), with an eighth-year associate's salary far exceeding $300,000.[232]

B. *Stigma and Barriers to Treatment*

Although awareness and understanding of mental illness have increased in recent years, it is still not often treated legitimately or seriously "either by businesses, by the health care system, or by our society."[233] This is true in the legal profession, in which "mental health 'is not talked about openly'" and, for years, has been kept "underground."[234]

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competitive marketplace, the lack of collegiality and loyalty among partners, the poor public image of the profession, and even the lack of civility.").

230. Indeed,

> [l]ife satisfaction in the United States has been flat for fifty years even though GDP has tripled. Even scarier, measures of ill-being have not declined as gross domestic product has increased; they have gotten much worse. Depression rates have increased tenfold over the last fifty years in the United States. . . . Rates of anxiety have also risen.

MARTIN E.P. SELIGMAN, FLOURISH: A VISIONARY NEW UNDERSTANDING OF HAPPINESS AND WELL-BEING 223 (1st ed. 2011).

231. *See* LEVIT & LINDER, *supra* note 13, at 10–11.

232. Stacy Zaretsky, *Salary Wars Scorecard: Which Firms Have Announced Raises and Bonuses*, ABOVE L. (June 5, 2018, 1:46 PM), http://abovethelaw.com/2018/06/salary-wars-scorecard-which-firms-have-announced-raises-2018/ [https://perma.cc/TU8X-83XQ]; *see also* Christine Simmons, *Milbank Boosts Associate Salaries with $190k Starting Pay*, AM. LAW. (June 4, 2018), http://www,law.com/americanlawyer/2018/06/04/milbank-boosts-associate-salaries-with-190k-starting-pay/ [https://perma.cc/HZN2-GLHE].

233. Stewart Friedman, *The Hidden Business Cost of Mental Illness*, HARV. BUS. REV. (Dec. 3, 2009), http://hbr.org/2009/12/the-hidden-business-cost-of-me.html# [https://perma.cc/J24U-59DL].

234. William Roberts, *When Counsel Needs Counseling*, WASH. LAW., Jan. 2018, at 20, http://washingtonlawyer.dcbar.org/january2018/index.php?startid=16#/p/16 [https://perma.cc/74CM-Z852] (quoting Arent Fox LLP partner David Dubrow); *see also* Zimmerman, *supra* note 5 ("'Law firms have a culture of keeping things underground, a conspiracy of silence,' [Dr. Daniel Angres, an associate professor of psychiatry at Northwestern University Feinberg School of Medicine] said. 'There is a desire not to embarrass people, and as long as they are performing, it's easier to just avoid it. And there's a lack of understanding that addiction is a disease.'"). In a 2017 *New Yorker* profile, former Acting Attorney General Sally Yates discussed her father's suicide in 1986, for which she said: "'Tragically, the fear of stigma then associated with depression prevented him from getting the treatment he needed.'" Ryan Lizza, *Why Sally Yates Stood up to Trump*, NEW YORKER (May 29, 2017), http://www.newyorker.com/magazine/2017/05/29/why-sally-yates-stood-up-to-trump [https://perma.cc/35ND-B9X7].

The profession recognizes that this stigma exists. A 2018 survey of managing partners and human resources personnel at Am Law 200 law firms revealed that stigma associated with mental illness and substance abuse is prevalent in the profession.[235] In particular, 81% of those surveyed believe a stigma exists against those suffering from depression, and 75% believe a stigma exists against those suffering from anxiety.[236] The numbers are even starker for those with substance abuse problems, with 94% of those surveyed believing a stigma exists against both those suffering from alcohol addiction and drug addiction.[237]

The stigma pervades the profession in a variety of ways. First, there is fear that lawyers struggling with mental health or addiction disorders are incompetent, incapable, or undesirable. This is succinctly captured by the comments of the chairman of an Am Law 100 law firm, who expressed reticence to follow other firms in having an on-site psychologist because of the fear that "our competitors will say we have crazy lawyers."[238]

Second, the overwhelming majority of state bars ask questions relating to applicants' mental health or substance use. Many states have historically asked bar applicants whether they had any history of mental health treatment. Even after a 2014 Department of Justice settlement with the Louisiana Supreme Court in which the State of Louisiana agreed to remove questions from its bar application about an applicant's mental health history, several states still ask whether applicants have any such history.[239]

As of March 2020, out of the fifty states, the District of Columbia, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands,[240]

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235. ALM INTELLIGENCE, 2018 MENTAL HEALTH AND SUBSTANCE ABUSE SURVEY (2018).

236. *Id.*

237. *Id.* Additionally, the stigma for drug use may be further internalized; in the Krill Study, less than 27% of participants responded to questions concerning drug use, compared with approximately 90% for questions relating both to mental health and alcohol use. Krill et al., *supra* note 10, at 48–50; *see also id.* at 52 ("Because the questions in the survey asked about intimate issues, including issues that could jeopardize participants' legal careers if asked in other contexts (e.g., illicit drug use), the participants may have withheld information or responded in a way that made them seem more favorable.").

238. Randazzo, *supra* note 22 (internal quotation marks omitted).

239. *See* Alyssa Dragnich, *Have You Ever . . . ?: How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 677 (2015).

240. Applications are on file with the author; the following information is based on the most recent attainable applications. For additional, summary information about U.S. bar applications, see generally *Bar Admission Questions Pertaining to Mental Health, School/Criminal History, and Financial Issues*, JUDGE DAVID L. BAZELON CTR. MENTAL HEALTH L., http://bazelon.org/wp-content/uploads/2019/12/50-State-Survey-To-Post.pdf [https://perma.cc/N9BF-7BP8] (last updated Feb. 2019); David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, 26 PROF. LAW. 3 (2020).

all but nine jurisdictions ask some question related to the bar applicant's mental health or substance use.[241] In particular, twenty-eight ask questions about the applicant's current mental health or substance abuse,[242] with an additional nine asking about the applicant's past as well as current mental health or substance abuse.[243] Four states ask questions regarding past and current substance use but ask only about current mental health issues.[244] Two states have questions about current substance abuse but do not have any questions regarding mental health,[245] and an additional state asks about substance abuse treatment but not about mental health.[246] Finally, two states ask about past and current instances of mental illness but only current instances of substance abuse.[247]

As one example, the Michigan bar application asks the following questions of its applicants:

> Have you ever used, or been addicted to or dependent upon, intoxicating liquor or narcotic or other drug substances . . . [or h]ave you ever had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life[; . . . or] which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?[248]

Given the stigma within the profession, as well as the "unduly intrusive" questions in state bar applications that "likely . . . deter" treatment,[249] it is no surprise that lawyers are reticent to seek treatment. Lawyers with mental health and addiction issues have "pervasive fears surrounding their

241. Arizona, California, Connecticut, Illinois, Massachusetts, New York, Tennessee, Virginia, and Washington.

242. Alabama, Alaska, Colorado, Delaware, District of Columbia, Guam, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Northern Mariana Islands, Oklahoma, Puerto Rico, Rhode Island, South Carolina, South Dakota, Vermont, Virgin Islands, and Wyoming.

243. Florida, Georgia, Maine, Michigan, Minnesota, Missouri, Nevada, Oregon, and Utah.

244. Arkansas, Iowa, New Jersey, and Texas.

245. California, Hawaii, and Pennsylvania.

246. Wisconsin.

247. Ohio and West Virginia.

248. STATE BAR OF MICH., CHARACTER & FITNESS APPLICATION PREVIEW, https://www.michbar.org/file/professional/pdfs/preview-app.pdf [https://perma.cc/EBB5-6V8F] (last visited May 7, 2020).

249. Conf. of Chief Justices, Res. 5 (Feb. 13, 2019), https://www.ncsc.org/__data/assets/pdf_file/0027/23589/07312019-implementation-clear-communications-streamlined-procedures.pdf [https://perma.cc/2TTV-QDGA].

reputation" that prevent them from availing themselves of the help that they need.[250] Accordingly, the two most common barriers for treatment for substance abuse are: (1) "not wanting others to find out they needed help"; and (2) "concerns regarding privacy or confidentiality."[251]

The statistics demonstrate that these are real barriers to meaningful treatment: only 6.8% of lawyers surveyed in the Krill study reported seeking treatment for substance use; the two most common barriers—among those who sought and have not sought treatment—are "not wanting others to find out they needed help" and "concerns regarding privacy or confidentiality."[252] The results are even starker for law students. Only 4% of respondents ever sought help for alcohol or substance use.[253] And while 42% of respondents indicated that they thought they needed help for mental health issues, only approximately half have done so.[254] Further, the greatest reported barriers to seeking treatment include "potential threat to job or academic status," "potential threat to bar admission," and "social stigma."[255]

IV. THE BUSINESS CASE FOR PROMOTING AND PRIORITIZING LAWYER WELL-BEING

As discussed in Part I above, calls have been made to humanize the legal profession for decades. However, throughout most of that time, as *The Path to Lawyer Well-Being* acknowledged, the profession at large generally has "turned a blind eye" to the pervasiveness of and not done enough to address mental health and addiction issues among its members.[256] As discussed in Section II.C above, many aspects of the law firm model negatively impact lawyer subjective well-being, which inversely correlates to depression and mental distress. And, as argued in Part III above, law firms and the profession in general have turned such a "blind eye" and ignored the moral case for promoting lawyer well-being because they have not had the financial incentives to change the existing law firm model.

This Part demonstrates how and why it is in law firms' business interest to promote and prioritize their lawyers' well-being.[257] First, this Sec-

250. Krill et al., *supra* note 10, at 51.

251. *Id.* at 50.

252. *Id.*

253. Organ et al., *supra* note 68, at 140. As noted in the text accompanying notes 151–153 above, a significant plurality of law students reported binge drinking, were at risk for alcoholism, or used illicit street drugs or prescription drugs without a prescription.

254. *Id.*

255. *Id.* at 141 Help-Seeking tbl.1.

256. *See generally* THE PATH TO LAWYER WELL-BEING, *supra* note 15, at 11–12 (observing that the profession has "not done enough to help, encourage, or require lawyers to be, get, or stay well").

257. To date, no study has been done to monetize the cost to the legal profession attributable to untreated mental health and addiction disorders, or the corresponding financial gains to the profession by prioritizing lawyer well-being.

tion argues that law firms incur significant direct and indirect costs related to untreated lawyer mental health and addiction issues. Second, this Section summarizes some of the initial steps taken by firms in recent years to begin to acknowledge and address lawyer well-being issues. Finally, this Section argues that while current efforts are important first steps, the time is ripe for firms to benefit financially from enacting lasting and meaningful change to promote and prioritize lawyer well-being.

A. *The Costs of Undermining Lawyer Well-Being*

All professions incur significant costs due to untreated employee mental health and addiction issues. Mental health disorders are by far the most burdensome illnesses to United States employers, costing over $200 billion each year—well exceeding the cost burden of heart disease, cancer, stroke, and obesity.[258] Further, the cost of alcohol abuse in the United States is $249 billion, with 72% of that total cost—or over $179 billion—resulting from losses in workplace productivity.[259]

As recognized by the World Health Organization, the "consequences of mental health problems in the workplace" include, among other things: poor work performance (including "reduction in productivity and output," "increase in error rates," and "poor decision-making") as well as an "increase in disciplinary problems"; absenteeism as well as "loss of motivation and commitment"; "burnout . . . [and] diminishing returns"; and turnover.[260] That is no different in law firms, where the costs that firms experience due to untreated lawyer mental health and addiction issues include: (1) lawyer disciplinary actions; (2) absenteeism and presenteeism; and (3) costs associated with high attrition. Each is discussed in turn below.

Accordingly, this Section will look to as instructive studies in other and across professions.

258. *See* Ron Z. Goetzel et al., *Mental Health in the Workplace: A Call to Action Proceedings from the Mental Health in the Workplace—Public Health Summit*, 60 J. OCCUPATIONAL & ENVTL. MED. 322, 323 (2018) (noting that mental health disorders cost American employers over $200 billion a year); *cf.* Matthew Jones, *How Mental Health Can Save Businesses $225 Billion Each Year*, INC. (June 16, 2016), http://www.inc.com/matthew-jones/how-mental-health-can-save-businesses-225-billion-each-year.html [https://perma.cc/S2M9-JYFK]. The World Health Organization estimates that depression and anxiety disorders cost the global economy over $1 trillion annually. *See* Dan Chisholm et al., *Scaling-up Treatment of Depression and Anxiety: A Global Return on Investment Analysis*, 3 LANCET PSYCH. 415, 419 (2016).

259. *Excessive Drinking Is Draining the U.S. Economy*, CTR. DISEASE CONTROL & PREVENTION, https://www.cdc.gov/features/costsofdrinking/index.html [https://perma.cc/4B6P-DVYB] (last visited May 7, 2020).

260. NATIONS FOR MENTAL HEALTH, WORLD HEALTH ORG., MENTAL HEALTH AND WORK: IMPACT, ISSUES AND GOOD PRACTICES 8–9 (2000), https://www.who.int/mental_health/media/en/712.pdf [https://perma.cc/84WJ-YRQR].

1. *Lawyer Discipline: Malpractice and Sanctions*

There can be no question that lawyers who have untreated mental health of addiction disorders can engage in conduct that gives rise to lawyer discipline or malpractice actions.[261] For instance, according to the ABA, "40%–70% of disciplinary proceedings and malpractice claims against lawyers involve substance use, depression, or both."[262] Further, a separate ABA survey covering New York and California found that "50 to 70 percent of all disciplinary cases involved alcoholism."[263] Reports from other states find similar percentages.[264]

2. *Absenteeism and "Presenteeism"*

In addition to the direct costs of health care and, for lawyers, malpractice and sanctions, firms suffer indirect costs from lawyers struggling with mental health issues. According to one study, businesses suffer over $102 billion in indirect costs annually due to the absenteeism and "presenteeism" of their depressed employees.[265] Absenteeism is the amount of work (in hours or days) an employee loses due to illness or otherwise being absent from work.[266] Presenteeism, as the name suggests, is the amount

261. *See, e.g.*, Badgerow, *supra* note 51, at 2 (noting that an "alarming number" of complaints against lawyers for ethics violations "involve lawyers' use of and dependence upon drugs and alcohol . . . and descent into depression").

262. THE PATH TO LAWYER WELL-BEING, *supra* note 15, at 8.

263. Carol Langford, *Depression, Substance Abuse, and Intellectual Property Lawyers*, 53 U. KAN. L. REV. 875, 902 (2005) (citing Allan, *supra* note 11, at 268).

264. *See, e.g.*, ATTORNEY ATT'Y REGISTRATION & DISCIPLINARY COMM'N, SUPREME COURT OF ILL., ANNUAL REPORT OF 2016, at 35 (2017), https://www.iardc.org/AnnualReport2016.pdf [https://perma.cc/FN2K-XH6V] (indicating that "thirty-three of the 107 lawyers disciplined, or 30.8%, had at least one substance abuse or mental impairment issue"); LAWYERS' FUND FOR THE STATE OF N.Y., ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR CALENDAR YEAR 2016, at 14 (2017), http://www.nylawfund.org/AR2016%20.pdf [https://perma.cc/8SBC-V95B] (noting that "causes of [lawyer] misconduct are often traced to alcohol, drug abuse, and gambling"); *cf. Indiana Judges & Lawyers Assistance Program, About JLAP*, STATE IND., https://www.in.gov/judiciary/ijlap/2361.htm [https://perma.cc/BY5H-NFF9] (last visited May 7, 2020) (noting that 85% of calls are about addiction or mental health issues).

