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Killing Ourselves: Depression as an Institutional, Workplace and Professionalism Problem

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Killing Ourselves: Depression as an Institutional, Workplace and Professionalism Problem

Abstract

Lawyers are frequent and consistent “winners” of undesirable honorifics such as “most depressed workers.” However, the undercurrent of unhappiness should not be ignored or hidden away by jokes told by lawyers about lawyers. In this article, the author proposes that depression is an institutional, workplace and professionalism problem in law. In Part II of the paper, the author analyzes professional codes of conduct as they relate to depression. Part III is devoted to the science of depression. Part IV examines the role of the institution, in particular law schools, to creating and reinforcing an environment that exposes individuals to developing depression. The “business case” for why mental illness does have an impact, particularly in dollar terms, on a firm’s business, is analyzed in Part V. Lastly, Part VI is devoted to examining depression as a professionalism challenge.

Keywords

depression, mental illness, profession, workplace, Law Society of Upper Canada, LSUC, rules

KILLING OURSELVES: DEPRESSION AS AN INSTITUTIONAL, WORKPLACE, AND PROFESSIONALISM PROBLEM

MEGAN SETO*

INTRODUCTION

The advent and persistence of the economic recession has ushered in a stressful, harsh and anxious reality for the legal profession. While this reality can be attributed to many factors—from the shortage of articling placements for law students to the rising number of billable hours for associates—there is certainty to the fact that as a collective, the profession is confronting a period of unhappy and unhealthy times. In law, the culture of endurance and workaholism is celebrated, while the need for greater “flexibility” and “balance” is often dismissed as an irreconcilable goal. It is important to recognize the personal toll to pursuing and practising law, given the timing of the economic recession and its effects on the Canadian workforce. This essay suggests that depression is not a personal failure or a moral weakness. Rather, depression is an institutional, workplace and professionalism problem that is created and reinforced by shared environments. However, through collective intervention and action, the legal profession can move closer to mitigating, and even preventing, depression.

Mental illness within the profession is not a new problem. Indeed, lawyers are consistent and frequent “winners” of undesirable honorifics such as the “most depressed workers” or “most prone to succeeding in committing suicide.”¹ However, the undercurrent of unhappiness and anxiety should not be ignored or hidden away by “the many rueful jokes often told by lawyers about lawyers.”²

This paper is organized into five parts. Part I begins with an analysis of the perception and attitudes distilled from professional codes of conduct as they relate to depression or a related term such as “mental instability.” Part II discusses the science of depression, including a survey

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¹ Patrick J Schiltz, “On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession” (1999) 52 Vand L Rev 871 at 880.

² Martin EP Seligman, Paul R Verkuil & Terry H Kang, “Why Lawyers are Unhappy” (2005) 10 Deakin L Rev 49 at 52 [Seligman, “Unhappy”].

explanation on how lawyers fare in comparison to the general population and the disease's co-occurrence with other psychiatric problems such as stress, anxiety, addiction, and isolation. Part III examines the role of the institutional agent, specifically law schools, in creating and reinforcing an environment that predisposes individuals to developing depression. This section includes suggestions for preventative strategies that are effective, yet also practical. Part IV analyzes similar issues as they relate to law firms and includes a business case that illustrates how mental illness is a firm's business, particularly in dollar terms. Finally, Part V is devoted to examining depression as a professionalism challenge.

I. RULES OF PROFESSIONAL CONDUCT—HOW DEPRESSION IS VIEWED

A. The Law Society of Upper Canada “Rules of Professional Conduct”

In the Law Society of Upper Canada's (“LSUC”) *Rules of Professional Conduct* (“Rules”), mental illness is indirectly addressed under Rule 2.01 of the *Rules* dealing with “competence.” While the rule does not directly refer to mental illness or a related term, such as depression or anxiety, it covers aspects related to functioning, which may be impaired if an individual suffers from depression.³ Under the rule:

“Competent lawyer” means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including [...]

- (e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner,
- (f) applying intellectual capacity, judgment, and deliberation to all functions,
- (g) complying in letter and in spirit with the Rules of Professional Conduct,
- (h) recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure that client is appropriately served,
- (i) managing one's practice effectively,
- (j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills, and
- (k) adapting to changing professional requirements, standards, techniques, and practices.⁴

³The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2010, Rule 2.01. See also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR*, 4th ed Text Revision (Washington, DC: American Psychiatric Association, 2000) at 349.

⁴Law Society of Upper Canada, *supra* note 3.

Pursuant to the commentary of Rule 2.01, lawyers are to be self-aware of problems. This includes an obligation to be “alert to recognize[ing] any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task.”⁵

In comparison, Rule 6.01(3)(d) of the *Rules* directly addresses mental illness. This rule creates a positive obligation on other lawyers to report the “mental instability” of another lawyer:

A lawyer shall report to the Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege, [...]

(d) *the mental instability of a licensee of such a serious nature that the licensee’s clients are likely to be severely prejudiced, and*

(e) any other situation where a licensee’s clients are likely to be severely prejudiced.⁶

Encouragingly, the commentary of this rule does reference the Ontario Lawyers’ Assistance Program (“OLAP”), a LSUC funded program devoted to assisting lawyers with mental health problems. The commentary also recommends that lawyers seek assistance for instances of improper conduct that may arise from emotional, mental, or family disturbances.⁷

When reading the *Rules* and the related commentary, it is not directly apparent as to who has the obligation to acknowledge a mental illness or health problem. It can be argued that the provisional language from the applicable rules and the explanatory content from the related commentary suggest that the individual lawyer has the obligation to recognize a problem.

In particular, Rule 6.01(3)(d) creates a positive obligation on others to report a lawyer suffering from “mental instability.” However, the provisional language implies that this option should be taken only as a “last resort” and that the standard for reporting must be of a “serious nature that licensee’s clients are likely to be severely prejudiced.”⁸ Comparatively, the commentary for Rule 6.01(3)(d) and Rule 2.01 detail an obligation on the *affected lawyer* to seek assistance or acknowledgment of a problem. This means that an individual lawyer has a positive obligation to make a subjective evaluation to determine personal competency and the possible presence of illness.

