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Fall 2023

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## The Ethical Risk of Experience

by  
Barbara Glesner Fines\*

Practice may make perfect, but in law practice, experience and specialization can actually increase some types of errors – leading to an increased risk of malpractice claims,<sup>1</sup> disciplinary complaints,<sup>2</sup> or client dissatisfaction. This article explores the question of why this may be so. The article first examines the phenomenon of increased malpractice and disciplinary risks for family law attorneys in general and experienced attorneys in particular. The central question this article examines is this, “Why might highly experienced and specialized family law attorneys find themselves facing the most severe of disciplinary sanctions or malpractice judgments?” The answers point to some individual risk factors that attorneys can consider in monitoring their own practice. On a larger scale, however, these cases identify the ways in which the culture of American law practice fails to identify and address these risks.

Part I of this article examines the increased risks of malpractice and disciplinary complaints in family law. This section also analyzes the overall increased risk of sanction and discipline attorneys face because of the unique nature of family law practice. Part II examines the risks of errors that result from a reliance on experience and routine. While experience and expertise can reduce the likelihood of some errors, routines and intuition can present increased risks in other ways. Part III then examines the concern that extensive experience in law practice can present challenges for wellbeing, with associated risks of career-ending errors. The article provides some advice for attorneys to manage these risks.

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<sup>1</sup> See 1 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 6.2 (4th ed. 2005).

<sup>2</sup> LESLIE C. LEVIN & LYNN MATHER, *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 66–67 (2012).

## I. Family Law as a High-Risk Practice Area

Family law is frequently identified as a field of practice with an elevated risk for both malpractice and disciplinary actions.

In studies of malpractice, family law represents the area of practice with the second largest number of claims.<sup>3</sup> The number of these claims has grown in the past two decades as compared to other areas of practice.<sup>4</sup> As one might expect, errors with significant financial impact predominate in these claims (e.g., errors in settlement agreements or Qualified Domestic Relations Orders (QDROs) for ERISA pension plans).<sup>5</sup>

Experienced family law attorneys may question the risk presented by these statistics. Family law's higher number of malpractice claims may simply be because this area of law represents a greater percentage of all client representation.<sup>6</sup> The nature of the litigants in family law practice may invite more claims as well. Litigants tend to be unfamiliar with the legal system in general and the high-stakes, high-emotion nature of the practice make it difficult to assess and manage client expectations. "Clients may be willing to blame attorneys—no matter how competently those attorneys acted—when outcomes are not what they had wished."<sup>7</sup> Opposing parties as well may attempt to blame attorneys for the outcome of their cases.<sup>8</sup> In other words, litigants may bring malpractice claims to address their own unresolved

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<sup>3</sup> ABA, PROFILE OF LEGAL MALPRACTICE CLAIMS 2016-2019, 12 (2019) [hereinafter ABA MALPRACTICE PROFILE]. One must read this data with caution of course because the claim frequency is not adjusted to reflect family law as a proportion of law practice generally. *Id.* at 11. Indeed, it would not be surprising to discover that family law practice constitutes the second largest area of practice.

<sup>4</sup> *Id.* at 14 ("This year, for the first time, Family Law, has moved into second place, comprising 12.81 percent of all claims for the collection period.")

<sup>5</sup> Ruth H. Baxter, *The Risk Manager*, LAW. MUT. KY. (Winter 2014), <https://www.lmick.com/item/avoiding-legal-malpractice-and-bar-complaints-in-family-law-cases>.

<sup>6</sup> Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 971 (2007).

<sup>7</sup> Barbara Glesner Fines, *The Changing Landscape of Disciplinary Risks in Family Law Practice*, 50 FAM. L.Q. 367, 368 (2016) (citing cases involving attorneys representing family members).

<sup>8</sup> Baxter, *supra* note 5.

emotional and psychological issues rather than because of any specific attorney errors. That this is one likely explanation is bolstered by the fact that the majority of claims in family law cases close without any payout.<sup>9</sup>

As comforting as these explanations may be, experienced family law attorneys should not consider themselves insulated from risk. Rather, the longer an attorney is in practice, the greater their risk of a malpractice claim. “[T]he greatest proportion of malpractice claims are reported by lawyers who have practiced law for more than a decade.”<sup>10</sup>

There are many possible reasons for this increased risk. The first is the combination of caseload volume and statutes of limitations. Given a standard ten-year window for a client to bring a malpractice claim, attorneys in their first decade of practice simply do not have the risk exposure as do attorneys with a longer practice history.<sup>11</sup> Experienced attorneys not only take on more cases, they are also increasingly responsible for supervising others, exposing them to additional risks from the actions of other attorneys.<sup>12</sup> Additionally, the largest group of malpractice

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<sup>9</sup> Zindaba Tembo, *Common Family Law Errors and How to Mitigate Your Risks*, OKLA. ATTY. MUT. INS. CO., <https://www.oamic.com/resources/legal-malpractice-risks-for-family-law/> (last visited June 23, 2023) (“About 70% of the claims received in this area close out with no loss payment.”).