265. Paul E. Greenberg et al., *The Economic Burden of Adults with Major Depressive Disorder in the United States (2005 and 2010)*, 76 J. CLINICAL PSYCHIATRY 155, 159 tbl.2 (2015) (finding that over $23 billion of such costs is attributable to absenteeism and nearly $79 billion attributable to presenteeism); *cf.* Sameer Kumar et al., *Operational Impact of Employee Wellness Programs: A Business Case Study*, 58 INT'L J. PRODUCTIVITY & PERFORMANCE MGMT. 581, 583 (2009) (finding that "[d]epressed employees" indirectly cost employers $52 billion each year, including $37 billion attributable to absenteeism and $15 billion attributable to presenteeism. Moreover, active disengagement by employees is estimated to cost businesses more than $500 billion annually. *See* SHAWN ACHOR, BIG POTENTIAL: HOW TRANSFORMING THE PURSUIT OF SUCCESS RAISES OUR ACHIEVEMENT, HAPPINESS, AND WELL-BEING 102 (2018) [hereinafter, ACHOR, BIG POTENTIAL]).

266. *See, e.g.*, Kathryn Rost et al., *The Effect of Improving Primary Care Depression Management on Employee Absenteeism and Productivity: A Randomized Trial*, 42 MED. CARE 1202, 1204 (2004).

of work an employee loses while at work because they are unproductive or under-productive.[267] Mental health and substance abuse issues affect both.

Indeed, studies overwhelmingly demonstrate that "[d]epression substantially reduces an employee's ability to work," as it increases both absenteeism and presenteeism.[268] According to one study, depression doubles the annual sickness days among employees and results in 2.3 days per month of lost productivity.[269] Another study found that employees with mental illness reported losing 4.3–5.5 days of productive work in the prior thirty days.[270] On average, workers with depression have 3.7 times more unproductive time at work per week than those without depression,[271] and depressed employees generally have "trouble concentrating, greater difficulty in making decisions, and decreased interest in work."[272]

In addition to lost workdays and lost productivity, the cost of absenteeism and presenteeism to employers can be monetized. For example, a 2003 study found worker absenteeism and presenteeism due to depression results in costs of $44 billion in 2002 dollars to employers.[273] Additionally, according to another study, 71% of employer expenditures on employee mental health issues are for lost productivity due to presenteeism.[274]

Moreover, the combination of long hours and all-day availability invariably leads to a lack of sleep.[275] Not only does fatigue compromise effectiveness, but sustained lack of sleep both leads to cognitive impairment

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267. *See, e.g.*, *id.*

268. *Id.* at 1202.

269. Philip S. Wang et al., *Effects of Major Depression on Moment-in-Time Work Performance*, 161 AM. J. PSYCHIATRY 1885, 1888 (2004).

270. Ronald S. Kessler et al., *The Effects of Chronic Medical Conditions on Work Loss and Work Cutback*, 43 J. OCCUPATIONAL & ENVTL. MED. 218, 220 tbl.2 (2001); *see also* Gregory E. Simon et al., *Recovery from Depression, Work Productivity, and Health Care Costs Among Primary Care Patients*, 22 GEN. HOSP. PSYCHIATRY 153, 153 (2000) (noting that "current depression is associated with an increase of 2 to 4 disability days per month"); *see also id.* at 154 ("[D]epression is responsible for a tremendous economic burden on employers and insurers.").

271. Walter F. Stewart et al., *Cost of Lost Productive Work Time Among US Workers with Depression*, 289 JAMA 3135, 3140 (2003).

272. *See* Kumar et al., *supra* note 265, at 583; *see also* Wang et al., *supra* note 269, at 1887 (finding that major depression "was associated with decrements of approximately 12 points in task focus and approximately 5 points in productivity on their 0-100 scales . . . equivalent to a 0.4 standard deviation increase in task focus and a 0.3 standard deviation decrease in productivity").

273. Stewart et al., *supra* note 271, at 3141 tbl.4.

274. Ron Z. Goetzel et al., *Health, Absence, Disability, and Presenteeism Cost Estimates of Certain Physical and Mental Health Conditions Affecting U.S. Employers*, 46 J. OCCUPATIONAL & ENVTL. MED. 398, 408 tbl.4B (2004).

275. Lack of sleep is a natural outgrowth of long hours and total accessibility, and lack of sleep is seen as the cost of exceptional client service. *See, e.g.*, Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207, 2211 (2002) ("A common assumption is that client service requires total accessibility."); *cf.* Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 182 (2005) (reporting on survey finding 35.7%

and can lead to or exacerbate depression.[276] With respect to the compromising effectiveness, fatigue "impair[s] judgment and decision making."[277] For instance, a person who averages four hours of sleep a night for four or five nights will be as cognitively impaired as someone who is legally intoxicated or who has been awake for twenty-four straight hours.[278] "Within ten days, the level of impairment is the same as . . . going forty-eight straight hours without sleep," which significantly "impedes judgment, interferes with problem-solving," and delays reaction times.[279]

As for causing or exacerbating depression, lack of sleep is a "major risk factor in the onset, recurrence, chronicity, and severity" of major depressive episodes.[280] Accordingly, sleep habits are important and modifiable risk factors to help prevent depression or achieve and maintain depression remission.[281]

Given law firms' reliance on the billable hour as the measure of both lawyer productivity and firm profitability, presenteeism could be seen as a way to maximize profits—after all, a lawyer who can bill more for a task will make more for the firm. However, as discussed below, clients are demanding that firms increase efficiency—both in their services and the methods for which they bill them—thus making presenteeism costly for firms.

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of lawyers reported sleeping an average of five-to-six hours per night and 3% reported sleeping an average of less than five hours per night).

276. JEAN M. TWENGE, iGEN: WHY TODAY'S SUPER-CONNECTED KIDS ARE GROWING UP LESS REBELLIOUS, MORE TOLERANT, LESS HAPPY—AND COMPLETELY UNPREPARED FOR ADULTHOOD—AND WHAT THAT MEANS FOR THE REST OF US 116 (2017) ("Sleep deprivation is linked to myriad issues, including compromised thinking and reasoning, susceptibility to illness, increased weight gain, and high blood pressure. Sleep deprivation also has a significant effect on mood: people who don't sleep enough are prone to depression and anxiety.").

277. RHODE, *supra* note, at 166; *see also* Austin, *supra* note 156, at 837 (arguing that since "sleep deprivation causes loss in cognitive skill—diminished attention, working memory capacity, executive function, quantitative skills, logical reasoning ability, mood, and both fine and gross motor control—law students . . . and lawyers should make adequate regular sleep a priority").

278. Bronwyn Fryer, *Sleep Deficit: The Performance Killer*, HARV. BUS. REV. (Oct. 2006), https://hbr.org/2006/10/sleep-deficit-the-performance-killer [https://perma.cc/TU23-D7NK].

279. *Id.*

280. Jean Twenge et al., *Age, Period, and Cohort Trends in Mood Disorder Indicators and Suicide-Related Outcomes in a Nationally Representative Dataset, 2005–2017*, 128 J. ABNORMAL PSYCHOL. 185, 197 (2019); *see also* Peter L. Franzen & Daniel J. Buysse, *Sleep Disturbances and Depression: Risk Relationships for Subsequent Depression and Therapeutic Implications*, 10 DIALOGUES CLINICAL NEUROSCI. 473, 479 (2008); *see also* Charlotte Fritz et al., *Embracing Work Breaks: Recovering from Work Stress*, 42 ORG. DYNAMICS 274, 275 (2013) ("Employees who do not completely recover during the weekend (i.e., they feel that a free weekend is not enough time to recover from the work week) over time are at an increased risk for depressive symptoms, fatigue, energy loss, and cardiovascular disease.").

281. Franzen & Buysse, *supra* note 280, at 479.

3. *Replacement Costs and High Attrition*

Mental health and addiction issues can contribute to lawyer attrition. In general, attrition rates among lawyers are high. In 2016, law firms lost an average of 16% of associates.[282] As a general matter, 44% of associates depart within three years of being hired, and 75% depart within five years.[283] Moreover, a 2016 survey found that 40% of lawyers surveyed were "likely" or "very likely" to be looking for a new job within the next twelve months.[284] According to one estimate, the cost of replacing a departing associate ranges from $200,000 to $500,000—roughly one-and-a-half to two times the annual salary of that lawyer.[285] This cost—which could include advertising, recruiters' time and salary, interviewing expenses, and training—does not account for implicit costs. Such costs, including lost productivity time, covering the work of the departing lawyer, and disrupted intrafirm and client relationships, "can dwarf the explicit expenses."[286] Thus, taking the midpoint and ignoring the implicit cost of attrition, associate attrition costs a firm with 100 associates $5.6 million and a firm with 500 $28 million annually.[287]

B. *Incremental Efforts to Address Lawyer Well-Being*

In the wake of the Task Force's 2017 call to action in its *The Path to Lawyer Well-Being* report, some law firms and other legal employers have

282. NALP FOUND., UPDATE ON ASSOCIATE ATTRITION 12 tbl.6 (2017).

283. *Id.* at 11 tbl.5.

284. *2016 Lawyer Satisfaction Survey: By the Numbers*, LAW360 (Sept. 2, 2016), https://www.law360.com/articles/833246/law360-s-2016-lawyer-satisfaction-survey-by-the-numbers [https://perma.cc/X35K-52N8].

285. LEVIT & LINDER, *supra* note 13, at 162 (citation omitted); *see also* Leslie Larkin Cooney, *Walking the Legal Tightrope: Solutions for Achieving a Balanced Life in Law*, 478 S.D. L. REV. 421, 427 (2010) ("The average cost to a law firm when an associate leaves has been documented at $315,000; while others estimate that it costs a firm 150% of a person's annual salary when she quits.").

286. LEVIT & LINDER, *supra* note 13, at 162 (citation omitted); *see also* RHODE, *supra* note 166, at 15; Peter H. Huang & Rick Swedloff, *Authentic Happiness & Meaning at Law Firms*, 58 SYR. L. REV. 335, 336 (2008) ("Attrition of associates is costly to law firms, in terms of money, morale, reputation, and time."); Seligman et al., *supra* note 13, at 33 ("Unhappy associates fail to achieve their full potential at a cost to them, their firms, their clients, and even their families.").

287. 100 lawyers x 16% = 16; 16 x $350,000 = $5,600,000. 500 lawyers x 16% = 80; 80 x $350,000 = $28,000,000.

Further, firms that fail to adequately promote the well-being of their lawyers may face the cost of attrition when that failure is seemingly most acute. For example, after Gabe McConaill's death (see *supra* notes 1–4 and accompanying text), "a number of employees" reportedly left his firm's Los Angeles office, purportedly because "they thought that the firm's leadership did not respond sufficiently in the wake of [his] death," and that "there was no clear commitment to support employees who . . . found [the firm's] demanding corporate culture an unwelcome environment in which to raise a hand" to seek help. Lilah Raptopoulos & James Fontanella Khan, *The Trillion-Dollar Taboo: Why It's Time to Stop Ignoring Mental Health at Work*, FIN. TIMES (July 10, 2019), https://www.ft.com/content/1e8293f4-a1db-11e9-974c-ad1c6ab5efd1 [https://perma.cc/P3PL-MHN7].

begun to, at least, recognize the mental health and addiction issues in the profession, and some have taken incremental steps to promote the well-being of their lawyers. While first steps are helpful toward addressing the crisis, there is still a long way for the profession to go to enact meaningful and lasting change.[288]

As an initial step, some firms have at least begun to acknowledge that mental health and addiction problems exist in the profession. For instance, in a Summer 2018 survey of managing partners and human resources officials at Am Law 200 law firms on mental health and substance abuse, 86% of those surveyed either agreed or strongly agreed that depression occurs at their firm, and 93% agreed or strongly agreed that anxiety occurs at the firm.[289] Further, 90% agreed or strongly agreed that alcohol abuse occurs at the firm, and 48% agreed or strongly agreed that drug abuse occurs at the firm.[290] And these firms recognize that their cultures contribute to these problems: when asked to rank the "causes of substance abuse and mental health problems in the law firm environment," 79% of respondents listed "stress and workload" as the principle cause.[291]

As an additional step, in September 2018 the ABA launched a campaign seeking to "raise awareness, facilitate a reduction in the incidence of problematic substance use and mental health distress and improve lawyer well-being."[292] To that end, the ABA developed a "seven-point framework for building a better future" for lawyer well-being[293] and requested firms

288. Patrick Krill, *Progress, Not Perfection, Is Key to Law Firms' Mental Health Programs*, LAW.COM (June 12, 2019), https://www.law.com/2019/06/12/progress-not-perfection-is-key-to-law-firms-mental-health-programs/ [https://perma.cc/GH6A-WR23] [hereinafter Krill, *Progress, Not Perfection*] (noting the "huge canyon between where the profession is now and where we might otherwise want it to be").

289. ALM INTELLIGENCE, *supra* note 235.

290. *Id.*

291. *Id.* In conducting the survey, the surveyors "noted that 'discussing substance abuse and mental health issues has often been considered taboo in the legal industry.'" Patrick Krill, *ALM Survey on Mental Health and Substance Abuse: Big Law's Pervasive Problem*, LAW.COM (Sept. 14, 2018), https://www.law.com/2018/09/14/alm-survey-on-mental-health-and-substance-abuse-big-laws-pervasive-problem/ [https://perma.cc/CRX4-RBZY]. The survey yielded a response rate of only 15%, which "would seem to suggest that the taboo is alive and well." *Id.*; *see also supra* notes 235–237 and accompanying text.

292. *See ABA Launches Pledge Campaign to Improve Mental Health and Well-Being of Lawyers*, AM. B. ASS'N (Sept. 10, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/09/aba-launches-pledge-campaign-to-improve-mental-health-and-well-b/ [https://perma.cc/SL3P-QERD] [hereinafter *ABA Launches Pledge Campaign*].

293. These seven points are: (1) "Provide enhanced and robust education to lawyers and staff on topics related to well-being, mental health, and substance use disorders"; (2) Disrupt the status quo of drinking-based events"; (3) "Develop visible partnerships with outside resources committed to reducing substance use disorders and mental health distress in the profession . . ."; (4) "Provide confidential access to addiction and mental health experts and resources, including free, in-house, self-assessment tools"; (5) "Develop proactive policies and protocols to support assessment and treatment of substance use and mental health problems, in-

sign a pledge of support for the ABA's campaign. The pledge provides as follows:

> Recognizing that substance use and mental health problems represent a significant challenge for the legal profession, and acknowledging that more can and should be done to improve the health and well-being of lawyers, we the attorneys of [FIRM] hereby pledge our support for this innovative campaign and will work to adopt and prioritize its seven-point framework for building a better future.[294]

Thirteen law firms initially signed the pledge upon its September 2018 issuance.[295] The ABA called upon "all legal employers" to take the pledge by January, 1, 2019;[296] through May 2020, only 133 law firms (and fifty other organizations) had done so.[297]

In addition to acknowledging mental health and addiction issues and pledging to take theoretical steps to improve lawyer well-being, firms have

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cluding a defined back-to-work policy following treatment"; (6) "Actively and consistently demonstrate that help-seeking and self-care are core cultural values, by regularly supporting programs to improve physical, mental[,] and emotional well-being"; and (7) "Highlight the adoption of this well-being framework to attract and retain the best lawyers and staff." *See Presentation, Challenging the Status Quo: A Campaign of Innovation to Improve the Substance Use and Mental Health Landscape of the Legal Profession*, AM. B. ASS'N, https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_working_group_pledge_and_campaign.authcheckdam.PDF [https://perma.cc/WF7X-P7FT] (last visited May 7, 2020).