A positive obligation on the affected lawyer is problematic in two ways. First, the *Rules* create a risk of making depression an abstract problem by making mental health detection a

⁵ *Ibid.*

⁶ *Ibid* at Rule 6.01 [Emphasis Added].

⁷ *Ibid.*

⁸ *Ibid.*

subjectively evaluated obligation. Those who are not affected are intuitively in a passive position towards risk detection. This example is illustrated in a passage from a Kansas Bar Association self-test, which examined attitudes toward depression and obligations to report:

It had been a good week for your clients. First, the judge granted summary judgment to one client, based on the opposing lawyer's failure to respond to your request for admissions... But [the] situation [never] felt quite right.

You had been in the opposing lawyer's office shortly after filing the summary-judgment motion. He said that he had been depressed for months since his wife had left him. You noticed a stack of unopened mail on his desk and piles of disorganized papers throughout the office. You expressed sympathy, but said that your client's interests—make that your *biggest* client's interest—had to come first.⁹

This passage demonstrates that few lawyers are likely to take action against the affected lawyer because the situation “does not feel quite right.”¹⁰ This means that a lawyer's condition will often remain unreported or will not be addressed by fellow colleagues.¹¹ Combined with the high standard for reporting, where the threshold is “mental *instability*,” the *Rules* offer limited opportunity for intervention. Effectively, the *Rules* promote the common belief that mental illness is an individual problem.

Second, and more problematic, the LSUC *Rules* and commentaries assume that an affected lawyer has the capacity and ability to recognize a problem. As will be later discussed, this is not always possible due to a psychological process referred to as cognitive distortion.

B. Canadian Bar Association “Code of Professional Conduct”

The Canadian Bar Association (“CBA”) has chosen to address the issue of mental health from the perspective of competency, much like the LSUC Rules. However, the CBA Code of Professional Conduct mentions only induced disability and not mental illness per se. Under “Competence and Quality of Service” (“Competence”), commentary 7, a number of examples are given relating to how quality of service may be breached.¹² Under section 7 (m), “self-

⁹ Page Thead Pulliam, “Lawyer Depression: Taking a Closer Look at First-Time Ethics Offenders” (2008) 32 J Legal Prof 289 at 302.

¹⁰ *Ibid* at 303.

¹¹ *Ibid*.

¹² The Canadian Bar Association, *CBA Code of Professional Conduct*, Ottawa: CBA, 2009, ch II, commentary 7.

induced disability” from the use of intoxicants or drugs is explicitly noted. However, the CBA Code lacks particular mention to depression to offer guidance that may differ from the Rules.¹³

C. Federation of Law Societies of Canada “Federation Model Code of Professional Conduct”

In addition to the CBA and the LSUC codes of conduct, in 2011 the Federation of Law Societies of Canada introduced the Federation Model Code of Professional Conduct (“FMCP”). Law societies across Canada are in the process of implementing the FMCP as a harmonized and national code of conduct. It is difficult to suggest that the FMCP serves as a departure from the previously mentioned codes of conduct. Much like the CBA and LSUC, mental illness is addressed under the FMCP in a limited, and often indirect, manner. Rule 2.01(2), in addressing “competence,” states that a lawyer has an obligation to “[...] refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.”¹⁴ It is fair to infer that, while depression or mental illness is not directly stated in the rule, mental illness would qualify as interference or “compromise” to capacity based on the symptomatic nature of depression.

Similar to other codes of conduct, lawyers have an obligation to report a lawyer suffering from “mental instability” under Rule 6.01(3)(d) of the *FMCP*. This reporting obligation is in keeping with Rule 6.01(3)(d) of the *LSUC Rules*.¹⁵ The difference between the two rules is in the threshold for reporting. Under the *FMCP*, the threshold for reporting is where “the lawyer’s clients are likely to be materially prejudiced.” Comparatively, under the *Rules*, the threshold for reporting is where the client is likely to be “severely prejudiced.” The commentary provided by the *FMCP* is substantively similar to the commentary provided in the *Rules*. As of the time of this writing, the reason for the language change is unclear. However, based on the choice in language, it can be argued that the threshold for reporting under the *FMCP* is lower than the current *LSUC* standard.

¹³ *Ibid.*

¹⁴ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: Federation of Law Societies, 2011, ch II.

¹⁵ *Ibid* at ch VI.

II. THE PSYCHOLOGY OF DEPRESSION AND STRESS

A. Science of Depression

Depression, clinically known as major depressive disorder (“MDD”), significantly disturbs a person’s “entire psycho-biologic system, including the way the individual thinks, feels, and behaves, as well as his vegetative body functions.”¹⁶ The disease is classified as a mood disorder under the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, the main tool used for identifying and treating those with depression.¹⁷ The main depressive symptoms are depressed mood and an inability to experience pleasure from activity once found enjoyable. At least one of the two symptoms must be present for a major depressive episode to be diagnosed. The behavior of those suffering from MDD is characterized by the presence of a depressed mood that pervades all aspects of life for at least two weeks.¹⁸ Episodes may be isolated or recurrent, and are categorized according to severity. A depressed individual is more likely to ruminate over thoughts and feelings of worthlessness, inappropriate guilt or regret, helplessness, hopelessness, and hatred. Other symptoms include insomnia, poor concentration and memory, withdrawal from social situations, and thoughts of death or suicide.¹⁹

Approximately 20% of the entire legal profession suffers from clinically significant levels of substance abuse, depression, anxiety or some other form of psychopathology.²⁰ In the often-cited 1990 research from Johns Hopkins University, it was found that approximately 3% to 5% of the general population suffers from MDD. Lawyers, in particular, have statistically significant elevations of MDD. Lawyers suffer from MDD at a rate of 3.6 times higher than non-lawyers who share key socioeconomic traits.²¹ In Ontario, OLAP reported in their 2010 annual report that 42% of their total calls were related to mental health issues, which included depression, bipolar disorder, and anxiety.²²

B. Depression and Comorbidity with other Psychiatric Problems

Depression commonly co-occurs with other psychiatric problems such as stress, anxiety, addiction, and isolation. Stress and burnout has three elements: chronic exhaustion, distancing

¹⁶ Phyllis W Beck & David Burns, “Anxiety and Depression in Law Students: Cognitive Intervention” (1979-1980) 30 J Legal Educ 270 at 274.