<sup>10</sup> Todd C. Scott, *Who Has the Most Malpractice? Hint: It's Not the New Lawyers*, 29:2 THE VIEW 1 (2013), <https://www.mlmins.com/Library/The%20View%20Newsletter%20April%202013.pdf> (“lawyers practicing two years or less have reported claims at the rate of 44%, the lawyers practicing 11 to 20 years report claims at the rate of 122% – about 12 claims for every 10 policyholders”).

<sup>11</sup> *Id.* (“Most significantly, the more experienced lawyers have more of a “tail,” meaning they have more matters in their past that can come back to haunt them.”).

<sup>12</sup> ABA Model Rule of Professional Conduct 5.1 provides three types of responsibility for supervision. First, partners and attorneys with managerial authority must make reasonable efforts to have policies in place to ensure compliance with the rules. Second, supervising attorneys must make sure that subordinates are aware of and comply with these policies. Third, attorneys directing subordinates must neither order nor ratify misconduct. MODEL RULES OF PRO. CONDUCT r. 5.1(a)-(c) (AM. BAR ASS'N 2023). For example, in *Lawyer Disciplinary Bd. v. Veneri*, 524 S.E.2d 900 (W. Va. 1999), a senior attorney was disciplined for failing to supervise his son, an associate in his firm, who prepared a QDRO and failed to notify the court of changes he made after filing. *Id.* at 905.

claims are found in solo and small firm practice;<sup>13</sup> family law practice is more often conducted in these practice settings.

Attorneys who specialize in family law may believe that most of these claims are against inexperienced attorneys. As any malpractice underwriter will tell you, the attorney who presents some of the greatest risk of malpractice is one who dabbles in multiple areas of law without developing a deep expertise.<sup>14</sup> Family law, in particular, is an area in which attorneys who are not familiar with the practice may nonetheless take on these cases because the demand for legal services is so high,<sup>15</sup> as a favor to friends or relatives,<sup>16</sup> or as an ancillary legal service to valuable clients.

Certainly, expertise can reduce the risks that flow from inexperience. Specialization can also provide a market advantage. Most state bar associations authorize attorneys to advertise as “board certified” or specialists.<sup>17</sup> Family law was one of the first

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Similarly, when it comes to malpractice liability, the principle of respondeat superior may result in a supervising attorney being held responsible for a junior attorney’s errors. MALLEN & SMITH, *supra* note 1, at § 30.

<sup>13</sup> Sixty-two percent of malpractice claims are filed against firms with one to five attorneys. This represents a decrease since 2015. Since the average firm size in most states is two to three attorneys, statistics may not reflect any particular increased risks. ABA MALPRACTICE PROFILE, *supra* note 3, at 16-17.

<sup>14</sup> WISC. LAW. MUT. INS. CO., *Common Mistakes May Be the Most Preventable Way to Avoid Malpractice* (May 11, 2022), <https://wilmic.com/avoiding-malpractice/> (“Roughly 45 percent of all claims involve areas of practice in which lawyers practice less than 10 percent of the time.”).

<sup>15</sup> Family law represents one of the largest areas of unmet legal need, making it appear to be a fertile field for generating clients and fees. “Bar surveys have consistently found that more than 4/5 of the legal needs of low-income individuals, and a majority of those of middle-income individuals, remain unmet.” DEBORAH J. RHODE, *THE TROUBLE WITH LAWYERS* 46 (2016). However, a significant reason that clients do not choose representation by an attorney is an inability to afford the fees necessary for full-service representation. *Cases Without Counsel: Experiences of Self-Representation in U.S. Family Court* 19-22, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (2016) [hereinafter *Cases Without Counsel*].

<sup>16</sup> Glesner Fines, *supra* note 7, at 367, n.5.

<sup>17</sup> ABA STANDING COMM. ON SPECIALIZATION, *Certification by State*, <https://www.americanbar.org/groups/specialization/state-sources-of-certification/certification-by-state/> (last visited June 23, 2023).

specializations to be recognized by a state.<sup>18</sup> Today, at least nine states directly certify attorneys as family law specialists.<sup>19</sup> Nearly all states permit advertisement of certifications provided by one of eight ABA approved agencies. Three of these agencies certify what could be characterized as sub-specializations in family law: child law,<sup>20</sup> elder law,<sup>21</sup> and family law trial practice.<sup>22</sup> Similarly, designation as a fellow in the American Academy of Matrimonial Lawyers signals expertise and experience.<sup>23</sup>

At the same time, the risks of liability for specialists in malpractice actions are increased because these attorneys are held to a higher standard of care. Under general tort principles, “one who holds himself out as specializing and as possessing greater than ordinary knowledge and skill in a particular field, will be held to the standard of performance of those who hold themselves out as specialists in that area.”<sup>24</sup> This heightened standard applies not only to attorneys who are certified specialists, but to any attorneys who hold themselves out to the public as specialists or even to non-specialist attorneys if the case they are handling is one that should be handled by a specialist and they continued with the representation rather than referring the case to a specialist.<sup>25</sup>

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<sup>18</sup> Buddy Herring, *Liability of Board Certified Specialists in a Legal Malpractice Action: Is There a Higher Standard?*, 12 GEO. J. LEGAL ETHICS 67, 71 (1998).