294. AM. BAR ASS'N, PLEDGE COMMITMENT FORM 1, https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_working_group_pledge_commitment_form.authcheckdam.pdf [https://perma.cc/M67S-VJ6S] (last visited May 7, 2020).

295. The law firms are:

> Akin Gump Strauss Hauer & Feld LLP; Corette Black Carlson & Mickelson P.C.; Duane Morris LLP; Honigman Miller Schwartz & Cohn LLP; Latham & Watkins LLP; Morgan, Lewis & Bockius LLP; Nixon Peabody LLP; Perkins Coie LLP; Reed Smith LLP; Schiff Hardin LLP; Seyfarth Shaw LLP; Snell & Wilmer LLP; and Wiley Rein LLP.

ABA Launches Pledge Campaign, *supra* note 292.

296. *Id.*

297. *Working Group to Advance Well-Being in the Legal Profession*, AM. B. ASS'N, https://www.americanbar.org/groups/lawyer_assistance/working-group_to_advance_well-being_in_legal_profession/ [https://perma.cc/Y4ST-4G6Q] (last visited June 1, 2020). Interestingly, perhaps in a sign of a change of the times, the firm whose chairman warned of client perception of employing "crazy lawyers" is one of the signatories to the ABA's pledge. *Id.; cf. OnAir with Akin Gump: Mental Health & Well-Being in the Legal Industry with Kim Koopersmith, Patrick Krill*, AKIN GUMP (June 18, 2019), https://www.akingump.com/en/news-insights/mental-health-well-being-in-the-legal-industry-with-kim.html [https://perma.cc/6GQW-ZKAJ] (in an interview with the chairman of an Am Law 100 firm, the creator of the well-being pledge describes how he "was essentially laughed off the stage as being a well-intentioned idiot" when he first proposed it to a group of lawyers a few years prior to its launch).

been beginning to take concrete steps to address them,[298] with some efforts even predating the formal call to action in *The Path to Lawyer Well-Being*. These programs include continuing education courses, visiting speakers, online resources, and social opportunities promoting healthy lifestyles, as well as employee assistance programs and direct access to professional services.[299] For instance, since 2016, Kirkland & Ellis has offered yoga, meditation, and wellness training to its lawyers.[300] In 2017, the New York and Washington, D.C. offices of Hogan Lovells started offering on-site psychologists to their employees;[301] also in 2017, Akin Gump Strauss Hauer & Feld began offering its lawyers the services of on-site behavioral assistance counselors as part of its overall "Be Well" program, which it started the year before.[302] Further, in 2019, Morgan Lewis launched an employee well-being program entitled "ML Well," and created a "Director of Employee Well-Being" position.[303]

Moreover, beyond firms themselves, some state bars have taken action to eliminate questions on bar applications relating to an applicant's mental health history. In February 2019, the Conference of Chief Justices, in recognition that questions about mental health history, diagnoses, or treatment are "unduly intrusive" and "likely to deter individuals from seeking mental health counseling and treatment," passed a resolution urging state and territorial bar authorities to eliminate such questions from bar applications.[304] The conference resolved that it is reasonable to ask about an applicant's mental health history "only . . . 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."[305] Consistent

298. *See generally* Dan Packel, *Law Firms Tackle Mental Health, One Initiative at a Time*, AM. LAW. (June 17, 2019), https://www.law.com/americanlawyer/2019/06/17/law-firms-tackle-mental-health-one-initiative-at-a-time/ [https://perma.cc/ZEG6-VZC6] (summarizing law firms' programs and other steps to improve lawyer and staff mental health and wellness).

299. *See id.*

300. Claire Bushey, *Kirkland & Ellis to Offer Wellness Training to All U.S. Lawyers*, CRAIN'S CHI. BUS. (May 2, 2016), https://www.chicagobusiness.com/article/20160502/NEWS04/160509972/kirkland-ellis-to-offer-wellness-training-to-all-u-s-lawyers [https://perma.cc/TB8X-SQAM].

301. Randazzo, *supra* note 22.

302. Ryan Lovelace, *Akin Gump Adds On-Site Counseling as Firms Fret over Mental Health*, NAT'L L.J. (May 15, 2017), http://www.law.com/nationalawjournal/2018/05/15/akin-gump-adds-on-site-counseling-as-firms-fret-over-mental-health/ [https://perma.cc/7AY8-5YMX].

303. *Morgan Lewis Launches ML Well Program*, MORGAN LEWIS (Mar. 18, 2019), https://www.morganlewis.com/news/morgan-lewis-launches-ml-well-program [https://perma.cc/V48C-SE5T].

304. Conf. of Chief Justices, Res. 5, *supra* note 249.

305. *Id.* In August 2015, the ABA adopted a similar resolution, which called upon state bars to "eliminate any questions that ask about mental health history, diagnoses, or treatment and instead focus questions on conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional manner." Am. B. Ass'n Res. 102 (Aug. 3, 2015).

with the conference's resolution, in 2019 three states—Connecticut,[306] Virginia,[307] and Wisconsin[308]—removed questions relating to applicants' mental health history (except when offered as a defense to conduct). Further, California and New York began examining whether they should remove such questions from their respective bar applications.[309] As a consequence of these examinations, in July 2019 California enacted legislation prohibiting its state bar from seeking applicants' mental health records beginning on January 1, 2020,[310] and on March 1, 2020, New York Court of Appeals Chief Justice Janet DiFiore announced that mental health-related questions would be removed from bar applications effective immediately.[311]

These pioneering steps are a helpful—and much needed—start to addressing lawyer mental health and addiction issues and well-being issues more generally.[312] However, more firms and legal employers need to take

306. *See* Connecticut Bar Examining Committee, CONN. JUD. BRANCH, https://www.jud.ct.gov/cbec/instadmisap.htm#Forms [https://perma.cc/EKF5-4QKQ] (last visited May 7, 2020). *See generally* Editorial, *Long Overdue Step Taken to Remove Mental Health Stigma in Law*, CONN. L. TRIB. (Apr. 12, 2019), https://www.law.com/ctlawtribune/2019/04/12/long-overdue-step-taken-to-remove-mental-health-stigma-in-law/ [https://perma.cc/9FXM-WDZT].

307. *Sample Forms*, VA. BD. B. EXAMINERS, http://barexam.virginia.gov/misc/resources/samples.html [https://perma.cc/49YH-AGEY] (last visited May 7, 2020). The Virginia State Bar removed questions relating to mental health history and treatment in response to organized law student effort for it to do so. Justin Mattingly, *Virginia Panel Scraps Mental Health Question After Law School Student Push*, RICHMOND TIMES-DISPATCH (Feb. 8, 2019), https://www.richmond.com/news/local/education/virginia-panel-scraps-mental-health-question-after-law-school-student/article_36ece9b3-078c-5e12-b748-762555b8f081.html [https://perma.cc/T8H7-WA3N].

308. *See generally For Attorneys: Admission to the Practice of Law in Wisconsin*, WIS. CT. SYS., https://www.wicourts.gov/services/attorney/bar.htm [https://perma.cc/Q9S4-5BQE] (last visited May 7, 2020).

309. Susan DeSantis, *Momentum Builds for Allowing NY Bar Applicants to Keep Mental Health History Secret*, N.Y.L.J. (June 10, 2019), https://www.law.com/newyorklawjournal/2019/06/10/momentum-builds-for-allowing-ny-bar-applicants-to-keep-mental-health-history-secret/ [https://perma.cc/AY3F-3CLH].

310. *See* Cal. Bus. & Prof. Code § 6060(b)(2) (2020).

311. Christian Nolan, *Law School Grads in NY Won't Face Mental Health Inquiry*, N.Y.S. BAR ASS'N (Mar. 1, 2020), https://nysba.org/mentalhealthinquiry/#:~:text=in%20a%20major%20victory%20for,state%20bar%20application%20effective%20immediately.&text=%E2%80%9CToday%20marks%20a%20historic%20step,said%20NYSBA%20President%20Hank%20Greenberg. [https://perma.cc/3UDS-NLCX].

312. Additionally, legal trade publications are speaking more to mental health and addiction issues in the profession. For instance, in May 2019, the website *Law.com* and its affiliate websites launched "Minds over Matters," a year-long "examination into mental health, stress, addiction, and overall well-being in the profession," which includes "articles, analysis, data, expert advice, personal stories of triumph, a resource center . . . and much more." Gina Passarella Cipriani & Leigh Jones, *Introducing Minds over Matters: A Yearlong Examination of Mental Health in the Legal Profession*, LAW.COM (May 12, 2019), https://www.law.com/2019/05/12/introducing-minds-over-matters-a-yearlong-examination-of-mental-health-in-the-profession/ [https://perma.cc/6R4X-KWP9]. *See generally* MIND OVER MAT-

action to enable meaningful, profession-wide change. And, of the efforts currently being made by firms, there is some concern that, however well-meaning, they "lack the teeth to address the toughest of the issues,"[313] or are "little more than window dressing-a way for firms to check a box and show they are making a difference while avoiding the more complex process of a true reckoning."[314] As one associate put it, "the fixes being offered [by firms] are 'like a band-aid over a bullet wound.'"[315]

Indeed, a 2020 study by ALM, which is based on the results of a survey of nearly 4,000 lawyers, demonstrates that more work needs to be done.[316] The study found that 41.2% of respondents feel that mental health and addiction problems in the legal profession have reached a "crisis level."[317] In particular, that study reported that:

- 31.2% of respondents reported feeling depressed;
- 64% reported feeling anxiety;
- 32.7% reported increasing their drug or alcohol use as a result of work;
- 17.9% reported that they have contemplated suicide over the course of their legal career;
- 67% reported that their personal relationships have suffered as a result of their being in the legal profession; and
- 74.1% reported feeling that the legal profession has had a negative effect on their mental health.[318]

Although not scientifically validated, this study's findings suggest the prevalence of mental distress and addiction issues at the same or greater levels than those reported in the Krill Study.[319]

Nevertheless, it would be counterproductive to reject this progress as less than the complete culture change or paradigm shift needed to ad-

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TERS: AN EXAMINATION OF MENTAL HEALTH IN THE LEGAL PROFESSION, LAW.COM, https://www.law.com/special-reports/minds-over-matters-an-examination-of-mental-health-in-the-legal-profession/ [https://perma.cc/manage/create?folder=8393-84673] (last visited May 7, 2020).

313. Gina Passarella Cipriani, '*Like a Band-Aid over a Bullet Wound': The Disconnect Between Firms and Lawyers on Wellbeing Efforts*, LAW.COM INT'L (June 30, 2019, 7:00 PM), https://www.law.com/international-edition/2019/06/30/like-a-band-aid-over-a-bullet-wound-the-disconnect-between-firms-and-lawyers-on-well-being-efforts-378-112902/ [https://perma.cc/GVA2-XPTF].

314. Packel, *supra* note 298.

315. Passarella Cipriani, *supra* note 313.

316. *See* Lizzy McLellan, *Lawyers Reveal True Depth of Mental Health Struggles*, LAW.COM (Feb. 19, 2020, 11:00 AM), https://www.law.com/2020/02/19/lawyers-reveal-true-depth-of-the-mental-health-struggles/ [https://perma.cc/933E-72UD].

317. *Id.*

318. *Id.*; *see also By the Numbers: The State of Mental Health in the Legal Industry*, LAW.COM (Feb. 19, 2020), https://www.law.com/2020/02/19/by-the-numbers-the-state-of-mental-health-in-the-legal-industry/ [https://perma.cc/XRN5-5LAH] (featuring key data points from survey).

319. Krill et al., *supra* note 10; *see also supra* notes 58–66 and accompanying text.

dress lawyer mental health and addiction issues in meaningful ways.[320] Incremental progress could allow the profession to build the bridge toward the systemic changes the profession needs.[321] However, the systemic changes needed may come about more quickly if firms recognize not just the social good in prioritizing their lawyers' well-being (which has long been one of the principal justifications in calls for systemic change), but the benefits that will inure to firms' bottom lines and profit margins. The next section explains why the time is right for these systemic changes, and why it is in firms' financial interests to make them.

C. *The Financial Benefits of Lasting and Meaningful Change*

The time is right for firms to prioritize lawyer well-being in part because we are at a tipping point in mental health awareness. While stigma about mental health certainly still exists—particularly in law firms[322]—people involved in entertainment,[323] sports,[324] and politics[325] have all

320. Krill, *Progress, Not Perfection*, *supra* note 288 ("Standing on the edge [of the canyon] while complaining about the width of the chasm won't do anything to narrow its yawn.").

321. *Id.*

322. *See supra* notes 235–237 and accompanying text.

323. *See, e.g.*, Sandra Gonzalez, *Emma Stone Opens up About Ongoing Battle with Anxiety*, CNN (Oct. 2, 2018, 3:00 PM), https://www.cnn.com/2018/10/02/entertainment/emma-stone-anxiety/index.html [https://perma.cc/ZGQ6-PEWB]; Cydney Henderson, *Chris Evans Reveals He Almost Turned Down "Captain America" over Anxiety*, USA TODAY (May 26, 2020, 11:44 PM), https://www.usatoday.com/story/entertainment/celebrities/2020/05/26/chris-evans-almost-turned-down-captain-america-over-anxiety/5264260002/ [https://perma.cc/9CPT-ALSD?type=image]; *see also Wale Says Record Deals Should Include Mental Health Assistance*, VIBE (Oct. 11, 2019, 10:07 PM), https://www.vibe.com/2019/10/wale-says-record-deals-include-mental-health-assistance [https://perma.cc/LPU6-J7KF].

324. *See, e.g.*, Kevin Love, *Everyone Is Going Through Something*, PLAYERS' TRIB. (Mar. 6, 2018), https://www.theplayerstribune.com/en-us/articles/kevin-love-everyone-is-going-through-something [https://perma.cc/99M3-B3ZB]; *see also, e.g.*, Jackie MacMullan, *The Courageous Fight to Fix the NBA's Mental Health Problem*, ESPN (Aug. 20, 2018), http://www.espn.com/nba/story/_/id/24382693/jackie-macmullan-kevin-love-paul-pierce-state-mental-health-nba [https://perma.cc/NCH9-BZDK]. Professional hockey player Robin Lehner won the National Hockey League's Masterton Trophy as the "player who best exemplifies the qualities of perseverance, sportsmanship, and dedication to ice hockey" for the 2018–2019 season after going public with his battle with addiction and mental illness. Dan Rosen, *Lehner Uses Masterton Trophy to Continue Mental-Health Message*, NHL (June 20, 2019), https://www.nhl.com/news/lehner-uses-masterton-to-continue-message/c-307928992?tid=280503612 [https://perma.cc/C2GM-REEZ]. In his speech accepting the award, he proclaimed: "I'm not ashamed to say I'm mentally ill, but that doesn't mean [I'm] mentally weak." *Id.* (internal quotation marks omitted).