¹⁷ American Psychiatric Association, *supra* note 3 at 345.

¹⁸ *Ibid* at 349.

¹⁹ *Ibid*.

²⁰ John Starzynski, “Battling Addiction in the Workplace”, *The Lawyers Weekly* 30:40 (4 March 2011) 22 at 22.

²¹ Schiltz, *supra* note 1 at 874.

²² Ontario Lawyers’ Assistance Program, “2010 Annual Report” (2010) 17, online: OLAP <<http://www.olap.ca/olap-annual-reports.html>>.

oneself from family, friends and colleagues, and feeling discouraged.²³ Anxiety is the most common comorbidity. Much like depression, those suffering from anxiety report feelings of social alienation and isolation, obsessive compulsiveness, paranoid ideation, interpersonal sensitivity, phobia, and hostility. While only 4% of the general population suffers from an anxiety disorder, nearly 30% of male lawyers and 20% of female lawyers suffer from the illness.²⁴ Chronic loneliness is another related illness that approximately 25% of lawyers have reported to experience.²⁵ This statistic is particularly troubling for the Ontario profession because nearly 34% of lawyers work as sole practitioners, and a further 29% work in firms comprised of 2 to 10 lawyers.²⁶ These numbers suggest that, given the link between isolation and depression, there is a substantial sector of the legal profession that is at an elevated risk of developing depression.

Addiction, in its various forms, frequently appears with depression. Alcohol is the most frequent form of addiction. In OLAP's 2010 Annual Report, 14% of calls were related to some form of addiction. To contextualize this problem, the rate of addiction for lawyers and judges is three times that of the general population.²⁷ Aside from alcohol, gambling is a common addiction amongst lawyers because of the easy access to client trust funds and monies. Mental health professionals continue to recognize new forms of addiction afflicting the legal profession, including shopping, sex, and technology.²⁸

C. Challenges to Identifying Signs of Depression

Depression is easily concealed and has symptoms that are difficult to identify.²⁹ The most significant challenge for the legal profession and law schools is identifying those affected. The first challenge is recognizing that those affected prefer to remain silent. Like alcoholism, depression is viewed commonly as a "moral weakness."³⁰ In adopting this prevailing view, the legal community has been slow to recognize depression as a legitimate disease that requires

²³ Donalee Moulton, "Understanding Burnout and Fixing it", *The Bottom Line* (April 2011) (Lexis) [Moulton, "Understanding"].

²⁴ Schiltz, *supra* note 1 at 876.

²⁵ Craig Cormack, "Lawyers turn to meditation to fight stress and improve performance", *Canadian Lawyer Magazine* (March 2009), online: <<http://www.canadianlawyermag.com/Lawyers-turn-to-meditation-to-fight-stress-and-improve-performance.html>>.

²⁶ "Support for Sole Practitioners and Small Firms", *Ontario Lawyers Gazette* 13:1 (Spring 2009) 11 at 11, online: LSUC <http://rc.lsuc.on.ca/jsp/olg/2009Vol13_1.jsp>.

²⁷ Ontario Lawyers' Assistance Program, *supra* note 22 at 17.

²⁸ Anna Greczmiel, "Shopping, sex latest addictions hitting lawyers", *The Lawyers Weekly* 31:14 (19 August 2011) 25 at 25.

²⁹ Pulliam, *supra* note 9 at 299.

³⁰ Todd Goren and Bethany Smith, "Depression as a Mitigating Factor in Lawyer Discipline" (2000-2001) 14 *Geo J Legal Ethics* 1081 at 1082.

attention.³¹ Professor Jennifer Jolly-Ryan of Northern Kentucky University argues that law remains one of the last workplaces where mental health is still viewed with discrimination and stigma:

[i]ronically, the very people who are in the best position to increase the number of lawyers who intimately understand the discrimination and health care laws in our society impose some of the highest hurdles to employment and educational opportunities. Lawyers stigmatize and often decline to hire other lawyers unless they have a clean mental health history—free of disabilities, disorders, and illnesses.³²

For law students and junior lawyers, fear proves to be a powerful inhibitor in detection. Those who are affected by MDD may be in denial as to the severity of the disease; others may refuse to self-identify out of fear that disclosure could lead to a negative effect on their careers and their ability to earn a living.³³ Complicating the issue of detection is that, in many cases, the symptoms are so personal that a colleague, friend, or family member may not immediately recognize the signs.³⁴ Symptoms such as disrupted sleep and changes in appetite are subtle enough that early detection is often difficult.

D. Depression and the Effect of Cognitive Distortion

A further challenge is that an affected lawyer may not recognize the symptoms of depression, much like colleagues, friends, and family members. Affected lawyers may not necessarily be in denial because depression has the effect of making symptoms seem normal and even desirable. In a process referred to as cognitive distortion, “an individual interprets stimuli that are neutral or mildly negative in an unrealistically bleak fashion. This erroneous or inaccurate interpretation causes the individual to feel sad, hopeless, and anxious.”³⁵ The depressed individual confuses the symptoms of depression—negative or critical judgments about himself—with his own identity.³⁶ Negative thoughts produce behavioural changes such as increased apathy and withdrawal from normal activities.³⁷ These symptoms are often mistakenly

³¹ *Ibid.*

³² Jennifer Jolly-Ryan, “The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket” (2010) 79 UMKC L Rev 123 at 124.

