

Why Your Mental Health Matters to the Disciplinary Board

While the very thought of dealing with the Office of Disciplinary Counsel may stress attorneys out, the ODC and the Disciplinary Board have a vested interest in attorneys' mental health.

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May is Mental Health Month. According to Youth.gov, Mental Health Month was established in 1949, to increase awareness of the importance of mental health and wellness in Americans' lives, and to celebrate recovery from mental illness. We take the opportunity to focus this column on the role of mental health in the disciplinary process.

The call for wider attention to attorney well-being has been growing louder for years. The pandemic crisis refocused everyone's attention on issues of mental health and that is particularly true within our profession. The American Bar Association and the Pennsylvania Bar Association have both supported firms adopting a seven-prong "Well Being Pledge." This comes in part as our profession begins to accept, acknowledge, and proactively deal with what is essentially a mental health crisis within our profession. Maintaining mental health and addressing issues as they arise is incumbent upon attorneys in connection with compliance with Rule of Professional Conduct 1.1 Competence.

As we have previously discussed, paying attention to your own mental health, as well

as the mental health of your colleagues can be vital in legal malpractice avoidance and staying out of trouble with the Disciplinary Board. The Disciplinary Board and Office of Disciplinary Counsel (the ODC) care about mental health on two distinct but correlated levels. Our disciplinary authorities care about the issues that attorney mental health can cause clients as protecting the public is one of the primary functions of the disciplinary system. However, on the other side of that same coin, the disciplinary authorities recognize that making certain an attorney receives appropriate mental health care so that they can be at their best for their clients serves the public interest. There is also recognition that mental health issues are best met with compassion rather than punishment.

A review of recent disciplinary actions include several where the respondent was dealing with mental health issues which may have contributed to their problems. In *Office of Disciplinary Counsel v. Toppin*, 91 DB 2022 (2023), the respondent received a suspension of three months followed by three years of probation conditioned on treating with a qualified mental health care professional during the period of probation. The

acts that precipitated Gina Toppin’s discipline were relatively minor, consisting of not telling a client that no professional liability insurance was maintained, not timely filing papers in a divorce proceeding, not responding to the client in that matter, and not refunding the fee paid. However, Toppin aggravated her conduct by failing to respond to requests for information from disciplinary counsel and not responding when she received a DB-7 “Letter Request for Statement of Respondent’s Position and Request for Documents.” Toppin also had a prior history of discipline. In 2016, Toppin received a stayed suspension of one year subject to two years probation, which she completed successfully.

The joint petition for discipline noted that if the matter proceeded to a hearing, “respondent would present mitigation evidence, under *Office of Disciplinary Counsel v. Braun*, 520 Pa. 157, 553 A.2d 894 (1989), that she was suffering from a mental infirmity, namely—adjustment disorder with mixed disturbance of emotions and conduct, persistent; and generalized anxiety disorder, which was a causal factor in her misconduct.” In *Braun*, the Pennsylvania Supreme Court determined that expert psychiatric testimony establishing that an attorney’s psychological condition was a causal factor in the misconduct was properly considered as mitigating evidence.

In *ODC v. Keller*, 177 DB 2022 (2023), the respondent was suspended for one year and a day on a joint petition with the ODC. The opinion lists seven different matters in which Keller did not perform work for the clients, failed to respond to client communications, and did not timely refund unearned fees. Keller also was administratively suspended for failing to comply with CLE

requirements, lying about not having clients on her statement of compliance, and continuing to operate her firm during the period of administrative suspension. After her administrative suspension, Keller generally did not follow any of the provisions of Pa. R.D.E. 217, which regulates the conduct of formerly admitted attorneys. The joint petition noted Keller did not have any prior history of discipline and if the matter proceeded to a hearing, she “would offer evidence that she was experiencing personal and professional difficulties during the time of her misconduct, including the loss of several staff members, the impact of the COVID-19 pandemic, and diagnosed anxiety and depression.”

In these cases we see both sides of the mental health issue. It is frequently at the root of disciplinary complaints, but at the same time, it can mitigate the severity of discipline. Although it may seem quixotic that disciplinary authorities are concerned about lawyer well-being, the commitment to lawyer well-being is actually imbedded in the Rules of Disciplinary Enforcement, including a provision that allows Disciplinary Counsel to make an informal referral to Lawyers Concerned for Lawyers of Pennsylvania. Asked about the reasoning for this, Chief Disciplinary Counsel Thomas Farrell stated:

By helping lawyers we help clients and the legal system, too, so the court created a rule, at the board’s suggestion, to enable our staff to make confidential referrals to LCL with no adverse repercussions to the attorney, even if she refuses help. Rule of Disciplinary Enforcement 402(d)(6). If treatment ameliorates the mental health condition or substance use disorder that led to a disciplinary violation, the attorney, if

she chooses, can cite that improvement as reason to mitigate any sanction in the disciplinary matter.

So, while the very thought of dealing with the ODC may stress attorneys out, the ODC and the Disciplinary Board have a vested interest in attorneys' mental health.



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