325. *See, e.g.*, Jason Kander, *I Suffer from Depression and Have PTSD Symptoms*, MEDIUM (Oct. 2, 2018), https://medium.com/@JasonKander/about-four-months-ago-i-contacted-the-va-to-get-help-2dc6006804c1 [https://perma.cc/L7FA-9F6D]; Tina Smith, *U.S. Senator Tina Smith in Senate Speech: "Why I'm Sharing My Experience with Depression,"* SENATOR TINA SMITH (May 15, 2019), https://smith.senate.gov/us-senator-tina-smith-senate-speech-why-im-sharing-my-experience-depression [https://perma.cc/VH3B-UT74].

raised awareness of mental health and addiction issues by coming forward to share stories of their personal struggles. Further, many other industries have taken steps to prioritize mental health.[326] And, while "law firms remain 20 years behind corporate America when it comes to taking measures to improve mental health,"[327] it is in firms' interest to catch up to other professions and industries as prioritizing lawyer well-being will help firms recruit and retain the best talent.

As noted above, the profession has made progress and both recognizing the problems and taking incremental steps to address them are positive steps. This should be acknowledged and applauded. But making lasting, meaningful change in the profession requires a shift in the paradigm within which firms operate at both the organizational and profession-wide levels. After all, as one law firm consultant observed, "the mixed messages sent when a firm says 'go use our meditation room but make sure you bill 2,000 hours or you won't get your bonus' need a broader fix that may require more people in the room than those focused purely on mental health."[328] As the ABA recognized in *The Path the Lawyer Well-Being*, "[b]road-scale change requires buy-in and role modeling from top leadership."[329]

That buy-in from firm leadership—i.e., those that have helped create and perpetuate the commodification of the legal profession as well as the stigma attached to lawyers with mental health and addiction issues—will not come unless and until that leadership sees a potential return on such an investment.

As explained in Section IV.A above, law firms and legal employers experience costs when lawyer mental health and addiction issues are unaddressed. A number of interventions can significantly lessen the burden of depression or anxiety in the workplace, and specifically work-related interventions can have a positive role in maintaining mental health and facilitating recovery from depression or anxiety.[330] Primary and secondary prevention approaches demonstrate "either moderate or strong efficacy in terms of reducing symptom severity."[331] Thus, workplace interventions

326. *See generally infra* notes 340–345 and accompanying text.

327. Packel, *supra* note 298.

328. *Id.*

329. THE PATH TO LAWYER WELL-BEING, *supra* note 15, at 11–12. At least one senior partner at an international law firm has publicly advocated for such broad-scale change, penning an open letter calling for firms to rethink billing and compensation practices—specifically "de-emphasiz[ing] the billable hour or [doing] away with it completely"—in response to the profession's "mental health crisis." Jane Cohen Barbe, *Open Letter from Dentons Partner: Mental Health Crisis Requires Rethinking Firm Business Models*, LAW.COM (July 31, 2019), https://www.law.com/2019/07/31/open-letter-from-dentons-partner-the-mental-health-crisis-requires-rethinking-firm-business-models/ [https://perma.cc/C3QM-Y6GD].

330. S. Joyce et al., *Workplace Interventions for Common Mental Disorders: A Systemic Meta-Review*, 46 PSYCHOL. MED. 683, 692 (2016).

331. *Id.*

and treatment initiatives can help obviate the costs discussed above. Moreover, these interventions lead to reductions in health care costs (and therefore insurance premiums). The costs associated with promoting wellness are significantly outweighed by the financial benefits. According to one study, for every dollar a company spends on employee wellness programs, medical costs fall by $3.27 and increased costs attributed to employee absenteeism fall by $2.73.[332] Further, more generally, a 2016 study estimated that every dollar spent to "scale up" treatment for mental illness between 2016 and 2030 within the thirty-six largest nations will yield $4.00 in increased productivity and the ability to work.[333]

In addition to these financial savings, healthier workers are more productive, and prioritizing lawyer well-being will likely help with lawyer retention and recruitment.[334] This is especially true now, with the growth of alternative fee arrangements as opposed to traditional hourly fee structures and the increasing importance millennial and now Generation Z lawyers and law students place on mental health and work-life balance.

As set forth below, firms that prioritize lawyer health and well-being similarly will see the indirect benefits of: (1) better performance from their lawyers and staff; (2) better retention; and (3) better yield of incoming lawyers through recruitment.

1. *Performance: Client Demands for Efficiency*

As discussed in Section IV.A.2 above, mental health and addiction disorders result in increased absenteeism and presenteeism. Indeed, the stress faced by lawyers results not only in a decline in their well-being and rise in anxiety, panic attacks, depression, substance abuse, and suicide, but

332. Katherine Baicker et al., *Workplace Wellness Programs Can Generate Savings*, 29 HEALTH AFF. 304, 308 (2010); *see also* RHODE, *supra* note 166, at 23 ("Some estimates suggest that every dollar invested in policies concerning quality of life results in two dollars saved in other costs."). As one example, Coors Brewing Company reported a $6.15 return in profitability for every dollar spent on its corporate fitness program. ACHOR, HAPPINESS ADVANTAGE, *supra* note 101, at 57–58 (citing JIM LOEHR & TONY SCHWARTZ, THE POWER OF FULL ENGAGEMENT: ENERGY, NOT TIME, IS THE KEY TO HIGH PERFORMANCE AND PERSONAL RENEWAL 65 (2003)).

333. Chisholm et al., *supra* note 258, at 415, 420–21. Specifically, the study estimated that while net present value (NPV) of this "scale-up" cost is $147 billion, the NPV of the resulting increased productivity in the workforce is $399 billion, with an additional $310 billion in additional "healthy life-years." *Id.*

334. *See* Baicker et al., *supra* note 332, at 304; *see also id.* at 310 ("Although these benefits surely accrue in part to the employee, it is also likely that they accrue in part to the employer—in the form of either lower replacement costs for absent workers or an advantage in attracting workers to the firm."). Data from a survey published in March 2018 of nearly 65,000 federal government employees provided "strong evidence of the positive association between employee use of work-life programs and high organizational performance, retention, and job satisfaction." U.S. OFF. OF PERS. MGMT., FEDERAL WORK-LIFE SURVEY GOVERNMENTWIDE REPORT 5 (2018), https://www.opm.gov/policy-data-oversight/worklife/federal-work-life-survey/2018-federal-work-life-survey-report.pdf [https://perma.cc/4CX7-DBTR].

also in diminished cognitive capacity.[335] It is no surprise, then, that treatment for depression "significantly improve[s] productivity" and improves absenteeism,[336] and substance abuse treatment similarly greatly reduces both presenteeism and absenteeism.[337] Consequently, as a practical matter, more engaged employees generate higher business incomes.[338] And, as recognized by a study of federal employees, employees are "significantly more likely" to receive high performance ratings if they participate in wellness programs, employee assistance programs, or similar wellness-based policies.[339]

Recognizing this, several companies outside the legal profession have engaged in what Whole Foods founder John Mackey and economist Raj Sisodia have termed "conscious capitalism"—a system whereby businesses "simultaneously create[] multiple kinds of value and well-being for all stakeholders: financial, intellectual, physical, ecological, social, cultural, emotional, ethical, and even spiritual."[340] As they explain, conscious businesses "place a huge emphasis on improving the health and well-being of [their] team members," under the belief that when employees are healthy, the company not only generates higher revenue (because the employees do better work and provide better services to customers) but it also spends less money on health care.[341] As a consequence, such businesses "enhance the[ir] bottom line" through programs that promote employee health and well-being, including onsite gyms, nutrition programs, work-life balance programs, mindfulness training, and stress management classes.[342] These businesses take their employees' physical and mental health

335. Austin, *supra* note 156, at 796–97.

336. Rost et al., *supra* note 266, at 1206; *see also id.* at 1208 ("The improvements in absenteeism and productivity we observed in the total cohort were largely due to the improvements consistently employed workers realized from intervention.").

337. Eli Jordan et al., *Economic Benefit of Chemical Dependency Treatment to Employers*, 34 J. SUBSTANCE ABUSE TREATMENT 311, 315–17 (2008).

338. James K. Harter et al., *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*, 87 J. APPLIED PSYCHOL. 268, 275 (2002) (noting "the correlation between employee engagement and business outcomes, even conservatively expressed, is meaningful from a practical perspective"); *see also id.* ("On average, business units in the top quartile on the employee engagement measure produced 1 to 4 percentage points higher profitability."); Sonja Lyubomirsky et al., *The Benefits of Frequent Positive Affect: Does Happiness Lead to Success?*, 131 PSYCHOL. BULL. 803, 803, 840 (2005) (noting the correlation between happiness among employees and business success because "positive affect engenders success," and it also "affect[s] . . . the following resources, skills, and behaviors: sociability and activity . . . , altruism . . . , liking of self and others . . . , strong bodies and immune systems . . . , and effective conflict resolution skills").

339. FEDERAL WORK-LIFE SURVEY GOVERNMENTWIDE REPORT, *supra* note 334, at 9. *See generally id.* at 36–41.

340. JOHN MACKEY & RAJ SISODIA, CONSCIOUS CAPITALISM 32 (2013).

341. *Id.* at 96.

342. Austin, *supra* note 156, at 798.

seriously, and they "encourage positive emotional energy in the workplace to promote intellectual vigor and enhance productivity."[343]

Unsurprisingly, conscious businesses perform exceptionally well financially. For instance, a sample of conscious businesses outperformed the overall stock market by a ratio of 10.5:1 over a fifteen-year period from 1996–2011.[344] These businesses delivered more than 1,646% returns when the market was up only 157% over that period.[345]

Moreover, research on mindfulness and happiness generally is instructive on the benefits of well-being to employee performance. First, beyond formal wellness programs, firms that promote mindfulness can help to manage and reduce lawyer distress and also enable their lawyers to provide exceptional client service.[346] Practicing mindfulness can help lawyers feel and perform better,[347] improve lawyer decision-making,[348] ethics,[349] and even active listening and negotiation skills.[350] In fact, lawyers at an international law firm reported a 45% increase in focus, a 35% decrease in stress, and a 35% increase in effectiveness after completing a firm-sponsored mindfulness program.[351]

Second, happiness research has demonstrated that happiness correlates to successful outcomes because "positive affect engenders success."[352] Happiness is inextricably linked to work satisfaction, as "[t]he number one determinant of happiness is 'a good job': work that is meaningful and

343. EDWARD M. HALLOWELL, SHINE: USING BRAIN SCIENCE TO GET THE BEST FROM YOUR PEOPLE 31 (2011). Moreover, corporations have increasingly recognized their commitment to all stakeholders beyond shareholders. For instance, in August 2019, the Business Roundtable—an association of CEOs of America's leading companies—issued a "Statement on the Purpose of a Corporation," in which it announced their respective corporations are committed to, among other things, "[i]nvesting in our employees." BUS. ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION (2019), https://opportunity.businessroundtable.org/ourcommitment/ [https://perma.cc/4SPY-JVUR].

344. MACKEY & SISODIA, *supra* note 340, at 278.

345. *See id.* at 278 tbl.A-1; *id.* at 35–36.

346. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 8 (2002).

347. *Id.* at 46–48.

348. Peter H. Huang, *Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?*, 55 HOUS. L. REV. 63, 79–80 (2017).

349. *Id.* at 101.

350. Riskin, *supra* note 346, at 48–60.

351. Felicity Nelson, *Mindfulness Training an Antidote to Lawyers' Toxic Lives*, LAW. WKLY. (Dec. 18, 2015), https://www.lawyersweekly.com.au/news/17721-mindfulness-training-an-antidote-in-lawyers-toxic-lives [https://perma.cc/FT9N-GY4E]. As an additional example, insurance company Aetna found that its fifteen-thousand employees that took part in a training program designed to teach them meditation and yoga found an average gain of "62 minutes of productivity [per] week." Shawn Achor & Michelle Gielan, *The Busier You Are, the More You Need Mindfulness*, HARV. BUS. REV. (Dec. 18, 2015), https://hbr.org/2015/12/the-busier-you-are-the-more-you-need-mindfulness [https://perma.cc/GMH9-TSKN].

352. Lyubomirsky et al., *supra* note 338, at 803.

done in the company of people we care about."[353] In a word, happiness is actually the cause of success, not merely the result.[354]

In fact, studies have found a strong correlation between happy employees and objective and subjective measures of productivity,[355] and as a general matter positive affect can improve not only skills important for effective lawyering (such as sociability, altruism, and conflict resolution), but physical health as well.[356] Engaged workers perform better because they often "experience positive emotions, including happiness, joy, and enthusiasm; experience better health; create their own job and personal resources; and transfer their engagement to others."[357]

Just as a negative environment can impact employees negatively, a positive environment can impact them positively. Research demonstrates that we can "pick up negativity, stress, and apathy" from others; simply observing a co-worker's stress "can have an immediate effect upon our own nervous systems, raising our levels of the stress hormone cortisol by as much as 26 percent."[358] By contrast, "the presence of even one positive person in a community can actually 'infect' everyone in it with positivity."[359] Put differently, working with positive, engaged, motivated people enhances our own positivity, engagement, motivation, and creativity.[360] Thus, in creating an environment that cultivates lawyer well-being, the improved well-being of one or some lawyers will affect positively those around them, thus making teams, departments, and firms more productive and successful.

That healthier employees perform better is critical in the legal profession for several reasons, but notably because of recent client demands for lawyer efficiency. As explained in Section III.B.1 above, firms could avoid addressing lawyer well-being issues on performance-related grounds because their business model was one that thrived on and financially re-

353. MACKEY & SISODIA, *supra* note 340, at 86.

354. ACHOR, HAPPINESS ADVANTAGE, *supra* note 101, at 2–4 ("[H]appiness and optimism fuel performance and achievement.").

355. Huang & Swedloff, *supra* note 286, at 337 (citations omitted); ACHOR, HAPPINESS ADVANTAGE, *supra* note 101, at 41 ("Data abounds showing that happy workers have higher levels of productivity, produce higher sales, perform better in leadership positions, and receive higher performance ratings and higher pay. They also enjoy more job security and are less likely to take sick days, to quit, or to become burned out."); EMMA SEPPÄLÄ, THE HAPPINESS TRACK 7–11, 152–61 (2016).

356. Lyubomirsky et al., *supra* note 338, at 840 ("[P]ositive affect fosters the following resources, skills, and behaviors: sociability and activity . . . , altruism . . . , liking of self and others . . . , strong bodies and immune systems . . . , and effective conflict resolution skills . . . .").

357. Arnold B. Bakker & Evangelia Demerouti, *Towards a Model of Work Engagement*, 13 CAREER DEV. INT'L 209, 215 (2008). Work engagement is not to be confused with workaholism, as work engagement is positively related to performance, while workaholism is not. *Id.* at 214.