³³ Michael H Hoeflich, “Legal Ethics and Depression” (2005) 74 J Kan B Assn 33 at 33.

³⁴ Pulliam, *supra* note 9 at 299.

³⁵ Beck, *supra* note 16 at 273.

³⁶ *Ibid* at 275.

³⁷ *Ibid.*

passed off as regular signs of stress.³⁸ Gradually though, the competent individual becomes incompetent and simple tasks, such as making an appointment, become increasingly insurmountable as cognitive functions, such as concentration, decrease.

In addition to a negative self-view, depression causes an increased pessimistic view of the world. Pessimism is defined by a tendency to interpret the causes of negative events in stable, global, and internal ways.³⁹ Pessimists view the world from a prudent perspective that requires caution, skepticism, and a higher sense of “reality-appreciation.”⁴⁰ Pessimism describes a highly desirable and adaptive trait for lawyers: an ability to view more of the potential problems in any given situation. However, pessimism is a problem trait because it cannot be easily turned off.

Resultantly, depression symptoms, such as maladaptive self-view and increased pessimism, are not only difficult to identify, but can be considered normal and even beneficial in the legal context. However, as the science of depression suggests, depression is most certainly not a personal failure. The illness is the result of a number of complex, inter-related biological and environmental conditions.

III. LAW SCHOOLS—THE FIRST LINE OF DEFENSE

A. Personality Traits as a Risk Factor of Depression

The most common explanation for the poor health of lawyers is the suggestion that the law profession draws its members from a subset of unhealthy and unhappy people. However, this explanation oversimplifies the problem by underestimating the collective forces involved in creating, or at the very least, contributing to maladaptive behavioural patterns that lead to depression. Another suggestion is that the demand of the law program is the causal factor for depression. A study in the *Yale Journal of Health* showed that law students, when compared to medical students, had higher levels of stress and stress symptoms despite the similarly demanding programs.⁴¹ While the notion that law draws the unhealthy or that the legal program is uniquely demanding may explain *part* of the problem, there is no denying that students are very much creatures of their collective environment, which in some cases is neither happy nor healthy.

³⁸ Moulton, “Understanding”, *supra* note 23.

³⁹ Seligman, “Unhappy”, *supra* note 2 at 55.

⁴⁰ *Ibid* at 56.

⁴¹ Todd David Peterson and Elizabeth Waters Peterson, “Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology” (2009) 2 *Yale J Health Pol’y, L & Ethics* 357 at 365.

1. Pessimistic Explanatory Style

While pessimism is a symptom of depression, the trait is not in itself dysfunctional. The problem with pessimism is its pervasiveness in the legal profession and the consequent mental health effects. We can attribute this to the fact that those with pessimistic personalities are drawn to the profession, and because pessimism is *taught* in law school through a process known as Pessimistic Explanatory Style (“PES”). As discussed in the previous section, pessimists view bad events as pervasive, permanent, and uncontrollable. Comparatively, their optimistic counterparts view the world as local, temporary, and changeable.⁴² In spite of what may be interpreted as a negative trait, pessimists actually do better at law. They not only outperform their optimistic peers, but they outperform in measurements of achievement, such as grade point average and law journal publications.⁴³ This information suggests that pessimism is not viewed as a detriment in law school, but rather a highly adaptive virtue. Legal educators recognize that skepticism becomes a virtue and have tried to incorporate this specific form of thinking to the law school curriculum.

The curriculum across Canadian law schools is quite standardized. The teaching is reliant on “case-law” methodology aimed at developing identification or “analytic” skills.⁴⁴ Student grades are reflective of identification skills and an ability to “see every conceivable snare and catastrophe that might occur in any transaction.”⁴⁵ More colloquially, the PES process in the legal context is referred to as “thinking like a lawyer.” Although a highly adaptive trait, chronic and persistent pessimism is a major risk factor for unhappiness and depression.⁴⁶ Law students who develop pessimism cannot “turn off” the trait. This makes compartmentalization between thought patterns of work and private life all the more difficult to separate.⁴⁷ For students who are less able to develop this skill, the initial enthusiasm of law school is often supplanted by feelings of depression, which disturbingly persists throughout law school.⁴⁸ Yet, it is fair to assume that law schools are unlikely to depart from the PES model. A highly developed sense of pessimism is, ultimately, what makes lawyers special. Lawyers have a trained ability to examine problems and betrayals that non-lawyers would otherwise be blind to.⁴⁹ The ethical issue lies in whether

⁴² Martin EP Seligman, *Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment* (New York: The Free Press, 2002) at 178 [Seligman, “Authentic”].

⁴³ Seligman, “Unhappy”, *supra* note 2 at 56.

⁴⁴ Veronica Henderson, “Building on Strong Foundations: Rethinking Legal Education with a View to Improving Curricular Quality” (2006) 29 Dalhousie LJ 491 at 497.

⁴⁵ Seligman, “Unhappy”, *supra* note 2 at 56.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Henderson, *supra* note 44 at 499.

⁴⁹ Seligman, “Authentic”, *supra* note 42 at 178.

this model should continue at the expense of student mental health. This is a complex issue that merits a study of its own.

2. *The Role of Self-Esteem*

Lack of self-esteem is another theory suggested as a cause for depression. Students prior to law school have a history of receiving concrete types of validation for their achievements, most commonly in the form of grades or awards. After internalizing the positive emotions, students begin and continue to invest time and effort to be acknowledged. Over time, external acknowledgement becomes the most important type of validation. However, a “perfection/failure” trap is created by the time students enter law school.⁵⁰

The mandatory “B” curve in law school triggers self-esteem issues and the high competition for jobs exacerbates them. While some law firms arguably contribute to the problem by employing controversial hiring practices—such as using only first year marks to determine summer and articling positions—laws schools have done little to address self-esteem issues.⁵¹ Professor Gerald Hess, founder and co-director of the Institute for Law Teaching and Learning, stated that grades and class rank serve as a “significant gatekeeper to the reward system during and after law school—law review membership, research or teacher-assistant positions, internships, and jobs.”⁵² Competition creates stress, fear, anxiety and “a profound loss of self-esteem.”⁵³ A student environment marked by feelings of inadequacy and incapability fosters an unhealthy psyche that encourages depression.