<sup>19</sup> Arizona, California, Florida, Indiana, Louisiana, New Jersey, North Carolina, Ohio, and Texas directly certify family law specialists. ABA STANDING COMM. ON SPECIALIZATION, *State Sources of Certification* at <https://www.americanbar.org/groups/specialization/state-sources-of-certification/> (last visited June 23, 2023).

<sup>20</sup> The National Association of Counsel for Children certifies specializations in juvenile law and child welfare law. ABA STANDING COMM. ON SPECIALIZATION, *Private Organizations with ABA Accredited Lawyer Certification Programs*, at <https://www.americanbar.org/groups/specialization/organizations-with-aba-accredited-lawyer-certification-programs/> (last visited June 23, 2023).

<sup>21</sup> The National Elder Law Foundation provides elder law certification. *Id.*

<sup>22</sup> The National Board of Trial Advocacy provides a family law trial advocacy specialty certification. *Id.*

<sup>23</sup> Am. Acad. of Matrim. Law., *Qualifications*, <https://aaml.org/qualifications/> (last visited June 23, 2023).

<sup>24</sup> Walker v. Bangs, 601 P.2d 1279, 1283 (Wash. 1979), citing RESTATEMENT (SECOND) OF TORTS § 299A, comment d (1965).

<sup>25</sup> Herring, *supra* note 18, at 90.

For the purpose of a malpractice claim, attorneys who hold themselves out as specialists, whether they actually possess superior skill and knowledge in the area, will be treated as specialists. . . . Likewise, attorneys who possess some type of family law specialist certification or attorneys who are labeled as specialists by virtue of membership in certain membership organizations (such as the American Academy of Matrimonial Lawyers) may also be considered specialists for malpractice claim purposes.<sup>26</sup>

Just as with malpractice cases, family law attorneys are the subject of disciplinary complaints at increased rates compared to other areas of practice.<sup>27</sup> Here too, the risk of a claim or complaint is far greater than the actual risk of sanction. Over 90% of disciplinary complaints in domestic relations cases are dismissed.<sup>28</sup> For the remainder of cases that result in formal discipline, the reasons for sanction are those common to most disciplinary matters: neglecting client matters, failing to communicate with clients, or unethical conduct (such as theft, fraud, or financial misconduct).

Experience can provide a basis for increased sanctions. The ABA Standards for Imposing Attorney Sanctions list “substantial experience in the practice of law” as an aggravating factor in determining the proper sanctions to be imposed for a violation of the rules of professional conduct.<sup>29</sup> The standards do not define “substantial practice” (or its corollary mitigating factor of “inexperience”). Likewise, the reasons supporting the treatment of substantial experience as an aggravating factor are not entirely clear.<sup>30</sup> The general principal courts sometimes express is that an

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<sup>26</sup> David S. Dolowitz & Jamila Abou-Bakr, *Attorney-Client Relations in Divorce Cases: The Intersection of Ethics and Malpractice in Family Law*, 31 J. AM. ACAD. MATRIM. LAW. 345, 363 (2019).

<sup>27</sup> Kyle Rozema, *Lawyer Misconduct in America* 14 (Jan. 2, 2020) (unpublished manuscript), <https://www.law.umich.edu/centersandprograms/lawandconomics/workshops/Documents/Paper%20.%CC20Kyle%CC20Rozema.Lawyer%CC20Misconduct%CC20in%20America.pdf> [<https://perma.cc/M7SW-4PL8>].

<sup>28</sup> LEVIN & MATHER, *supra* note 2, at 67.

<sup>29</sup> ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 9.22(i) (2012).

<sup>30</sup> Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U.L. REV. 1, 50 (1998) (“The justifications for treating substantial experience in the practice of law as an aggravating factor are weak in many cases.”).

attorney with substantial experience “should have known better” than to have engaged in the charged misconduct.<sup>31</sup>

States differ on the extent to which they adopt the ABA’s treatment of substantial practice as an aggravating factor. Even within a single state, the same number of years of experience may or may not be treated as “substantial” or may or may not be given consideration as an aggravating factor, let alone whether the factor is being applied or not.<sup>32</sup> In many instances, even if a court does consider experience as an aggravating factor, if the respondent attorney does not have a record of discipline, this acts as a mitigating factor that tends to balance out the impact of substantial experience.<sup>33</sup>

While seasoned family law attorneys may be protected from many errors that result in discipline or liability, neither experience nor expertise confer immunity. Attorneys should consider the extent to which quite the opposite may be true and substantial experience in family law practice could actually be a source of errors.