358. ACHOR, BIG POTENTIAL, *supra* note 265, at 149.

359. *Id.* at 148–49; *see also id.* at 59–86.

360. *Id.* at 70.

warded inefficiency—the billable hour. Over the last few years, however, clients have caused law firms to move away from the traditional hourly-billing model and toward "alternative fee arrangements," or a "mutual agreement between a law firm and [client] for billing and payment of outside legal services that does not rely on straight hourly billing by the firm."[361] Such arrangements include fixed price agreements, success fee agreements, contingency pricing, and other alternatives to the traditional billable hour.[362]

The rise of nontraditional billing is "[o]ne of the most potentially significant" changes to the profession in recent years, as it portends the "effective death of the traditional billable hour . . . in most law firms."[363] As of 2017, alternative fee arrangements account for 15%–20% of law firm revenues; however, when combined with budget-based pricing, such alternatives to the billable hour "may well account for 80 or 90 percent of all revenues."[364] Nearly 68% of all firms are working with clients to create alternative fee arrangements, and nearly 77% of firms with more than 250 lawyers are doing so.[365]

Large companies are seeking to change the billing model for their outside counsel and are insisting on alternative fee arrangements. For instance, Microsoft enacted a "Strategic Partner Program" on July 1, 2017, which "plac[ed] a stronger focus on alternative fee arrangements, retainer payments, diversity and developing relationships with outside counsel that go beyond the billable hour."[366] At that time, approximately 55%–60% of its outside counsel matters were billed on a non-hourly, alternative-fee basis, with the hope of raising that figure to "a very robust 90 percent" by mid-2019.[367] Additionally, pharmaceutical company GlaxoSmithKline had 80% of outside legal work in 2017 done through an alternative fee arrangement, compared with just 3% in 2008.[368]

361. ALM LEGAL INTELLIGENCE, SPEAKING DIFFERENT LANGUAGES: ALTERNATIVE FEE ARRANGEMENTS FOR LAW FIRMS AND LEGAL DEPARTMENTS 10 (2012).

362. For a list of examples of alternative fee arrangements, see *id.*

363. CTR. FOR THE STUDY OF THE LEGAL PROFESSION, GEORGETOWN LAW & LEGAL EXEC. INST., THOMPSON REUTERS, 2017 REPORT ON THE STATE OF THE LEGAL MARKET 9 (2017), https://www.legalexecutiveinstitute.com/wp-content/uploads/2017/01/2017-Report-on-the-State-of-the-Legal-Market.pdf [https://perma.cc/E8QH-ARN2].

364. *Id.* at 10.

365. ALTMAN WEIL, INC., 2018 LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY 62 (2018), http://www.altmanweil.com//dir_docs/resource/45F5B3DD-5889-4BA3-9D05-C8F86CDB8223_document.pdf [https://perma.cc/5XPE-WBL3].

366. David Ruiz, *Microsoft Deputy GC: In New Outside Counsel Program, AFAs Plus Competition Equals Success*, LAW.COM (Aug. 7, 2017), https://www.law.com/2017/08/07/microsoft-deputy-gc-in-new-outside-counsel-program-afas-plus-competition-equals-success/ [https://perma.cc/VLK8-59D7].

367. *Id.*

368. Randall Colburn, *How Brennan Torregrossa and GlaxoSmithKline are Moving Beyond the Billable Hour*, MODERN COUNSEL (Mar. 15, 2018), https://modern-counsel.com/2018/glaxosmithkline/ [https://perma.cc/DD98-HTHF].

In all, since 2008, clients have asserted more control over decisions regarding their legal representation and are "insisting on more value for their legal spend"—i.e., "higher levels of predictability, efficiency, and cost effectiveness in the delivery of legal services, quality being assumed."[369] Moreover, a 2019 survey revealed that 82% of in-house corporate counsel are seeking to cut their company's legal spend over the next two years.[370] Thus, since the billable hour model is one that is antithetical to productivity and efficiency[371]—why finish a task efficiently in four hours when it could billed over six?—clients are now demanding firms move away from this model, and instead will award their business to firms that demonstrate they can perform the work productively, efficiently, predictably, and cost-effectively.[372] Accordingly, firms that prioritize lawyers' well-being will be better equipped to meet client demands for exceptional yet efficient service.

2. *Retention*

As discussed in Section III.A.3 above, mental health and addiction issues can lead to high attrition rates. By contrast, firms that promote lawyer well-being will see improved retention rates. This is borne out by experiences in other industries; for example, conscious businesses typically operate with much lower levels of employee turnover, which avoids the replacement cost of new employee hiring and training.[373]

Moreover, general counsel at major corporations have begun to understand that balance in the lives of their outside lawyers can be an important factor in their companies' bottom line.[374] In fact, general counsel will consider lawyer attrition as well as the quality-of-life issues that affect

369. 2019 REPORT ON THE STATE OF THE LEGAL MARKET, *supra* note 167, at 13.

370. ERNST & YOUNG, REIMAGINING THE LEGAL FUNCTION REPORT 2019, at 4, 7–8 (2019), https://www.ey.com/en_gl/tax/why-the-legal-function-must-be-reimagined-for-the-digital-age [https://perma.cc/FW3G-P439].

371. HARPER, *supra* note 20, at 78 ("Total elapsed time without regard to the quality or usefulness of the result reveals nothing about a worker's value. More hours often mean the opposite of real productivity. No one inside most big firms questions this perversion because leadership's primary goal is increasing equity partner wealth. More is better, and the misnomer 'productivity' persists.")

372. 2019 REPORT ON THE STATE OF THE LEGAL MARKET, *supra* note 167, at 13.

373. MACKEY & SISODIA, *supra* note 340, at 287. For instance, at the conscious business The Container Store, "turnover is less than 10 percent per year, in an industry that's over 100 percent." *Id.* at 89–90 (internal quotation marks omitted). Additionally, Jet Blue enacted a peer-to-peer recognition program in which one employee could nominate a coworker to be acknowledged for their performance; not only did this program lead to "significantly higher levels of employee performance and engagement," it also led to an increase in retention. ACHOR, BIG POTENTIAL, *supra* note 265, at 136–37.

374. HARPER, *supra* note 20, at 174 ("No other company would treat its most important commodity poorly enough to cause a turnover rate of 85 percent for first year lawyers who are gone by the sixth year. Why are you doing it? How can you get away with that?").

attrition when making decisions of which outside firms to retain.[375] These corporate clients recognize "that the absence of balance contributes to high associate attrition rates in large law firms and that attrition, in turn, imposes costs that result from the loss of institutional knowledge and continuity."[376] As the former senior vice president and general counsel of the Association of Corporate Counsel recognized more generally, the "greatest investment in any new lawyer" is in "developing the culture, support mechanisms and leadership initiatives that will ensure [that] lawyer's success," because firms will not only receive the "returns" generated by that lawyer, but the "larger benefits of cultivating a better work environment will rain down on everyone in the firm."[377] Indeed, in August 2019, 3M—whose legal department is itself a signatory to the ABA Wellness Pledge—has incorporated the pledge into its requests for proposals from outside counsel by asking "law firms if they have signed the pledge and what specific action they have taken to promote well-being among the lawyers and other legal professionals in their firm."[378]

Thus, firms that make efforts to retain their lawyers will not only avoid turnover costs and lose institutional knowledge about matters and clients as well as client relationships generally, it will help to foster and retain clients in the first place. And firms will be better equipped to retain their lawyers by taking steps to promote and prioritize their wellness and well-being.

3. *Recruiting Younger Lawyers: Choices for the New Generations*[379]

The third area in which law firms will benefit will be in recruitment, particularly with respect to millennial and, as they enter the profession, Generation Z lawyers.[380] People in these younger generations suffer from "higher levels of depression, anxiety, and suicide ideation than they did a

375. *Id.* at 189–90; *see also id.* (quoting one general counsel as saying they look to "retention issues, training, and flex time" when selecting outside counsel, as those issues "are all creeping into the alternative fee discussion").

376. *Id.* at 174.

377. *Id.* at 175.

378. Kristen Rasmussen, *Making Mental Health a Money Matter: 3M Uses ABA Wellness Pledge in Outside Counsel Search*, CORP. COUNS., https://www.law.com/corpcounsel/2019/08/25/making-mental-health-a-money-matter-3m-uses-aba-wellness-pledge-in-outside-counsel-search/ [https://perma.cc/WD4E-8QAX].

379. The author notes the anachronism in, and perhaps showing his age by, paraphrasing a corporate slogan from the Generation-X era as a title for a section discussing millennials and Generation Z lawyers. *Pepsi, the Choice of a New Generation*, DUKE UNIV. DIGITAL REPOSITORY, RESOURCE OF OUTDOOR ADVERTISING DESCRIPTIONS, https://idn.duke.edu/ark:/87924/r3fb4x59j [https://perma.cc/5WEL-X2GK] (last visited May 7, 2020).

380. Millennials are those born, roughly, in the 1980s and early 1990s. COREY SEEMILLER & MEGHAN GRACE, GENERATION Z GOES TO COLLEGE 4 (2016). Generation Z "refers to those born between 1995 and 2010." *Id.* at 6.

decade ago."[381] Indeed, in 2009, the average age of individuals diagnosed with depression was fourteen and a half, compared to twenty-nine in 1978.[382]

Younger millennials are now entering the profession, with older millennials having as much as ten years or more in practice. That latter age cohort has increased a spike in mental health issues. A recent study by BlueCross BlueShield revealed that the prevalence of depression among millennials has increased by 31% from 2014 to 2017, and is the top condition affecting millennials by adverse health impact.[383] Depression is 18% more prevalent for older millennials than Generation X'ers at the same age.[384]

The trend is more concerning for the next generation. Generation Z'ers are "on the verge of the most severe mental health crisis for young people in decades."[385] Depression of middle- and high school-aged Generation Z children has "skyrocketed" between 2012 and 2015, a trend that exists across all demographic and socioeconomic classes.[386] In fact, a 2015 study by the U.S. Department of Health and Human Services found that "56% more teens experienced a major depressive episode in 2015 than in 2010, and 60% more experienced severe impairment."[387]

This trend has continued as Generation Z'ers have gotten older. They are increasingly entering college with mental health issues,[388] with nearly twice the number of incoming students in 2016 indicating they feel depressed than those who entered college in 2009.[389] They are more likely to report feeling "overwhelming anxiety" and that they feel "so depressed they [can] not function."[390] Additionally, a 2019 study revealed that current twenty to twenty-one-year-olds were 78% more likely to have experienced serious psychological distress in the last month than twenty to

381. Thomas Curran & Andrew P. Hill, *Perfectionisim Is Increasing over Time: A Meta-Analysis of Birth Cohort Differences from 1989 to 2016*, 145 PSYCHOL. BULL. 410, 420 (2019).

382. ACHOR, BIG POTENTIAL, *supra* note 265, at 22.

383. BLUE CROSS BLUE SHIELD, THE HEALTH OF AMERICA REPORT: THE HEALTH OF MILLENNIALS 2 (2019), https://www.bcbs.com/sites/default/files/file-attachments/health-of-america-report/HOA-Millennial_Health_0.pdf [https://perma.cc/WKG7-YFUD]. Substance use and alcohol use disorders were the second and third conditions affecting millennials by adverse health impact. *Id.*

384. *Id.* at 3.

385. Twenge et al., *supra* note 280, at 93.

386. *Id.* at 102–03; *see also id.* (observing that "more and more teens [say] they don't enjoy life").

387. *Id.* at 108; *see also* DEP'T OF HEALTH & HUM. SERVS., SUBS. ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH 38 (2016), https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2015/NSDUH-FFR1-2015/NSDUH-FFR1-2015.pdf [https://perma.cc/2WZU-H5TL].

388. SEEMILLER & GRACE, *supra* note 380, at 196–97.

389. Twenge et al., *supra* note 280, at 103.

390. *Id.*

twenty-one-year-olds in 2008, and current eighteen to twenty-five-year-olds are 71% more likely to experience such distress than eighteen to twenty-five-year-olds in 2008.[391] In all, Generation Z'ers are 49% more likely than millennials to have reported serious psychological distress in the past month.[392]

Perhaps not surprisingly, then, millennials prioritize work-life balance when choosing employment, even more than salary.[393] As a general matter, millennials seek meaning and purpose in their work, as well as supportive and nurturing work environments.[394] In fact, a 2016 survey of millennials revealed that, salary excluded, work-life balance is the most important characteristic millennials search for when choosing a job.[395] Other top considerations include leadership opportunities, a sense of meaning or purpose in their work, training, and the impact the work has on society[396]—that is, the types of motivations and values that enhance one's subjective well-being and, in turn, inversely correlate to depression.[397] Thus, millennials respond best to employers who convey "you matter to us"—that is, employers who see their employees' humanity and well-being is integral to the company and its success.[398]

With Generation Z beginning to enter law school and the profession, firms that address mental health and addiction issues and that foster a

391. *Id.* at 188.

392. *Id.*

393. JOANNE G. SUJANSKY & JAN FERRI-REED, KEEPING THE MILLENNIALS: WHY COMPANIES ARE LOSING BILLIONS IN TURNOVER TO THIS GENERATION—AND WHAT TO DO ABOUT IT 5 (2009); *see also id.* at 11, 51 (citing a study finding that salary was only the fourth-most important "determinant of an attractive workplace," following health benefits, work-life balance, and promotional opportunities); Leslie Larkin Cooney *Walking the Legal Tightrope: Solutions for Achieving a Balanced Life in Law*, 47 SAN DIEGO L. REV. 421, 450 (2010) ("Millennials undoubtedly seek more work-life balance . . . ."); Eddy S.W. Ng et al., *New Generation, Great Expectations: A Field of Study of the Millennial Generation*, 25 J. BUS. PSYCHOL. 281, 289 (2010) ("The need for work-life balance . . . remains an important factor in [millennials'] job choice decisions, despite an expectation for rapid advancement and pay increases."); Katie French, *Millennials Prioritising Work-Life Balance over Job Security, Study Finds*, TELEGRAPH (UK) (Nov. 19, 2018), https://www.telegraph.co.uk/news/2018/11/19/millennials-prioritising-work-life-balance-job-security-applying/ [https://perma.cc/S7C8-YQDY] (reporting on a survey finding that one third of millennials believe that work-life balance is the "most important factor" in choosing a job).

394. *See* Ng et al., *supra* note 393, at 282–83, 288–89.

395. DELOITTE, THE 2016 DELOITTE MILLENNIAL SURVEY: WINNING OVER THE NEXT GENERATION OF LEADERS 20 & fig.11 (2016), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-millenial-survey-2016-exec-summary.pdf [https://perma.cc/9WTN-MB9V].

396. *Id.*

397. *See supra* notes 123–127 and accompanying text; *cf.* Brafford, *supra* note 179, at 99–102 (arguing that law firms that promote and foster positive psychology will be "recruiting magnets for law firms").