B. Creating and Reinforcing an Unhappy Environment - The Undermining Effect

It is important to acknowledge that law students remain vulnerable to developing depression during law school, even where there is no evidence to suggest a pre-existing risk. In a seminal motivational study by Professor Kennon M. Sheldon and author Lawrence S. Krieger, pre-law students reported that they felt happier, healthier, and had more intrinsic pro-social values. Intrinsic values, such as emotional intimacy, community contribution, and personal growth, are associated with positive emotions, whereas extrinsic rewards, such as financial success, appealing appearance, and social popularity, have a greater association with negative

⁵⁰ Susan Daicoff, “Why are Lawyers so Depressed?” online: Lawyers with Depression <<http://www.lawyerswithdepression.com/articles/why-are-lawyers-so-depressed>>.

⁵¹ Henderson, *supra* note 44 at 498.

⁵² Peterson, *supra* note 41 at 380.

⁵³ *Ibid.*

well-being. The statistical shift where initial positive emotions are eroded or usurped has been referred to as the “undermining effect.”⁵⁴

The study by Sheldon and Krieger found that, by the end of the first year in law school, students from the same pre-law sample reported large reductions of life satisfaction and overall social well-being.⁵⁵ Students reported large increases in depression and other illnesses such as anxiety. The students also reported a greater desire for extrinsic rewards. This result was present in students of all demographics, regardless of age, ethnicity or gender.⁵⁶ Typically, the undermining effect is found in “controlling and coercive environments.” It can therefore be inferred that law school may represent such an environment.⁵⁷ If these experiences are common in law schools, it could be suggested that problems such as depression may have significant roots in the law school environment.

The researchers suggest that a legal education thwarts students’ natural need for growth, personal integration, and internally based motivation. Instead, the intense pressure of law school, when coupled with competitive norms, creates a process where students reorient themselves away from positive personal values.⁵⁸ Such an environment leads to general loss of self-esteem, life satisfaction, and well-being.⁵⁹ Gradually, superficial awards and extrinsic values begin to define law school, success, and worth. The Honorable Judge Patrick Schiltz of the U.S. District Court argues that in coveting image-based awards, such as prestige and status, young law students are setting the foundation for later discontent as associates.⁶⁰

C. Intervention and Action Required to Prevent Depression

Law school’s response to past scholarly commentaries on the prevalence of depression in law school has been largely reactive, despite a body of evidence to suggest that prevention is the strongest method to addressing depression. While almost every law school has counseling services available for seriously troubled students, there are few preventative programs designed to address the emotional development of law students.⁶¹

⁵⁴ Kennon M Sheldon & Lawrence S Krieger, “Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values and Well-Being” (2004) 22 Behav Sci & L 261 at 273.

⁵⁵ *Ibid* at 272.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at 273.

⁵⁸ *Ibid* at 263.

⁵⁹ *Ibid*.

⁶⁰ Schiltz, *supra* note 1 at 923.

⁶¹ Peterson, *supra* note 41 at 361.

1. *Developing and Encouraging Learned Optimism*

While the law school curriculum is unlikely to change as a whole, there are practical based solutions available to law schools to address and prevent depression. For the pessimism problem, the immediate antidote is to inject optimism into the law school curriculum. Optimism is the ability to dispute recurrent catastrophic thoughts effectively. Much like pessimism, this trait can be learned through a process known as the “disputing technique.”⁶² The goal of this technique is to teach law students and lawyers the ability to control negative emotions by learning to identify negative thoughts, treat them as if they were uttered by his or her rival, and then marshaling evidence against them.⁶³ By reinterpreting *who* is speaking, the depressed individual is more likely to use skills such as positive reinforcement and encouragement. Optimism can be taught in a non-invasive manner, as the intention is to offer a preventive measure to negating a maladaptive sense of pessimism.

2. *The Role of the Faculty Friend*

Commonly, when a student experiences an emotional crisis, they often turn to a member of the administration, known as a “faculty-friend.” The challenge for law schools is training faculty-friends to respond effectively to an emotional crisis. Literature on the psychology of law students does not offer the faculty-friend a model by which to help the student in need.⁶⁴ The staff member may often feel discomfort and inadequate when approached by a student with an emotional problem.⁶⁵ Often, the instinct is to divest from the situation by referring the student to professional help.⁶⁶ While the faculty-friend may genuinely feel that this is the best solution, the student mistakenly interprets such recommendations as disinterest. The faculty-friend’s response can be harmful since the student feels ignored and discouraged after soliciting help.⁶⁷ Studies suggest that this result is counterproductive since untrained faculty-friends can provide helpful therapeutic intervention for students who may be “mildly troubled.”⁶⁸ Professors and staff members who express genuine concern can produce the same results as professional forms of

⁶² Seligman, “Unhappy”, *supra* note 2 at 58.

⁶³ *Ibid.*

⁶⁴ Beck, *supra* note 16 at 270.

⁶⁵ *Ibid* at 272.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid* at 271.

help. A high degree of technical expertise is not required to achieve even minimal improvements in a student's mood.⁶⁹

Instead of immediately referring the student to professional help, a faculty-friend should determine the nature and intensity of the student's emotional problem.⁷⁰ Much like working with a client, the role of the faculty-friend is to identify the kind of problem (be it depression, anxiety, or stress), and then establish the severity. In some cases, it is important to recognize that the faculty-friend may not be helpful. Depending on the severity of the mood problem, professional help may be the most appropriate decision. However, as a person of authority, the faculty-friend must convey this conclusion with sincerity rather than simply divest from the situation.⁷¹ For law schools, training faculty-friends is an effective, standardized and practical solution to addressing student depression.