This continued vigilance is especially important in family law practice. Regardless of an attorney’s experience or expertise, the view of the courts toward family law practice may also influence decisions on sanctions. While family law practitioners are subject to the same standards of conduct as any other attorney, courts sometimes appear to hold these attorneys to a more stringent application of these standards, with courts commenting on the unique and even higher demands for attorneys in this field.<sup>34</sup>

For example, a family law attorney may be more often subject to professional discipline for private misconduct, because

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<sup>31</sup> *In re Hill*, 144 N.E.3d 184, 196 (2020).

<sup>32</sup> Levin, *supra* note 30.

<sup>33</sup> *Hill*, 144 N.E.3d at 196 (“Respondent’s substantial experience in the practice of law . . . counsels that he should have known better than to conduct himself at the bar in the manner he did; but that same experience, consisting of roughly three decades of public service without prior discipline, also carries mitigating weight.”); *Beier v. Bd. of Pro. Resp.*, 610 S.W.3d 425, 447 (Tenn. 2020) (attorney with over forty years of practice, including service as a juvenile court judge, “should have known better” than to forge a client’s signature on document and charge an unreasonable fee).

<sup>34</sup> Glesner Fines, *supra* note 7, at 371 (noting that, in family law practice, “courts do not tend to tolerate the types of raw partisanship or even the adversarial advocacy they might permit in other legal settings.”).



conduct in one's personal relationships may more often be considered relevant to one's ability to represent clients in their relationships. For example, in *Matter of Walker*,<sup>35</sup> the Indiana Supreme Court disciplined an attorney under Rule 8.4(b) who had been convicted of domestic assault against his partner, who also happened to be a former divorce client.

In finding a violation of Rule 8.4(b), the court noted that not all criminal violations committed in one's private capacity are a basis for professional discipline. However, the court noted that the attorney both practiced family law and acted as a part-time prosecutor. Given these areas of practice, the court found a clear nexus between his private conduct and his fitness to practice. His assault conviction implicated "his ability to zealously prosecute or to effectively work with the victims of such crimes"<sup>36</sup> and his "effectiveness with his own clients or with adversaries in situations involving issues of domestic violence is compromised by his own contribution to this escalating societal problem."<sup>37</sup>

The emotional distress that frequently accompanies many family law matters and the impact these actions may have on children also raise the stakes for discipline. Among the aggravating factors courts consider in determining sanctions is "the vulnerability of the victim."<sup>38</sup> A victim's individual characteristics (such as age, education, or disability) are frequently the central considerations in whether a victim is considered vulnerable.<sup>39</sup> However, in family law actions, courts sometimes appear to take vulnerability as a given simply because of the nature of the practice.<sup>40</sup> Courts are especially likely to conclude that actions affect-

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<sup>35</sup> *Matter of Walker*, 597 N.E.2d 1271, 1271 (Ind. 1992).

<sup>36</sup> *Id.* at 1272.

<sup>37</sup> *Id.*

<sup>38</sup> ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 29, at Standard 9.22(h).

<sup>39</sup> ABA, ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.22 (2d ed. 2019) (collecting cases)

<sup>40</sup> *In re Berg*, 955 P.2d 1240, 1250 (Kan. 1998) (the fear of losing children in custody actions creates emotional vulnerability); *Bd. of Pro. Resp. v. Osten*, 519 P.3d 326, 332 (Wyo. 2022) (applying the vulnerability of a client factor in suspending an attorney for lack of diligence and candor in a divorce action).

ing children<sup>41</sup> or victims of domestic violence<sup>42</sup> necessarily involve vulnerable clients.

For example, in *Florida Bar v. Dove*,<sup>43</sup> the Florida Supreme Court reviewed the conduct of an attorney who did not provide required statutory notices to the birth father and grandparents in an adoption action and misrepresented facts in *ex parte* proceedings.<sup>44</sup> The court concluded that it must reject disciplinary recommendations of a public reprimand and two years of probation and impose a much higher sanction of three years of suspension.<sup>45</sup> The justification relied in part on the unique nature of family law practice:

This Court is committed to the best interests of children. Lawyers who undertake representation in the vital areas of adoption, dependency, and delinquency and in other family law cases serve interests which have unexcelled importance in the law. We expressly advise lawyers

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<sup>41</sup> For example, in *In re Disciplinary Proceeding Against Dornay*, 161 P.3d 333, 340 (Wash. 2007), an attorney was having an affair with a married man whom she had seen being violent and “rageful.” She testified as a witness in his divorce and custody action, perjuring herself by claiming that she had never seen him lose his temper. After she broke off their relationship, she filed for an order of protection against him, alleging that he was “unstable and threatening.” *Id.* at 340. In a disciplinary proceeding brought based on this false testimony, she admitted that she had intentionally committed perjury. The court applied the aggravating factor of “vulnerability of the victim,” reasoning that the divorce action would affect the safety of the three-year-old boy who was the subject of the custody action. *Id.* See also *In re Discipline of Whitney*, 120 P.3d 550, 556 (Wash. 2005) (applying the vulnerability factor in disbarring an attorney for providing false testimony while serving as a guardian ad litem, noting that “how one conducts himself or herself as a GAL reflects on their ability to practice law.”).