398. Brafford, *supra* note 179, at 102 ("The common theme to the Millennial profile is that they respond best to employers that convey 'you matter to us'; your well-being and enthusiasm are important to our success.").

healthy environment will help attract these incoming interns and associates. They experience mental health issues in greater frequency than millennials, and they are more likely to talk about[399] and seek help for them.[400]

In fact, law students on the millennial/Generation Z cusp have made clear that mental health is a priority to them as they enter the legal profession. In its *2019 Summer Associates Survey*, *The American Lawyer* reported that 42% of respondents said they are concerned about their mental health, including because of the "structure of the legal industry."[401] Further, when asked to list their top three factors in considering an employment offer from a law firm, work-life balance was the most important factor among the respondents.[402]

This prioritization of mental health and work-life balance is not an anomaly in this one survey, as young millennial and Generation Z students are engaging in activism to promote and mental health in the profession. For instance, in 2019 the Virginia State Bar removed questions relating to mental health history and treatment in response to a student-led movement for it to do so,[403] and several well-being-related programs at law schools are led by students.[404] Younger Generation Z students are also campaigning for greater mental health awareness and treatment; for instance, in June 2019, in response to student activism, Oregon enacted a law that will allow students to take "mental health days" from school as an excused absence, just as they would a sick day.[405] Thus, as they enter the workforce, these students certainly will prioritize their mental health and well-being in choosing among employers.[406]

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399. Sue Shellenbarger, *The Most Anxious Generation Goes to Work*, WALL ST. J. (May 9, 2019, 12:22 PM), https://www.wsj.com/articles/the-most-anxious-generation-goes-to-work-11557418951 [https://perma.cc/QX5C-X6UP].

400. *See* AM. PSYCHOL. ASS'N, STRESS IN AMERICA: GENERATION Z 4 (2018), https://www.apa.org/news/press/releases/stress/2018/stress-gen-z.pdf [https://perma.cc/6F36-N7EN].

401. Dylan Jackson, *The 2019 Summer Associates Survey: Wined, Dined and Worried*, AM. LAW. (Sept. 23, 2019), https://www.law.com/2019/09/23/the-2019-summer-associates-survey-wined-dined-and-worried/ [https://perma.cc/Y6LH-5D7H].

402. *Id.*

403. Mattingly, *supra* note 307.

404. *See* Jordana Alter Confino, *Where Are We on the Road to Law Student Well-Being?: Report on the ABA CoLAP Law Student Assistance Committee Law School Wellness Survey*, 68 J. LEGAL EDUC. 650, 693–98 (2020); Karen Sloan, *'Law School Was Kind of a Shock:' Students Take the Lead in Mental Health Initiatives*, LAW.COM (Aug. 5, 2019), https://www.law.com/2019/08/05/law-school-was-kind-of-a-shock-students-take-the-lead-with-mental-health-initiatives/ [https://perma.cc/6Z45-VGV3].

405. Sarah Zimmerman, *Teen Activists Score Mental Health Days for Oregon Students*, ASSOCIATED PRESS (July 21, 2019), https://apnews.com/b2ce8f6a019846f7844f59af449ad567 [https://perma.cc/W7EM-JB5Z].

406. Human resources software company Zenefits found that "Gen Z-ers recognize that mental health in the workplace is important, and they are demanding benefits and workplace policies that acknowledge this reality." Nicole Roder, *Young Workers Demand Emphasis on Mental Health in the Workplace*, ZENEFITS (Jan. 3,

Consequently, firms that prioritize lawyer health and well-being will be attractive both to lateral lawyers who seek better balance as well as to younger and future lawyers who prioritize their own well-being.

CONCLUSION

The legal profession has known for decades that its members suffer from mental illness and addiction in staggering numbers, and firms largely have been unmoved by the moral case for change. As the practice of law has become more of a business, firms can and will make changes to reduce costs, increase efficiencies, and improve profit margins. This Article argues not only that the profession should and should want to create a "better future for our lawyers"[407] by making such changes, but that it is in its interest to do so. Since firms have not wanted to make changes on moral grounds, they can and should at least make them on business ones, and lawyers and the profession itself will benefit as a result. Put differently, *why* firms make these changes is not as important so long as they *are made*, and if it takes a cost-benefit analysis for firms and the profession to prioritize lawyer well-being, so be it.

2019), https://www.zenefits.com/blog/young-workers-demand-emphasis-on-mental-health-in-the-workplace/ [https://perma.cc/RPA9-A84T].

407. THE PATH TO LAWYER WELL-BEING, *supra* note 15, at 47.

The Washington Post
Democracy Dies in Darkness

Opinion How to counter today's tribalism and build 'a more perfect union'

By Bernice B. Donald and Don R. Willett
September 16, 2022 at 7:00 a.m. EDT

Bernice B. Donald is a judge on the U.S Court of Appeals for the 6th Circuit. Don R. Willett is a judge on the U.S. Court of Appeals for the 5th Circuit.

Federal judges rarely write newspaper op-eds. Rarer still: a *joint* op-ed by two assumed foes. In this era of poisonous tribalism, what could these two judges agree on?

After all, one is an African American female Obama appointee, the other a White male Trump appointee.

For starters, we're friends. More, we respect each other as judicial siblings committed to a shared oath; our robes are black, not red or blue. In this coarse and graceless age, believing that our similarities eclipse our differences might be derided as Pollyannish. So be it.

Saturday is Constitution Day. But let's begin with the Declaration of Independence, which in 2026 will mark its semiquincentennial — 250 years.

The Declaration is aspirational, debuting a uniquely American theory: that government exists to secure people's inborn, individual, inalienable rights. The Constitution is architectural, erecting a structure to achieve those ideals. But the union was very far from perfect at the founding: One-third of the Declaration's signers were enslavers.

Still, the Rev. Martin Luther King Jr. was right in 1963 when he called the nation's founding documents "a promissory note to which every American was to fall heir." While he recognized that America had "defaulted" on that note in failing to recognize equality for African Americans, he also knew that those founding documents made possible a government that could correct itself over time. He was echoing Frederick Douglass, who a century earlier declared that the Declaration's promises of liberty and equality are eternal, even if America betrayed those promises.

King implored Americans not to tear down the nation's heritage but to live up to it. Doing so might seem difficult these days, when entrenched tribalism threatens to swamp citizens' shared attachment to the nation. But that makes trying all the more important. This Constitution Day, here are five suggestions to help form a "more perfect union."

Log off. In today's hot-take culture stoked by social media, the art of disagreeing agreeably seems quaint. The snarling, sneering and sniping are on full display in a realm we know well: modern law schools. Online incivility seems to fuel real-life boorishness. Earlier this year, a panel at Yale Law School brought together lawyers from the left and right to tout the importance of free speech. Chaos ensued. That is what happens when views held by the "other side" are deemed no longer debatable but disreputable. Better to reject venomous online voices — and promote civility in the physical world.

Learn up. The civics IQ of "We the People" is not exactly Mensa-level. According to the 2022 Annenberg Civics Survey, most American adults cannot name all three branches of government, and 25 percent cannot name a single one. The judicial branch is likely the least understood — especially by those who depict the judiciary as hijacked by craven politics. Facts are hostile witnesses. The Supreme Court's rate of dissent today is no higher than it was in 1945, when eight of nine justices had been appointed by the same president. Besides, fixating on the Supreme Court is distorting: Ninety-nine percent of federal cases go no higher than regional circuit courts. That's where we serve, and we can attest, as research has shown, that roughly 98 percent of circuit-court decisions are *unanimous* — hardly a sign of ideologically driven judging.

Reach out. Genuine across-the-aisle friendships are rare today. According to an NBC News-Generation Lab poll last month, about half of college sophomores say they wouldn't date, or even choose as a roommate, someone who didn't vote as they did in the 2020 presidential election. Americans too often hunker down in like-minded echo chambers, marinating in confirmation bias, rarely encountering, much less befriending, anyone who sees the world differently. Cross-party friendships are no easy feat. But if Justices Antonin Scalia and Ruth Bader Ginsburg could do it, so can we — and so can you.

Pull back. Many Americans view everything through a political prism. Entire identities get distilled to partisan labels. The places where attachments were found — such as civic and religious institutions — have thinned out, and politics has rushed into the vacuum. Political strife is nothing new, but things have radically intensified. Regrettably, some judges *contribute* to the noxiousness, penning acidic opinions that fuel a perception of judges as ideological combatants rather than evenhanded arbiters. But the toxicity is culture-wide. Fact: There is more to life than politics.

Plug in. President Jimmy Carter put it powerfully during his 1981 farewell address when he said he would be taking up "the only title in our democracy superior to that of president, the title of citizen." American citizenship is not a spectator sport. Be engaged citizens, not enfeebled (or enraged) bystanders. Self-government is not self-perpetuating. This raucous republic belongs to us all, and the secret sauce is a sleeves-rolled-up citizenry.

This Constitution Day, if any identity should define us as Americans, let it be one that transcends ideological and demographic differences: Our common identity as heirs to a rich civic inheritance.

Chris L. Newbold

Chris L. Newbold is Executive Vice President of ALPS Malpractice Insurance. As EVP, Chris oversees ALPS business development team, sales strategy and is ALPS' chief liaison into the bar association community, where ALPS is endorsed by more state bars than any other carrier regardless of size.

Externally within legal circles, Chris is a recognized nationally based on his strategic planning facilitation work to bar associations and bar foundations and his leadership in the lawyer well-being movement. On well-being, Chris has been at the epicenter of discussion both strategically and as an advocate. As co-author of the movement launching 2016 report The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, his leadership as co-chair of the National Task Force on Lawyer Well-Being, his participation on the ABA's Working Group to Advance Well-Being in the Legal Profession and his role as co-host The Path to Well-Being in Law podcast, Chris has been at the forefront of a movement intent on creating a culture shift in the legal profession, and advancing personal and professional satisfaction in all sectors of legal life. In January 2023, Chris became the President of the Institute for Well-Being in Law, an organization he helped form in 2020.

Chris received his law degree from the University of Montana School of Law in 2001 and holds a bachelor's degree from the University of Wisconsin-Madison (1994). Following his graduation from law school, he served one year as a law clerk for the Honorable Terry N. Trieweiler of the Montana Supreme Court. After his clerkship, he launched his ALPS career as President and principal consultant of ALPS Foundation Services, a non-profit fundraising and philanthropic management consulting firm. In that capacity, he authored The Complete Guide to Bar Foundations in conjunction with the National Conference of Bar Foundations.

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Stephanne Cline Thornton

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Employment History

Clinical Director ▪ West Virginia Judicial and Lawyer Assistance Program
Charleston, West Virginia ▪ May 2022 to Present

- Conduct clinical assessments and make recommendations for further external treatment programming or provide in-house counseling and coaching for members of the Bench, Bar, and Law School Students;
- Review clinical evaluations and assessments and formulate approved clinical recommendations post-assessment;
- Develop, plan, and implement strategies for program's continuation and growth;
- Remain current on clinical trends, issues and best practices for licensed professionals and safety sensitive workers;
- Coordinate with Executive Director and staff to ensure clinical and monitoring forms and documentation are appropriate and compliant with applicable laws;
- Develop clinical and administrative policies and procedures in conjunction with the Executive Director that adhere to legal and clinical ethical standards, as well as State Bar and Supreme Court rules.
- Educate Bench, Bar and Law School students and staff on clinical, ethical, physical, mental, emotional, and behavioral health issues; their potential for impairment to practice and/or serve, as well as the corresponding legal, ethical, employment and disciplinary consequences.
- Develop a resource network of medical/clinical evaluation and treatment resources and facilities, and peer support options for attorneys with substance use disorder and mental health issues; monitor the skill level of counselors, quality of approved medical/clinical providers, evaluators, treatment facilities and other support options.
- Facilitate referrals to approved medical/clinical evaluation, treatment, and continuing care providers;
- Develop statewide network of peer volunteers and monitors and train peer volunteers on signs and symptom identification for attorneys with substance use disorder and mental health issues;
- Facilitate referrals to approved medical/clinical evaluation, treatment, and continuing care providers;
- Develop process for debriefings and well-being support for legal practitioners; and
- Train and present on various well-being initiatives.

Director of Programs ▪ Public Defender Services
Charleston, West Virginia ▪ November 2021 to May 2022

- Developed and oversaw creation and implementation of new programs related to indigent defense and holistic representation;
- Wrote grants to obtain funding for newly created programs;
- Supervised VISTA members/line staff working on resource and program support and community engagement for Public Defender Corporations;
- Developed and oversaw the development, coordination, data collection, operations, and outcome measures of the Public Defender Corporation Recovery Coach Project and the Social Worker Intervention for Trauma-Informed (SWIFT) Defense of Women project;
- Developed the training requirements, online training program, and policies and procedures of the Parent Representative Navigator program in coordination with the agency Title IVe Coordinator;
- Supervised the NLADA AmeriCorps VISTA members and oversaw their agency-specific projects;
- Oversaw recruitment and supervision of university interns in related fields (social work, criminal justice, psychology);

- Conducted trainings for social workers to become engaged in defense-based advocacy for public defenders and court appointed panel attorneys; and
- Conducted trainings for defense counsel to work collaboratively with social workers in defense.

Criminal Justice Specialist ▪ Public Defender Services
Charleston, West Virginia ▪ May 2016 to November 2021

- Served as a mitigation and alternative sentencing resource to the Public Defender Corporations in West Virginia to include meeting with criminal defendants to develop mitigation;
- Provided education and training information and resources to attorneys within the Public Defender Corporations with particular focus on resiliency, trauma-informed legal practice, and mitigation development;
- Created training program for and oversaw training of Public Defender Corporation Recovery Coaches;
- Evaluated and analyzed data collected by the Public Defender Corporation Recovery Coach project;
- Identified community resources across the state to provide targeted services to criminal defendants;
- Identified and pursued grant opportunities to benefit the Public Defender Corporations;
- Served as agency liaison with other programs dedicated to developing alternative sentencing and rehabilitative programs offering opportunities for criminal defendants;
- Developed and conducted educational programs related to mitigation and sentencing advocacy; and
- Assisted with the planning and execution of the annual Indigent Criminal Defense Conference.

Social Worker Resource Coordinator ▪ National Association for Public Defense
Remote/Contract Work ▪ September 2021 to Present

- Work as a support to the National Association for Public Defense team to engage, train, and develop the skills of and engender a professional connection among social workers, sentencing advocates, mitigation specialists, reentry specialists, and others in similar roles on defense teams;
- Co-developed and co-facilitate a hybrid online and synchronous learning program of mitigation and created and facilitate other online mitigation training programs;
- Identify guest speakers to present at live conferences, virtual webinars, and virtual meetings and create and oversee the social work track at live conferences.

Contracted Sex Offender Treatment Evaluator ▪ Dayspring Counseling
Dunbar, West Virginia - Contract Work ▪ November 2018 to August 2019

- Performed psychosexual evaluations and treatment assessments addressing mental health, substance use, and behavioral concerns of federal probationers convicted of sexual offending upon their reentry to the community.

Sentencing Advocate Director ▪ Office of the Kanawha County Public Defender
Charleston, West Virginia ▪ May 2012 to April 2016

- Clinically assessed criminal defendants for substance use and mental health issues and other mitigating factors towards the development of alternative sentencing, mitigation, and treatment plans;
- Worked to identify, link, and refer criminal defendants to treatment programs based on identified needs and appropriate levels of care;
- Advocated on behalf of and provided expert testimony for criminal defendants before the Court, prosecuting attorneys, probation, and parole for sentencing alternatives that are congruent with clients' treatment needs;
- Developed sentencing memorandums for criminal defense attorneys to use in court and pleadings;
- Coordinated with forensic experts to provide clinical background information on criminal defendants presenting for evaluation;

- Collaborated with community treatment providers and community agents to ensure proper placement and care of criminal defendants with substance use disorder and mental health conditions requiring treatment in the community.