IV. PRACTISING LAW—BREAKING THE CULTURE OF ENDURANCE AND WORKAHOLISM

A. The Business Case for Addressing Depression

While it is easy to blame law schools for the state of lawyers' mental health within the profession, such a reaction would greatly oversimplify the problem. To do so would be to ignore the effects of external business pressures that encourage poor mental health. Self-reports of depression from lawyers reflect a rate as high as 37%, depending on measurements used.⁷² To grasp the problem beyond the statistics, lawyers and firms need to recognize that depression and mental illness are collective business problems, not merely personal ones. The illness has the effect of limiting a lawyer's ability to distribute his or her most valuable asset—talent and knowledge.

LSUC supports this position, most evidently in the LSUC's *Practice Management Guidelines*, where the directive states that lawyers, with their talent and knowledge, determine the "quantity and quality of legal service" as a representative of the firm. This means that the preservation, enhancement, and investment in lawyers' well-being is a "necessary component of a risk management plan and a key factor in the business success of a law practice."⁷³ The private sector is increasingly adopting this attitude in a desire to understand and address the challenges arising from issues such as depression and stress in the workplace.

⁶⁹ *Ibid.*

⁷⁰ *Ibid* at 278.

⁷¹ *Ibid* at 272.

⁷² Schiltz, *supra* note 1 at 875.

⁷³ *Practice Management Guidelines*, online: The Law Society of Upper Canada <<http://rc.lsuc.on.ca/jsp/pmg/personalManagement.jsp>>.

Furthermore, well-being does have a dollar term impact on a firm's business. In a 2006 study titled "Flexibility in Canadian Law Firms," it was found that the average cost of an associate's departure is \$315,000.⁷⁴ More alarming, however, are the costs associated with stress-related problems. It is estimated that about 20% of a firm's payroll is devoted to resources to address absenteeism, employee turnover, disability leaves, counseling, medical costs, and accidents.⁷⁵ These totals do not account for costs associated with conduct related to negligence or other forms of liabilities related to delivering client services. By the very nature of the symptoms and definition of depression, the illness means that the lawyer may not be fit to continue practice without a form of assistance.⁷⁶ A prudent business should recognize that the culture of silence and fear surrounding depression is not only problematic for the individual lawyer, but also has the effect of putting the firm in a vulnerable business position. To mitigate this risk, the firm should identify risk factors.

B. Risk Factors for Depression in the Practice of Law

1. Internalizing Law as a Win-Loss Game

The adversarial process, which underlies the structure of the Canadian legal system, is a classic example of a zero-sum game: one side's gain is the other side's loss.⁷⁷ Disputes are fuelled by negative emotions such as anger, anxiety, and sadness.⁷⁸ In a job where zero-sum situations are pervasive, negative emotions become part of the job itself thereby creating a protracted period of exposure to the development of depression or other associated illnesses.

Lawyers complain that the primary goal of law has migrated from justice and fairness to being a business.⁷⁹ The success of a lawyer is based on the number of hours billed, which is often equated with "winning" the game.⁸⁰ To succeed in the profession, lawyers are adversarial and on guard when dealing with other lawyers, which in turn spurs issues related to incivility and isolation from others.⁸¹ These issues are even more heightened in a poor economic environment,

⁷⁴ "Beyond a Reasonable Doubt: Building the Business Case for Flexibility", The Catalyst series on flexibility in Canadian law firms (March 2005) at 13, online: Catalyst <<http://www.catalyst.org/publication/38/beyond-a-reasonable-doubt-building-the-business-case-for-flexibility>> ["Beyond Doubt"].

⁷⁵ Donalee Moulton, "Destressing your law office in these stressful times", *The Lawyers Weekly* 29:35 (29 January 2010) 25 at 25.

⁷⁶ Hoeflich, *supra* note 33 at 34.

⁷⁷ Seligman, "Unhappy", *supra* note 2 at 60.

⁷⁸ Seligman, "Authentic", *supra* note 42 at 180.

⁷⁹ Schiltz, *supra* note 1 at 888.

⁸⁰ *Ibid* at 905.

⁸¹ Seligman, "Unhappy", *supra* note 2 at 61.

where lawyers complain about the increased pressure to attract and retain clients in a fiercely competitive marketplace.⁸² However, this responsive behaviour does not serve an effective purpose because it is a “single-minded drive towards winning the competition ... [which] will make [...] young lawyers not only less useful citizens ... but also less good as lawyers, less sympathetic to other people’s troubles, and less valuable to their clients.”⁸³ This means that law firms gain little value in using negative emotions to deliver client services. This suggestion is part of a subset of evidence that proves, if proof was needed, that workplace environment does play a role in contributing to depression.

C. Creating and Reinforcing an Unhappy Environment—Low Decision Latitude

The lack of decision-making latitude by lawyers practising in large firms is often cited as a source of unhappiness. Decision latitude refers to the number of choices one has or believes one has.⁸⁴ In recent years, young associates are confronting a situation of low decision latitude, where they have little control over their work, and limited contact with superiors and clients.⁸⁵ High-pressure demand combined with low decision latitude creates a risk of depression, low morale, and poor physical health.⁸⁶ As was suggested in the discussion relating to internalizing law as a win-loss game, little control over work is occurring in conjunction with longer workdays and decreasing time for personal and family life.⁸⁷ Workload is not equally distributed across the workforce. Lawyers who work for large private practice firms tend to work longer hours than those who work for the government or in corporations.⁸⁸ Large firms respond to associate dissatisfaction through compensation of wages or “retention bonuses.”⁸⁹ However, the problem of dissatisfaction does not appear to relate to inadequate compensation, since money has little effect on the underlying issue of control and decision-making.