<sup>42</sup> See, e.g., *People v. Hohertz*, 102 P.3d 1019, 1023-24 (Colo. 2004) (applying the vulnerability of a victim factor where an attorney’s neglect in failing to obtain an order of protection against the client’s abusive husband resulted in the client and children being forced to leave the state).

<sup>43</sup> 985 So. 2d 1001 (Fla. 2008).

<sup>44</sup> The attorney in this case also owned an adoption agency from which she received referrals for her legal services. *Id.* at 1003.

<sup>45</sup> Florida standards for sanctions provided a presumption of disbarment for the attorney’s conduct; however, the court found that the attorney’s extensive pro bono service mitigated this sanction. A lengthy dissent argued that the appropriate sanction was disbarment, citing cases in which economic misconduct resulted in disbarment and commenting, “Are we more concerned with economic misbehavior than with damage to our children and families?” *Id.* at 1023 (Lewis, C.J., dissenting).

that we applaud and appreciate their service in this representation but that the service must be performed in compliance with the Rules of Professional Conduct. If it is not, we will deal harshly with the violations.<sup>46</sup>

Two dissenting opinions would have imposed disbarment; however, all agreed that the fact that the attorney's misconduct impacted a family merited the most serious of sanctions.<sup>47</sup>

This heightened concern for ethical practice in family law can be a factor not only in justifying increased sanctions, but also in determining whether an attorney has violated specific rules of conduct. At least one rule of conduct specifically provides for separate standards for family law attorneys. The ABA Model Rules of Professional Conduct governing contingent fees provide an express "family law" exception to this rule.<sup>48</sup> This prohibition on contingent fees is justified by concerns for the vulnerability of clients and the special role of law in adjusting family relationships.<sup>49</sup>

Likewise, risks of violations from rules governing conflicts of interest may be greater in family law practice. First, as one socio-

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<sup>46</sup> *Dove*, 985 So. 2d at 1010. The dissent took issue with the majority's claim that it was protecting families and children with the three-year suspension rather than imposing a disbarment. "We do not hesitate to disbar for the theft of money but apparently we do not cloak the family structure and vulnerable individuals with that same sense of protection." *Dove*, 985 So. 2d at 1012 (Lewis, C.J., dissenting).

<sup>47</sup> "The message from this Court in both the majority and dissenting opinions is unmistakable and should not only be heard but heeded by all members of The Florida Bar and the public — violations of the rules of professional conduct that affect children will not be tolerated under any circumstances." *Id.* at 1033 (Pariente, J. dissenting).

<sup>48</sup> Rule 1.5(d) provides: "A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof."

MODEL RULES OF PRO. CONDUCT r. 1.5(d)(1) (AM. BAR ASS'N 2023). See generally Denise Fields, Comment, *Risky Business or Clever Thinking? An Examination of the Ethical Considerations of Disguised Contingent Fee Agreements in Domestic Relations Matters*, 75 UMKC L. REV. 1065 (2007).

<sup>49</sup> "This prohibition protects against overreaching in highly emotional situations and reflects a policy of promoting reconciliation." ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT § 1.5 Fees (Ellen J. Bennett & Helen W. Gunnarsson, eds. 2019).

logical study of attorneys in family law practice noted, attorneys may not be as aware of potential conflicts in assisting families:

law is especially invoked at times of or in planning for family transition—birth (e.g., adoption or estate planning), marriage (e.g., prenuptial agreements), divorce, remarriage, financial crisis (i.e., bankruptcy), retirement, incapacity, and death—the very points at which fault lines emerge and chasms develop as the interests and alliances of family members shift, clash, and reconfigure. But because of popular stereotypes of families as safe, loving, harmonious, nurturant havens, the festering disputes and grievances and the structurally irreconcilable interests are less likely to be recognized or acknowledged than in other organizational settings.<sup>50</sup>

Attorneys in transactional settings may be less likely to recognize conflicts among family members. Courts, however, strictly police these conflicts of interest in family law matters.<sup>51</sup> ABA Model Rule 1.7 provides the template for conflicts analysis and one of the few situations in which the rule does not permit client informed consent to waive a conflict is when the representation involves “the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.”<sup>52</sup> While the rule does not specifically mention divorce actions, the most frequent situation in which the rule is applied is when an attorney represents

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<sup>50</sup> SUSAN P. SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* 82-83 (2002).

<sup>51</sup> BARBARA GLESNER FINES, *ETHICAL ISSUES IN FAMILY REPRESENTATION* 89 (2010):

The clients in family representation tend to be less sophisticated, so that consents may not be as reasonable in these representations. In some instances, clients may not even have the capacity to consent to a conflict. The information an attorney gains in representing family members ranges widely and often involves highly personal and sensitive matters. Thus, the concern for confidentiality that drives much of conflicts analysis is likely to apply even more strongly in family representation.