Program Coordinator ▪ Western Judicial Circuit Felony Drug Court
Athens, Georgia ▪ November 2008 to May 2012

- Assisted the Superior Court Judge in planning and executing treatment, administrative, grant writing and fundraising duties related to the Felony Drug Court Program;
- Supervised contracted counselors, staff, and university interns;
- Provided clinical support for crisis management intervention;
- Provided direct counseling services to participants through individual counseling (EMDR) sessions, group therapy sessions, and educational group sessions addressing substance use, recovery, relationship, trauma, and adjustment issues;
- Clinical Assessor and Treatment Provider for DUI offenders (towards their license reinstatement);
- Clinically assessed and evaluated potential participants for substance use and entrance criteria to the program based on DSM and ASAM patient placement criteria;
- Coordinated with defense attorneys and assistant district attorneys to arrange assessments and alternative treatment recommendations when applicable;
- Prepared and monitored operating budget and performed grant writing for program development.

Clinical Supervisor – Contracted ▪ Athens Day Reporting Center
Athens, Georgia ▪ August 2010 to April 2012

- Provided clinical supervision for Day Reporting Center counseling staff towards their attainment of IC & RC Addiction Counseling Certification ensuring compliance protocol of Day Reporting Center treatment interventions;
- Educated staff on assessment criteria, treatment interventions, mental health treatment and assessment protocol, and substance use disorder based on the 12 core functions of counseling skill groups.

Director of Social Services ▪ Athens Justice Project
Athens, Georgia ▪ November 2006 to November 2008

- Evaluated and assessed criminal defendants for strengths, rehabilitation goals, and motivation to change criminogenic patterns;
- Performed community outreach, referral, and linkage to identified treatment resources in addition to outreaching criminal defendants in jails and Department of Corrections;
- Performed individual counseling with clients using cognitive behavioral therapy, strengths-based therapy, and mindfulness therapy approaches. Performed couples' counseling as requested;
- Assisted in grant writing and community development;
- Facilitated reentry planning (under the umbrella of restorative justice using curriculum from the Georgia Department of Corrections) for inmates of the local county detention camp;
- Created "Athens Workforce Enhancement Reentry Curriculum" (AtWERC) focusing on reentry of criminal offenders from incarceration settings to enhance employment readiness, promote life skills, and decrease criminogenic thinking.

Program Manager, Community Treatment and Outpatient Teams ▪ Mental Health Center of Denver, Inc.
Denver, Colorado ▪ May 2002 to October 2006

- Part of the team and organization awarded the 2005 Community Provider of Excellence as presented by the National Council for Community Behavioral Healthcare;
- Prepared and managed team operational budget;

- Provided clinical oversight and administrative supervision to a multi-disciplinary clinical and administrative staff to ensure efficient team operations;
- Assessed staff work performance for performance evaluations;
- Advised individual staff members toward resolution of day-to-day operations by the clinical team;
- Assessed, diagnosed, and treated adult clients experiencing mental illness and co-occurring substance use disorder in group and individual therapy setting;
- Performed civil commitments and other crisis intervention as needed at clinic site, in the community, or as applicable;
- Maintained a therapy caseload specializing in treatment of substance use disorder, trauma, and complex PTSD issues.

Forensic Social Worker ▪ Fulton County Conflict Defender Office
Atlanta, Georgia ▪ May 2000 to April 2002

- Member of the Alternative Sentencing and Mitigation Division;
- Conducted biopsychosocial assessments and created mitigation on behalf of criminal defendants charged in capital cases and with high and aggravated felony charges;
- Created alternative sentencing placements for criminally charged defendants; and
- Part of the collaborative jail treatment team to discuss and plan for release of mentally ill defendants charged with low-level offenses.

Education

University of Georgia, Graduate School of Social Work, Athens, GA

- Master of Social Work, 2000
- Elected Phi Kappa Phi

Emory University, Candler School of Theology, Atlanta, GA

- Master of Divinity, Honors Program, 1998
- Special Focus in Psychology and Sociology of Religion
- Thesis: "From the Minister's Mouth to the Parishioner's Pocketbook."

Furman University, Greenville, SC

- Bachelor of Arts, 1995
- Double Major in Religion and Sociology

Licensure and Certifications

Licensed Independent Clinical Social Worker, #DP0094473, State of West Virginia
Master Addiction Counselor, #507534, NAADAC
Certified Addiction Counselor Level III, #6213, State of Colorado
Certified Sex Offender Treatment Provider, IATP
Certified Clinical Trauma Professional, IATP
Certified Clinical [Addictions] Supervisor, #0947, State of Georgia (lapsed due to relocation)
Certified Addiction Counselor Level II, #1947 - R, State of Georgia (lapsed due to relocation)

Specialized Training, Boards, and Affiliations

- West Virginia State Advisory Committee Member to the United States Commission on Civil Rights.
- West Virginia Governor's Council on Substance Abuse Prevention and Treatment, Co-Chair of the Courts and Criminal Justice Populations Subcommittee.
- West Virginia Board of Social Work Member.
- REACH Initiative Board Member.
- Speakers Bureau: Trauma-Informed Care Network.
- National Association of Social Workers, National Association of Alcohol and Drug Abuse Counselors and West Virginia Association of Addiction and Prevention Professionals Member.
- Eye Movement Desensitization and Reprocessing (EMDR) Basic Training Levels I & II, including DeTur Protocol (urge reduction for substance use) training.

- Approved Clinical Evaluator and Treatment Provider for the DUI Intervention Program through the Georgia Department of Behavioral Health and Developmental Disabilities.
- Past member of Georgia Addiction Counselors Certification Board.
- Successful grant writer and program developer (including grant awards from the Bureau of Justice Assistance and the Chan-Zuckerberg Initiative donor advised fund).

Selected Presentations and Publications

The Art of Listening to Your Clients and To Yourself. NYSACDL, Weapons for the Firefight 2022: Caring for Mental Health, the Client, and You, New York, NY ▪ 2022

Fake it Till You Make It. George Mason College of Law, virtual ▪ 2022

The Age of Rage. Kentucky DPA Annual Conference, Louisville, KY ▪ 2022

Hiding in Plain Sight: Impostor Phenomenon. Virginia Judicial and Lawyer Assistance Program Annual Conference, Lynchburg, VA ▪ 2022

There's No "I" in Team: An Overview of Mitigation and Integration Throughout the Case. NAPD Team Mitigation Institute, Denver, CO ▪ 2022

Voluntary Brain Disease? Substance Use Disorder, Neurobiological Effects, and Mitigating Factors. NAPD We the Defenders Conference, Indianapolis, IN ▪ 2022

A Slippery Slope: Self-Doubt, Impostor Phenomenon, Burnout, and Moral Injury. Mid-Atlantic Legal Professionals Retreat, Asheville, NC ▪ 2022

Then There Were Four: Addressing Trauma's Four Responses. WVU School of Social Work Lunch & Learn Series, virtual ▪ 2022

Will the Real Legal Professional Please Stand Up? Understanding and Confronting Impostor Syndrome. NAPD "We Are the Ones We've Been Waiting For" Women's Conference, virtual ▪ 2021

Not My New Normal! A Self-Compassion Solution to Vicarious Trauma, Burnout, and Moral Injury. Keynote Address, 2021 Texas Poverty Law Conference, virtual ▪ 2021

Return to Ourselves: Post-Pandemic Habits of Life. The 48th Annual Meeting of the National Conference of Appellate Court Clerks, virtual ▪ 2021

The Self-Compassion Solution to Job Burnout. WV JLAP Annual Retreat ▪ 2021

Seeing the Forest for the Trees: Self-Care, Client Care, and COVID. NASW WV Virtual Spring CE Conference for Social Workers, virtual ▪ 2021

The Unintended Consequences of Caring for your Work and How to Flourish Using Compassion. WVU CED Staff Training, virtual ▪ 2021

Attorney-Social Worker Collaboration for Holistic Representation: Teamwork for Mitigation. Public Defender Services CLE, virtual ▪ 2021

Implicit Bias: Learning to Check Our Biases. WVAADAC Regional Training Seminar, virtual ▪ 2021

In Support of Women: Gender-Responsive Work with Female Defendants. NAPD "We Are the Ones We've Been Waiting For" Women's Conference, virtual ▪ 2021

Chance Meeting, Changed Life: Trauma-Sensitive Engagement for Non-Lawyers. NAPD "We Are the Ones We've Been Waiting For" Women's Conference, virtual ▪ 2021

What Happened? ACEs, Substance Use, and the Criminal Legal System. Criminal Justice Reform Summit, virtual ▪ 2021

Caring for People with Your Heart Wide Open. WVU Pediatric Neurology Grand Rounds, virtual ▪ 2021

Trauma-Informed Care and Secondary Trauma: Unintentional and Unexpected Consequences of Caring on the Job. Baltimore (MD) County Fire Department EMS Training Series, virtual ▪ 2021

ACEs, Trauma, and SUD. WVAADAC Regional Training Seminar, virtual ▪ 2021

From Vicarious Trauma to Moral Injury and the Self-Compassion Solution to Fix It. Presentation to West Virginia Legal Aid ▪ 2020

Trauma-Informed Legal Practice. Presentation for the New York County (NY) Defender Services, virtual ▪ 2020

Trauma-Informed Legal Practice. Presentation for the Kentucky Department of Public Administration, virtual ▪ 2020

Tackling Vicarious Trauma, Compassion Fatigue, and Burnout. Presentation at the NASW WV Virtual CE Conference ▪ 2020

Bouncing Back: The Science of Resilience. Presentation at the NASW WV Virtual CE Conference ▪ 2020

The Science of Resilience. Presentation for Federal Defenders and Criminal Justice Act Panel Attorneys, virtual (Seattle, Washington) ▪ 2020

Trauma-Informed Legal Practice. Presentation for the National Association for Public Defense, "We Are the Ones We've Been Waiting For" National Women's Conference, virtual ▪ 2020

Mitigation Training for Social Workers. Presentation for Continuing Education Credit for Social Workers in West Virginia, hosted by Public Defender Services, Charleston, West Virginia ▪ 2020

Resilience: Making Mitigation Hopeful. Presentation for Lawyers, hosted by Public Defender Services, Charleston, West Virginia ▪ 2019

Resilience: Making Mitigation Hopeful. Presentation at the National Association for Public Defense, "We the Defenders" Conference, Seattle, Washington ▪ 2019

Trauma-Informed Legal Practice. Presentation to the Handle with Care Annual Conference, Charleston, West Virginia ▪ 2019

How Did We Get Here? Pain, Pill Mills, and What's Next. Presentation to the Handle with Care Annual Conference, Charleston, West Virginia ▪ 2019

The Trauma Imperative: Understanding Trauma in WV Today. Presentation at the NASW WV Spring CE Conference, Charleston, West Virginia ▪ 2019

Mindfulness: Meditation Practices for Practitioners and Clients. Presentation at the National Association for Public Defense, "We the Defenders" Conference, Indianapolis, Indiana ▪ 2018 and Biloxi Mississippi ▪ 2019

The Science of Addiction. Presentation to the West Virginia Government Lawyers Committee, Charleston, West Virginia ▪ 2019

Incorporating Mindfulness into Addiction Treatment. Presentation at the WVAADC "Light up the Darkness" Annual Conference. Lakeview Resort, Morgantown, West Virginia ▪ 2018

How Did We Get Here? Pain, Pill Mills, and Pharma. Presentation at the NASW WV Spring CE Conference, Charleston, West Virginia ▪ 2018

Application of Mind-Body Awareness Techniques in Therapy. Presentation at the NASW WV Spring CE Conference, Charleston, West Virginia ▪ 2018

Zeroing in on Client Records (Working with IDD Clients). Presentation on behalf of Public Defender Services Criminal Law Research Center Traveling CLE, Fairmont and Charleston, West Virginia ▪ 2018

Client Interviewing (for Mitigation and Rapport Building). Presentation to the West Virginia Public Defender Services New Attorney Training, Charleston, West Virginia ▪ 2017

DIY Mitigation online seminar. Presentation on behalf of West Virginia Public Defender Services Public Defender Corporation Resource Center, Charleston, West Virginia ▪ 2017

History of Addiction, Recovery, and Drug Laws. Presentation to the National Association of Social Workers of West Virginia Spring Annual Conference, Charleston, West Virginia ▪ 2017

Trauma Treatment: What We Did Then, What is Now. Presentation to the National Association of Social Workers of West Virginia Spring Annual Conference, Charleston, West Virginia ▪ 2017

House Bill 2494 (2016) Creation of a Deferred Adjudication Process in West Virginia. Presentation to the Chief Defenders of West Virginia at the 2016 West Virginia Indigent Defense Conference, West Virginia ▪ 2016

Creating Alternatives: Tailoring Assessments, Interventions, and Treatment to Criminal Offenders. Presentation to the West Virginia Association of Alcoholism and Drug Abuse Counselors Professional Development Summit, West Virginia ▪ 2016

Mindfulness and Addiction: Brief Interventions to Quiet the Feedback Loop. Presentation to the National Association of Social Workers of West Virginia Spring Annual Conference, Charleston, West Virginia ▪ 2016

Tailoring Assessments, Interventions, and Treatment to Criminal Offenders. Presentation to the National Association of Social Workers of West Virginia Spring Annual Conference, Charleston, West Virginia ▪ 2015

Mitigation, Sentencing Advocacy, and Utilizing What Others Say About Your Client. Presentation as part of the West Virginia Public Defender Services Skills Training, Flatwoods, West Virginia ▪ 2015

Mitigating Factors: Considering Substance Abuse and Mental Health in Criminal Defendants. Presentation to the West Virginia Public Defender Services 2009 Public Defender Conference, Snowshoe, West Virginia ▪ 2009

Presentations on the Efficacy and Operation of Felony Drug Court to Representatives from Korean Judicial Services and to Representatives from Israeli Police Services, Athens, Georgia ▪ 2008

Sentencing Alternatives to Incarceration. Institute of Continuing Legal Education in Georgia, Atlanta, Georgia ▪ 2001

Alternatives to Incarceration: The Team Approach to Plea Negotiation and Sentencing. National Legal Aid and Defender Association Annual Conference, Miami, Florida ▪ 2001

Markward, M., Cline, S., & Markward, N. (2001). "School shootings: Group socialization, angry youth, and the Internet." International Journal of Adolescence and Youth [Special Issue on Youth and Violence], 10 (1-2).

School Shootings: Early Friendships, Angry Youth, and the Internet. UGA School of Social Work Continuing Education Conference, Savannah, Georgia ▪ 2000

Defense of the Indefensible: How a Social Worker Can Help. NASW-Georgia 12th Annual Conference, Atlanta, Georgia ▪ 2000

My name is Michael S. McKnight and I am a partner in Boyce Law Firm LLP. I have practiced with this firm for over thirty-one years. My practice during that time has focused on employment law related issues.