The health effects for those working in a high-pressure and low control environment are not surprising—there are higher rates of both heart disease and divorce.⁹⁰ On its face, a high divorce rate may not seem problematic, but the health impact is significant. Married people live longer and report lower risks of physical and psychological illnesses than the unmarried.⁹¹ Like the higher rates for depression in law students compared to medical students, female lawyers

⁸² Schiltz, *supra* note 1 at 889.

⁸³ Seligman, “Unhappy”, *supra* note 2 at 61.

⁸⁴ *Ibid* at 56.

⁸⁵ *Ibid* at 57.

⁸⁶ *Ibid*.

⁸⁷ Schiltz, *supra* note 1 at 892.

⁸⁸ *Ibid*.

⁸⁹ Seligman, “Unhappy”, *supra* note 2 at 57.

⁹⁰ *Ibid*.

⁹¹ Schiltz, *supra* note 1 at 877.

report higher levels of divorce than the same age group of female doctors.⁹² This fact is not lost on associates, with nearly 62% of females and 47% of males suggesting that they would leave their firm in five years or less.⁹³ The relationship between employees' well-being and the cost to a firm's business is exemplified by the cost of associate departure.

D. Intervention and Action Required to Prevent Depression

1. Encouraging Cooperative Litigation

A growing number of law schools and law firms are now recognizing alternative models to litigation. In particular, many are using dispute resolution forums such as mediation and arbitration. This is part of a recognition that more collaborative or non-zero-sum situations are better for business and health.⁹⁴ After all, most lawyers are not litigators.⁹⁵ In scenarios where the engagement is not a zero-sum scenario, alternative dispute resolution should be encouraged. Instead of behaving like an untrammelled advocate, the lawyer's role is to encourage "normative-order" by serving as a lawyer-statesman in deal making.⁹⁶ Evidence suggests that positive emotions from "cooperative" alternatives to litigation solicit feelings of joy, amusement, and interest. These emotions in turn are sources of broadening social and intellectual functions. Cooperative engagement reinforces our view of the positive health benefits to lawyers.

2. Increasing Sense of Control

Law firms should consider solutions that offer lawyers more personal control in day-to-day work.⁹⁷ The most effective and practical way to address low morale or depression is to build greater intrinsic value, rather than provide just extrinsic rewards. Client contact, mentorship, and a voice in management are more effective in conveying value and worth than large bonuses or expensive dinners.⁹⁸ To achieve this solution, firms should learn and recognize associates' strengths and use that knowledge to shape a work environment.⁹⁹ A strength analysis should emphasize qualities such as leadership, originality, fairness, enthusiasm, perseverance, and social

⁹² *Ibid* at 879.

⁹³ "Beyond Doubt", *supra* note 74 at 4.

⁹⁴ Seligman, "Unhappy", *supra* note 2 at 64.

⁹⁵ *Ibid* at 63.

⁹⁶ *Ibid*.

⁹⁷ *Ibid* at 58.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* at 59.

intelligence.¹⁰⁰ The intention of this exercise is to increase morale by acknowledging skill strength that is not conventionally used on a daily basis.¹⁰¹ Prevention strategies in the law firm context often relate to matters that first emerge in law school. For instance, self-esteem and the “undermining effect” may occur where the practice of law has low decision latitude. This is further evidence that prevention strategies need to occur on a continuum basis.

V. DEPRESSION AS A PROFESSIONALISM CHALLENGE

A. The Effect of Depression on Our Current System

In the analysis thus far, the focus has been primarily on the various risk factors to suggest causes or conditions that reinforce depression. The remaining part of this paper takes a survey examination of why depression is a professionalism challenge as much as a law school and law firm problem.

For the profession, the current model has the effect of attracting a greater number of disciplinary problems with statistics suggesting that 40% to 75% of disciplinary actions are against lawyers who are chemically dependent or mentally ill.¹⁰² More worrisome is the suggestion that the deteriorating mental health of lawyers could affect the self-regulation of lawyers in Canada. John Sopinka, former Justice of the Supreme Court of Canada, suggested that our current model restrains the profession’s ability to grow. He states that signs of this impending problem include a lack of tolerance for pro bono and community work, limited time to train and develop young lawyers, no time to read outside the law, and increases in disciplinary problems. These trends have the effect of creating a long-term consequence of attracting government regulation of lawyers.¹⁰³ Justice Sopinka’s argument is alarming, but supported by this paper’s analysis of the gamut of systemic risk factors present in the legal profession.

B. Ethic Offenders and Discipline

An untreated lawyer is more dangerous to the public than someone who has recognized a problem and has sought professional help.¹⁰⁴ In recent years, organizers, coordinators, funding bodies, and directors from Lawyers Assistance Programs across Canada have examined the link between mental illness and disciplinary proceedings. The “Ontario Study” revealed that drugs,

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Cormack, *supra* note 25.

¹⁰³ “Stop whining about hard work, Greenspan tells lawyers”, *The Lawyers Weekly* 11:17 (6 September 1991) (Lexis).

¹⁰⁴ Pulliam, *supra* note 9 at 293.

alcohol or “psychiatric” illness was present in nearly 50% of the 172 cases categorized as serious disciplinary proceedings.¹⁰⁵ The findings are based on examination of the LSUC’s Discipline Digest between the periods of 1992-1995. The table results have been reproduced in this paper as an appendix.¹⁰⁶

Lawyers are disbarred for serious offences, or may be disbarred for a series of lesser offences that result in an appearance that the lawyer is “ungovernable.”¹⁰⁷ Disbarment usually occurs where there is lack of evidence to suggest mitigation. The Ontario Report found psychiatric impairment reported in 2 of the 29 cases where lawyers were disbarred.