<sup>52</sup> MODEL RULES OF PRO. CONDUCT r. 1.7(b)(3) (AM. BAR ASS'N 2023).

spouses in a divorce.<sup>53</sup> This dual representation can provide the basis for disciplinary sanction and civil liability.<sup>54</sup>

Additional differential standards, not found in the text of the rules themselves, are revealed in judicial interpretations of these rules in family law matters.<sup>55</sup> For example, Rule 1.6 provides that any and all “information relating to the representation” is confidential and should be not used or disclosed unless the disclosure furthers the client’s interest, is made with the client’s consent, or is authorized by an exception in the rule.<sup>56</sup> The duty of confidentiality is extended to prospective<sup>57</sup> and former clients<sup>58</sup> with nearly as much breadth.

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<sup>53</sup> *Holmes v. Holmes*, 248 N.E.2d 564, 570–71 (Ind. App. 1969) (holding that the joint representation of husband and wife was impermissible in both negotiating agreements and in representing parties before the court); *Lawyer Disciplinary Bd. v. Frame*, 479 S.E. 2d 676, 678 (W. Va. 1996) (reprimanding an attorney for representing the husband in a divorce and also preparing an answer for the unrepresented wife to sign); *Ex parte Osbon*, 888 So. 2d 1236, 1237 (Ala. 2004) (in a divorce proceeding, the husband’s lawyer subpoenaed the wife’s records from a mental health agency; the lawyer’s partner responded on behalf of the agency); *In re Gamino*, 753 N.W.2d 521, 524 (Wis. 2008) (suspending an attorney for the dual representation of a husband and a wife in acting as “scrivener” for the divorce and property settlement without informed consent and then appearing in court on behalf of only the husband).

<sup>54</sup> In *Vinson v. Vinson*, 588 S.E.2d 392 (Va. Ct. App. 2003), the trial court found that an attorney’s retainer agreement in which the attorney identified both the husband and the wife as his clients in a divorce was “on its face” a “gross conflict of interest.” The appellate court affirmed the court’s finding of liability in the husband’s suit against the attorney.

<sup>55</sup> Glesner Fines, *supra* note 7, at 144 (reviewing the Missouri Supreme Court’s novel application of Rule 4.4(a) Respect for Rights of Third Persons to require an attorney representing a birth mother to disclose information about a potential adoption to the birth father, even though substantive adoption law did not require this disclosure). See also Dana E Prescott & Gary A. Debele, *Shifting Ethical and Social Conundrums and “Stunningly Anachronistic” Laws: What Lawyers in Adoption and Assisted Reproduction May Want to Consider*, 30 J. AM. ACAD. MATRIM. LAW. 127, 154 (“ethical codes are not stagnant, and what may be a “safe harbor” in one era (e.g., no rights of fathers and kin) may be quite dangerous to licenses or net worth in another.”).

<sup>56</sup> MODEL RULES OF PRO. CONDUCT R. 1.6 (AM. BAR ASS’N 2023).

<sup>57</sup> MODEL RULES OF PRO. CONDUCT R. 1.18(b) (AM. BAR ASS’N 2023).

<sup>58</sup> MODEL RULES OF PRO. CONDUCT R. 1.9(c) (AM. BAR ASS’N 2023).

Despite the breadth of this duty, attorneys do frequently talk about their cases and their clients.<sup>59</sup> Discipline for these disclosures is rare, however, unless made with some self-serving intent or serious harm to the client. However, in more than one state, the instances in which courts discipline attorneys for gossip arise in divorce actions.

This heightened concern for confidentiality in divorce actions can be seen in *In re Anonymous*, a 2010 Indiana discipline case.<sup>60</sup> The attorney in that case worked for an organization and became friends with one of its employees (“AB”). The attorney referred AB to an attorney in her firm for representation in a divorce. After the divorce was filed, AB and her husband reconciled.<sup>61</sup> The attorney, unaware of the reconciliation, mentioned AB’s marital difficulties to another mutual friend, encouraging her to call AB.<sup>62</sup> AB was upset by the disclosure and filed a disciplinary complaint. There was no evidence of any specific injury to AB that resulted from the disclosure. The court found that AB’s request for a referral made her a prospective client<sup>63</sup> and that the attorney had a duty to “scrupulously avoid” revealing confidential information obtained in that consultation.<sup>64</sup> The court noted that the confidentiality duty attached even though AB had previously disclosed this same information to her friends, and the attorney’s motivation for the disclosure was “personal concern for the client.”<sup>65</sup>

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<sup>59</sup> Suzanne Lever, *Myth Busters: What Is Generally Known About the Lawyer’s Duty of Confidentiality?*, N.C. STATE BAR (2021), <https://www.ncbar.gov/for-lawyers/ethics/ethics-articles/myth-busters-what-is-generally-known-about-the-lawyer%E2%80%99s-duty-of-confidentiality/> (last visited June 26, 2023) (noting that a proposed North Carolina ethics opinion prohibiting an attorney’s comment about a former client’s case on a podcast was met with robust “watercooler and listserve” discussions and formal comments that the rule was “impractical and illogical”).

<sup>60</sup> *In re Anonymous*, 932 N.E.2d 671 (Ind. 2010).

<sup>61</sup> *Id.* at 672.