I have been blessed with many professional accomplishments but several standout in my mind. I am an "AV Preeminent" rated lawyer by Martindale Hubbell. I have been recognized by Best Lawyers, Chambers and Great Plains Super Lawyers. Our Firm was selected to be the South Dakota representative of the National Workers' Compensation Defense Network and I was the first South Dakota lawyer to be inducted in to the College of Workers' Compensation Lawyers. I have been named Sioux Falls Best employment lawyer multiple years in a row and have been inducted in to the National Academy of Distinguished Neutrals. Perhaps my most cherished accomplishment is forming the South Dakota Chapter of Kids' Chance, a nonprofit that provides scholarships to young men and women whose lives have been negatively impacted by the work related injury or death of a parent.

In March of 2016 I completed my 30-Hour Civil Mediation Training through Mitchell Hamline Law School and the Mediation Center of Minnesota. In May of 2017 I completed the American Arbitration Association (AAA) training and am on the AAA Panel of Arbitrators for employment matters. In August of 2018 I completed 7 hours of Advanced Mediation Skills training through the Iowa Mediation Service. I have also participated in numerous webinars dealing with mediation training and lectured to employers and HR groups about the benefits of workplace dispute resolution.

At this stage of my professional and personal life my practice is focused on alternative dispute resolution - mediation and arbitration. While the lawyers involved in ADR are familiar with the process most of their clients are not. I view it to be a large part of my job as a mediator/arbitrator to ensure that the participant's questions are answered and that they understand and feel comfortable with the process. One of the most rewarding aspects of my mediation practice is interacting with the participants, actively listening to their issues and complaints and helping guide them to a solution to their particular problem. As a wise mediator once wrote, "while I am neutral I am not passive" and I believe it is an important part of my job to point out to the participants issues they may never have thought of or perhaps simply wish to ignore. I truly enjoy and have a passion for the people I meet in mediations and get great satisfaction out of helping those participants resolve their disputes.

I was born and raised in a small town in northeastern Minnesota along the north shore of Lake Superior. After playing college football and graduating from South Dakota State University (and after a short stint working on a master's degree) I attended the University of South Dakota School of Law, graduating with honors in 1986. My wife and I were married in 1981(Nancy is the best thing that ever happened to me) and have four children and (thus far) one grandchild. In my spare time I am an avid outdoorsman focusing mainly on traditional bowhunting and fly fishing. I am also involved in many conservation related causes and am an active public land supporter. Few people know this about me but I played high school hockey against several members of the 1980 Olympic hockey team that won the gold medal and of "Miracle on Ice" fame.

I love helping people resolve disputes probably because I spent over thirty years helping one side or the other perpetuate disputes. I grew tired mentally and physically of the fighting and find my new role in ADR much more rewarding to me personally. Mediation works so well in my opinion because the participants have control over the outcome of the dispute. I am happy to be able to play a part in that success.

Gregg S. Greenfield
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Greenfield Law, PC (2014-Present)
Shareholder. Practice emphasis on entity formation and governance; sales, mergers and acquisitions; real estate, construction, environmental, probate and estate, and municipal law.

Partner, Boyce, Greenfield, Pashby & Welk, LLP (1989 – 2014)
Business Section
Admitted to Practice in South Dakota State, Federal District, and Eighth Circuit Court of Appeals
Practice emphasis on entity formation and governance, sales, mergers and acquisitions, real estate, construction, environmental, probate and estate, and municipal law.

Credentials	• Business/Corporate Law – Best Lawyers, Super Lawyer, Chambers, US News and World Report Best Law Firms Tier One • Environmental Law – Best Lawyers • Real Estate Law – Best Lawyers, Super Lawyer, Chambers, US News and World Report Best Law Firms
Representation	• City of Sioux Falls with the $535 million Lewis & Clark water pipeline project and Water Delivery Agreements as well as the design and implementation of impact fees, regional sewer system development fees, § 1926(b) litigation, TIF districts and business improvement districts. • Real Estate developers of numerous projects including Garden Village, Willowbrook, Summer Creek, Prairie Green, Baseline Heights, The Villas, and Prairie Hills South, including dedicated easements and restrictive covenants. • Owners, General Contractors and Subcontractors on numerous multi-million-dollar construction projects, including: -Avera Cancer Institute – General Contractor ($69 Million) -Madison Community Hospital - Owner ($33 Million) -Sioux Falls Catholic School System – Owner (O'Gorman Renovation - $22 Million) -Sioux Falls Surgical Center – Owner ($11 Million Renovation) • Owners in development and construction of Big Stone to Ellendale electrical transmission line. ($400 Million)
Associations/Boards	• State Bar of South Dakota (Business Section, Lawyers Concerned for Lawyers) • American Bar Association • Director, Northern Prairies Land Trust (2009-Present) • South Dakota Board of Natural Resources -Board Member (1996-1998) -Chairman (1999-2004) • South Dakota Board of Minerals and Environment - Board Member (2014-Present) • Southeastern Council of Governments - Board Member (2016-2018) • SD Auto Dealers Association • SD Trucking Association

Education & Credentials	J.D., University of South Dakota School of Law Claude Schutter Scholar	(1986-1989)
	B.A., The George Washington University With Distinction	(1984-1985)
	St. Olaf College	(1981-1983)
	Adjunct Professor University of SD School of Law Modern Practice Course: Stock Sales and Asset Purchase Modern Real Estate Transactions	(2013-2014) (Spring 2013, Spring 2014) (Fall 2013)
	Assistant Professor Augustana University	(August 2022-present)

References

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REBECCA PORTER

Lawyers Concerned for Lawyers

Pierre, South Dakota

Rebecca Porter graduated from Black Hills State College, B.S., summa cum laude, 1983, The University of South Dakota Law School, JD - 1987 (Sterling Honor Graduate, Law School Foundation Scholar).

Rebecca is a member of the Pennington County Bar Association (President, 2000-2001), State Bar of SD, and the American Bar Association.

She received the "Exceptional Lawyer of the Year" award in recognition of integrity, leadership, and exemplary service to clients, community, and the Bar by Pennington County Bar in May 2015.

Rebecca served as the Chair of the Family Law Committee 2008-2009, serves as Co-Chair of the Lawyers Concerned for Lawyers 2000-2019, is a member of the Lawyers Assistance Committee since its inception, the Program Director of the SD Lawyers Assistance Program 2019-2020, and is the Commissioner of the Judicial Qualifications Commission 2016-2020.

Attorney Health & Wellness Resources

Almost every state bar member has experienced a time when a personal problem or crisis affected their life. Recognizing this, your State Bar, over the past several years, has instituted a variety of ways to support our members when they may need it most. The below information will provide you with the information you need about the programs and resources available to the members of our South Dakota legal community and their families.

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LIVING ABOVE THE BAR

Want to be the best lawyer you can be? To do that, sometimes we need the help of a medical expert – our own doctor. Don't feel like you have time to go see your medical provider? Short videos posted on the State Bar website (www.statebarofsouthdakota.com/page/health-&-wellness) will provide you with inspiration from other South Dakota lawyers and advice from a nationally recognized physician so that you will know when medical evaluation is your best option. *Knowing when to ask for help is not only a sign of strength and intelligence, it can literally save your life.*

SAND CREEK MEMBER ASSISTANCE PROGRAM

South Dakota state bar members and their families have access to the Sand Creek Member Assistance Program portal. Because we believe in the importance of providing support when YOU need it, our state bar has contracted with Sand Creek to provide FREE, confidential assessment, short-term counseling, referral, and follow-up for you and your eligible family members. A licensed counselor will assist you in assessing your situation, finding options, making choices, and locating further help.

For more information, please visit the Sand Creek Member Assistance Website at www.sandcreekeap.com, click on the "work life wellness login" located on the top bar of the website. Our State Bar Company ID is sbsd1.

You can also call 1-888-243-5744. This service is available 24 hours a day, 7 days a week. A trained professional will speak with you about crisis services and/or problem assessment, action planning and follow up. If you call the crisis line, tell them you are a member of the State Bar of South Dakota. You do not need to give them any other information.

MENTAL HEALTH CENTERS AGREEMENT

Our state bar has an agreement with the eleven mental health centers across the state of South Dakota. If you think you need help with a mental health, substance or addiction issue, the State Bar encourages you to seek a professional evaluation. If you don't have insurance or otherwise lack the financial resources, this State Bar project, funded by ALPS and the SD Bar Foundation, will cover the evaluation cost and several follow-up counseling sessions if they are needed.

The only requirement from you is to schedule your appointment with the mental health center of your choosing and show your active State Bar membership card. *This is a confidential project. Counseling records are not made available to the State Ba*r. We just pay the bill for those who can't afford it, up to a limit of $500 per lawyer.

A listing of the South Dakota Mental Health Centers is located after this handout.

SOLACE

What is SOLACE? If you are aware of anyone within the South Dakota Legal Community (this includes lawyers, law office personnel, judges, courthouse employees, or law students) any member of this community who has suffered a sudden or catastrophic loss due to an unexpected event, illness, or injury, the South Dakota SOLACE Program may be able to assist.

Please contact solace@sdbar.net if you, or someone you know, could benefit from this program. We have a nationwide network of generous South Dakota attorneys willing to get involved and help. The SOLACE program includes contributions of clothing, housing, transportation, medical community contacts, and a myriad of other possible solutions through the thousands of contacts available through the State Bar of South Dakota and its membership.

SOUTH DAKOTA
COUNCIL OF MENTAL HEALTH CENTERS, INC.

Terrance L. Dosch, Executive Director
P.O. Box 532
2520 East Franklin Street
Pierre, South Dakota 57501-0532
Phone: (605-) 224-0123 (Voice & FAX)
E-Mail: tladosch@dakota2k.net
Web: www.sdmentalhealth.org

AGENCY	ADDRESS	PHONE
Northeastern Mental Health Center Director: Joseph Manuel MIS Coordinator: Laura Boone Business Manager: Lisa German	628 Circle Drive Aberdeen, SD 57401 e-mail: jmanuel@nemhc.org web: www.nemhc.org	225-1010 (Work) 225-1017 (FAX)
East Central Behavioral Health Director: Mike Forgy Office Manager: Lona Groos Computer Support: Lona Groos	211 Fourth Street Brookings, SD 57006 e-mail: mforgy@gmail.com	697-2850 (Director's Work) 697-2853 (O.M.'s Work) 697-2874 (FAX)
Community Counseling Services Director: Shawn Nills Business Manager: Melissa Hofer Computer Support: Greg Kludt	357 Kansas, S.E. Huron, SD 57350 e-mail: dumajeres@ccs-sd.org web: www.ccs-sd.org	352-8596 (Work) 352-7001 (FAX)
Three Rivers Mental Health and Chemical Dependency Center Director: Susan Sandgren Business Manager: Carla Sackmann Computer Support: Susan Sandgren	Box 447 11 East 4th Street Lemmon, SD 57638 e-mail: threerivers@sdplains.com	374-3862 (Work) 374-3864 (FAX)
Dakota Counseling Institute Director: Michelle Carpenter Business Manager: Vacant Computer Support: Janette Huber	910 West Havens Mitchell, SD 57301 e-mail: m.carpenter@dakotacounseling.net web: www.dakotacounseling.com	996-9686 (Work) 996-1624 (FAX)
Capital Area Counseling Service Director: Dennis Pfrimmer Business Manager: Loretta Jochim Computer Support: Leonard Chick	P.O. Box 148 803 East Dakota Avenue** Pierre, SD 57501 e-mail: dpfrimmer@cacsnet.org web: www.cacsnet.org ** Use P.O. Box for routine mailing purposes so correspondence does not have to go through St. Mary's Hospital mail room.	224-5811 (Work) 224-6921 (FAX)

AGENCY	ADDRESS	PHONE
Behavior Management Systems Director: Alan Solano Finance Director: Linda Reidt-Kilber Computer Support: Rodd Ahrenstorff	350 Elk Street Rapid City, SD 57701 e-mail: asolano@behaviormanagement.org web: www.behaviormanagement.org	343-7262 (Director's Work) 343-4716 Ext. 241 (F.D.'s Work) 343-4716 Ext. 243 (Computer Support) 343-7293 (FAX)
Southeastern Behavioral HealthCare Director: Kris Graham Business Director: Holly Brunick Computer Support: Stacy Roberts	2000 S. Summit Ave. Sioux Falls, SD 57105 e-mail: krisg@southeasternbh.org web: www.southeasternbh.org	336-0510 (Director's Work) 336-0510 (B.D.'s Work) 338-5099 (Director's FAX) 336-3779 (B.D.'s FAX) 336-0510 (Computer Support)
Human Service Agency Director: Chuck Sherman V.P., Behavioral Health: Kari Johnston V.P., Administration: Judy Resel Computer Support: Patty Engels	P.O. Box 1030 123 19th Street, NE Watertown, SD 57201-6030 e-mail: chucks@humanserviceagency.org web: www.humanserviceagency.org	886-0123 (Work) 886-5447 (FAX)
Southern Plains Behavioral Health Services Director: Donna Brown Business Manager: Phyllis Meiners Computer Support: Phyllis Meiners	500 East 9th Street Winner, SD 57580-2604 e-mail: spbhsdbrown@gwtc.net	842-1465 (Work) 842-2366 (FAX)
Lewis & Clark Behavioral Health Services Director: Tom Stanage Business Manager: Glen Mechtenberg Computer Support: Brenda Hoxeng	1028 Walnut Yankton, SD 57078 e-mail: Thomas.Stanage@lcbhs.net	665-4606 (Work) 665-4673 (FAX)

Effective: 7/28/2011

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) Paragraphs (a) and (b) shall not apply to information obtained by a lawyer or judge as a member of a committee, organization or related group established or approved by the State Bar or the Supreme Court to assist lawyers, judges or law students with a medical condition as defined in 48, including the name of any individual in contact with the member and sources of information or information obtained therefrom. Any such information shall be deemed privileged on the same basis as provided by law between attorney and client.

(d) A member of an entity described in paragraph (c) shall not be required to treat as confidential communications that cause him or her to believe a person intends or contemplates causing harm to himself, herself or a reasonably identifiable person and that disclosure of the communications to the potential victim or individuals or entities reasonably believed to be able to assist in preventing the harm.

Source: SL 2004, ch 327 (Supreme Court Rule 03-26), eff. Jan. 1, 2004; SL 2018, ch 303 (Supreme Court Rule 18-12), eff. July 1, 2018.

Document: S.D. Codified Laws § 16-18-Appx., Rule 8.3

S.D. Codified Laws § 16-18-Appx., Rule 8.3

Current through acts received as of April 30th from the 2019 General Session of the 94th South Dakota Legislative Assembly, Executive Order 2019-1 and Supreme Court **Rule** 19-15

Rule 8.3. Reporting Professional Misconduct.

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COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the **Rules** of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of **Rule** 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the **Rules**, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This **Rule** limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this **Rule**. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the **Rules** applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this **Rule** encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These **Rules** do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the **rules** of the program or other law.

History

SL 2004, ch 327 (SCR 03-26), eff. Jan 1, 2004; SL 2018, ch 303 (SCR 18-12), eff July 1, 2018.

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