Lawyers may not resign without permission from the LSUC, and this resignation may be denied if there are further disciplinary matters to be addressed. Permitted to resign cases occur when a member is facing serious disciplinary charges and evidence suggests addiction or mental illness as an excuse or explanation for the problem under review.¹⁰⁸ Psychiatric impairment was reported in 6 of the 25 cases reported as permitted to resign. More troubling is the conclusion that nearly 48% of resignations involved alcohol, drug or psychiatric impairment.¹⁰⁹ The same figure was also reported in relation to lengthy suspensions as well. Lengthy suspensions are given where there is a greater chance for recovery. Much like the findings from the previous category, nearly 50% of 16 lengthy suspension cases involved alcohol, drugs, and psychiatric illnesses.¹¹⁰ Improving from the previous section, 7 of these cases were reported as involving a psychiatric illness.

This regional study suggests that nearly half of disciplinary cases involve some form of psychiatric illness, notwithstanding the recognition that there is generally underreporting in disciplinary filings. However, the report does reflect an ongoing criticism that regulators and law societies often view and address all forms of mental illness as one large issue rather than recognize the differences between the various forms of illness.¹¹¹ This means that the data lacks specificity as to whether the disciplined lawyers were affected by the illness of depression *per se*.

C. Challenges Related to Discipline–Depression as a Mitigating Factor

The issue of whether mental illness should be accepted as a mitigating factor has been a contentious matter for the profession. This debate is more developed in the United States, but in

¹⁰⁵ “Addiction and Psychiatric Impairment of Lawyers and Judges”, online: Legal Profession Assistance Conference <http://www.lpac.ca/main/Courses_01/alcohol_03.aspx>.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Pulliam, *supra* note 9 at 305.

Ontario, depression is generally accepted as a mitigating factor in disciplinary cases as evident in the Ontario Report. There is disagreement over discipline for “middle range” misconduct complaints, or permitted-to-resign and suspension cases.¹¹² One specific point of disagreement is whether suspension is appropriate given that, by the time lawyers have reached the stage of a serious disciplinary hearing they have already “gone too far in the system” to warrant leniency.¹¹³ To allow lawyers to otherwise return to the profession would be a violation to the public duty owed by regulatory agencies. There remains no consensus to this issue, but the debate does demonstrate the complexity of the issue and the unenviable position of professional regulators in addressing mental illness.

D. The Next Step for Regulators

There is some truth to the argument that once a lawyer has been before a disciplinary board, they have “gone too far.” The next step for regulators is to consider how to reverse the current trend so that mental illness is not overly represented in disciplinary cases. The LSUC’s current approach has been to develop groups and task forces that indirectly address mental health. This is evident in the working groups related to the “Civility Complaints Protocols” and the “Retention of Women.” Currently, it is not foreseeable that the LSUC will create a working group aimed at specifically addressing the issue of depression. The Rules as they relate to depression are likely to remain the same.

Justice Sopinka is not alone to suggest a concern that the legal profession is headed towards greater government intervention. Governor General David Johnston spoke in similar tones in his speech to the Canadian Bar Association in 2011.¹¹⁴ In his speech, he spoke passionately about the possibility of forced government regulation and the factors that would bring about such a result. Johnston referred to the importance of maintaining the public’s trust. As this paper has attempted to demonstrate, trust with the public is invariably broken once a lawyer has been disciplined. The affected lawyer was likely not honest with herself, her firm or her professional colleagues. If the profession is to truly accept Governor General Johnston’s speech about the risk of losing self-regulation, then lawyers need to examine the root of what is causing the disproportionate number of disciplinary cases involving mental illness. Establishment of a task force would be a proper starting place.

¹¹² “Addiction and Psychiatric Impairment of Lawyers and Judges”, *supra* note 105.

¹¹³ Goren, *supra* note 30 at 1097.

¹¹⁴ David Johnston, “The Legal Profession in a Smart and Caring Nation: A Vision for 2012” (Speech delivered at the Canadian Bar Association’s Canadian Legal Conference, Halifax, 14 August 2011), online: The Governor General of Canada His Excellency the Right Honourable David Johnston <<http://www.gg.ca>>.

CONCLUSION

It is time for the legal community to recognize and appreciate that depression is not a personal failure or a moral weakness. Depression is an institutional, workplace, and professionalism problem that is created and reinforced by occupational hazards and shared environments. The illness can be easily concealed, and its symptoms are often difficult to identify or are mistaken for regular signs of stress. The science of depression suggests that depression is the result of complex, inter-related biological and environmental conditions.

Law schools and law firms play a role in creating an environment that causes and reinforces symptoms of depression. Legal educators recognize that pessimism is a virtue in the practice of law and have tried to incorporate this specific form of thinking into the law school curriculum. However, pessimism is a problem trait because it cannot be easily turned off and it is a symptom of depression. The intense pressure of law school, when coupled with competitive norms, may result in a general loss of student' self-esteem, life satisfaction, and well-being.

In recent years, young associates are confronting a situation of low decision latitude, where they have little control over their work, and limited contact with superiors and clients. Large firms respond to associate dissatisfaction through compensation of wages or "retention bonuses." However, money has little effect on the underlying issue of control and decision-making.

Mental illness is disproportionately represented in disciplinary cases, making depression a professional issue. In order to effectively implement any of the preventative strategies that have been suggested, the profession needs to accept the fact that depression is an endemic hazard and will likely afflict a large number of lawyers in the lifespan of their legal careers. However, the author remains optimistic that, in the face of an economic recession and with the risk of losing self-regulation, the time is now to re-examine how the profession addresses the problem of depression.

APPENDIX

Table 1: Categories of Disciplinary Disposition

Category of Disposition	Cases
1. Disbarment	29
2. Permitted to Resign	25
3. Suspension: 12 months or longer	16
4. Other	102
Total	172

Table 2: Rates of Lawyer Impairment

	Cases	Alcohol/Drugs	Psychiatric	Total	Percentage
1. Disbarment	29	2	2	4	14%
2. Permitted to Resign	25	6	6	12	48%
3. Lengthy Suspension	16	1	7	8	50%
4. Other	102	1	14	15	15%

From Canadian Bar Association “Addiction and Psychiatric Impairment of Lawyers and Judges”