<sup>62</sup> *Id.* at 673.

<sup>63</sup> *Id.*, citing IND. RULES OF PRO. CONDUCT r. 1.18 (2010).

<sup>64</sup> *Anonymous*, 932 N.E. 2d at 674.

<sup>65</sup> *Id.* at 675. See also *In re Beguelin*, 417 P.3d 1118 (Nev. 2018). In *Beguelin*, an attorney representing the husband in a divorce conducted a prospective client interview with the client’s wife, receiving confidential information before discovering the conflict. The attorney then called the husband to inform him that he would be unable to represent him because this conversation

In sum, while we may not be able to determine precisely to what degree attorneys in family law practice face a greater a risk of malpractice or discipline, no attorney wants to be the subject of the case that reveals that risk. Experience and specialization can both reduce error, but there are other risks that can accompany an extended career in family law. The next section of this article examines two such possibilities.

## II. Risks of Routines and Expertise

As attorneys grow their practice, they find their cases expanding in number, size, and complexity. At the same time, these attorneys become more efficient and develop routines and intuitions that draw on their experience.<sup>66</sup>

Routines are critical to effective practice. Checklists, forms, and systems are all tools that permit attorneys to standardize tasks such as client intake, preparation of documents, or management of litigation. Whether on paper or built into case management software, these tools help to ensure that attorneys do not overlook critical information or steps in the representation. Just as checklists and routines for airline pilots have dramatically reduced accident rates in that industry, so too can these tools help attorneys avoid critical gaps in representation.<sup>67</sup> These routinizations are critical to meet the demands of today's clients who want "better, faster, cheaper"<sup>68</sup> legal services.

In addition to promoting efficiency, checklists can help attorneys document their procedures. Malpractice insurers promote the use of checklists and routines. Many of the most common causes of malpractice can be avoided through the diligent use of checklists, calendars, and other case management tools.<sup>69</sup> These include missing deadlines, failing to identify con-

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with the wife created a conflict. The attorney was publicly reprimanded for violation of Rule 1.18.

<sup>66</sup> DOUGLAS O. LINDER & NANCY LEVIT, *THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW* 129 (2014) ("Years of work in a practice area provide a lawyer with the ability to see patterns in facts and in cases that other lawyers miss.").

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 275.

<sup>69</sup> DANIEL J. SIEGEL, MOLLY GILLIGAN, & PAMELA A. MYERS, *CHECKLISTS FOR LAWYERS* 7-10 (2014).

flicts of interest, or failing to document critical client communications.

However, while routines can be helpful in promoting ethical conduct, they can also potentially lead to ethical problems for attorneys if not managed carefully. Laws and regulations change, client goals shift, and new evidence or issues arise. The attorney who relies on standardized practices without double-checking that those practices conform with current law invites malpractice and disciplinary risks.

The risk of routines resides not only in individual law offices but in entire systems as well. Experienced attorneys know very well that local practices and cultures can impact the expectations for their practice. In their study of divorce lawyers, Lynn Mather and her colleagues concluded that these attorneys often comprise a small subset of a legal community and develop “collegial norms and conceptions of roles” that develop informally from “communities of practice.”<sup>70</sup> These communities shape the ethical choices of attorneys.

Many attorneys who regularly practice divorce law share common conceptions of reasonable conduct.

The portrait of the reasonable divorce lawyer shows a tough-minded advocate committed to settlement as the best resolution in divorce (but willing to go to trial if necessary), knowledgeable about the law and likely legal outcomes, objective and independent in judgment, and willing to guide the client to a fair outcome. Collegiality does not get in the way of advancing the client’s interests, but neither does thoughtless advocacy undermine the working relationships necessary within the community. Judgment and balance prevail in this view of the consummate, reasonable professional.<sup>71</sup>

Similar research focusing on solo and small firm practice indicates that these professional communities of practice or networks of attorneys “develop their own identifiable ethical cultures even when lawyers are not formally affiliated.”<sup>72</sup>

Some evidence suggests that more experienced attorneys are even more attuned to these cultural norms than newer attorneys.

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<sup>70</sup> LYNN MATHER, CRAIG A. MCEWEN, & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 176 (2001).

<sup>71</sup> *Id.* at 51.

<sup>72</sup> Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 *HOUSTON L. REV.* 309, 389 (2004).



A survey of Michigan law alumni reported a correlation between years in practice and the likelihood that an attorney will view the conduct of attorneys with whom they work as “highly ethical.”<sup>73</sup> This convergence of opinion about ethical practice can present a risk to experienced attorneys if the phenomenon actually represents “ethical fading” – that is, the process by which an attorney learns to “behave self-interestedly while, at the same time, falsely believing that one’s moral principles were upheld.”<sup>74</sup> This ethical fading results from “repeated exposure to ethical dilemmas in a series of small decisions [that] leads to progressively unethical conduct.”<sup>75</sup>

Many cases in which attorneys with extensive experience face substantial sanctions may be explained in part by these risks of routines and acceptance of small lapses by communities of practice. One case that might illustrate these risks is *Matter of Kenney*.<sup>76</sup> The attorney in that case had more than two decades of experience in the practice of law focusing on adoption and family law matters. The matters that brought the attorney’s practice to the attention of disciplinary authorities involved representation of birth mothers in two different adoptions, each of which required termination of the father’s parental rights. In the petitions for termination of the biological father’s parental rights, the attorney quoted all the statutory bases for termination of parental rights, without flagging that the allegations lacked current evidence.<sup>77</sup> His clients verified these petitions under oath. His explanation for this practice was:

Because Kansas is a notice pleading state, I included all applicable or potentially applicable provisions of the statute for termination of the birth father’s parental rights in my initial pleading. Because a respondent/birth father is generally young and sometimes unsophisticated, I thought it fairest to inform the young man as soon as possible what

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<sup>73</sup> Lynn Mather & Leslie C. Levin, *Why Context Matters*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 3, 17 (Leslie C. Levin & Lynn Mather, eds., 2012).

<sup>74</sup> Elizabeth Chambliss, *Whose Ethics? The Benchmark Problem in Legal Ethics Research*, in *LAWYERS IN PRACTICE*, *supra* note 73, at 47, 50.

<sup>75</sup> *Id.*

<sup>76</sup> 490 P.3d 1194 (Kan. 2021).

<sup>77</sup> KAN. STAT. ANN. § 59-2136(h)(1)(2021).

was at stake. My intent was never to mislead the birth father or the court.<sup>78</sup>

In one of the cases, the father had only learned of the birth four days before the adoption was filed. In the other, the father learned of the birth when served with the adoption petition. Accordingly, in both instances, the allegations of abandonment during pregnancy were not supported with evidence. The court found that this “pattern of alleging the statutory grounds in adoption petitions without any factual support was careless, sloppy, and negligent.”<sup>79</sup> The court found multiple violations of the rules of professional conduct relating to meritorious claims<sup>80</sup> and candor,<sup>81</sup> along with findings of misconduct grounded in dishonesty<sup>82</sup> and conduct prejudicial to the administration of justice.<sup>83</sup>

An eighteen-month suspension was recommended by disciplinary counsel, although the hearing panel imposed only a six-month suspension. Mitigating circumstances included such factors as no prior discipline, full cooperation with the disciplinary process, and an expression of remorse. The hearing panel treated the attorney’s twenty years of experience in the practice of law as an aggravating factor. The Kansas Supreme Court rejected both the hearing panel and disciplinary counsel’s recommendations and held that the attorney’s conduct merited disbarment:

The respondent’s admitted pattern of conduct in these cases is egregious. He knowingly made false statements to a court with the intent to circumvent a father’s constitutional rights to parent his own child and to obtain a fraudulent termination of that father’s parental rights. In so doing, he “won” adoptions of the children for his clients which a significant time later had to be overturned due to the respondent’s fraud.<sup>84</sup>

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<sup>78</sup> *Kenney*, 490 P.3d at 1202.

<sup>79</sup> *Id.* at 1204.

<sup>80</sup> KAN. RULES OF PRO. CONDUCT r. 3.1 (2021).

<sup>81</sup> KAN. RULES OF PRO. CONDUCT r. 3.3(a)(1) (2021).

<sup>82</sup> KAN. RULES OF PRO. CONDUCT r. 8.4(c) (2021).

<sup>83</sup> KAN. RULES OF PRO. CONDUCT r. 8.4(d) (2021).

<sup>84</sup> *Kenney*, 490 P.3d at 1205.

There could be many explanations for the Kansas Supreme Court's decision to so significantly increase the sanction.<sup>85</sup> The attorney's repeated attempts to justify his behavior even though he had stipulated to the violations appeared to frustrate the judges.<sup>86</sup> Likewise, the court was concerned that the attorney's reported efforts to reform his pleading practice after the initial disciplinary charge did not dissuade him from continuing to allege facts without evidence.<sup>87</sup> As noted previously, concerns for

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<sup>85</sup> The author does not know the respondent in this case or any of the case studies examined in this article. The conjectures offered here are based solely on the reported discipline case; the decision on appeal in the underlying adoption. *In re* Adoption of C.L., No. 117, 723, 412 P.3d 1042, 2018 WL 1022887 (Kan. Ct. App. Feb. 23, 2018) (unpublished opinion); the oral arguments presented on appeal of the adoption, Kan. Sup. Ct., 117, 723 – *In the Matter of* Adoption of Baby Boy CL, [https://www.youtube.com/watch?v=R8B\\_BoCqwaE](https://www.youtube.com/watch?v=R8B_BoCqwaE) (last visited June 20, 2023); and the oral arguments in the appeal of the disciplinary action. Kan. Sup. Ct., 123, 589 – *In Re* Kevin W. Kenney – May 27th – 1:30 PM, <https://www.youtube.com/watch?v=tbz4aphvkc0> (last visited June 26, 2023) [hereinafter Kenney Oral Argument].

<sup>86</sup> See generally Leslie C. Levin & Jennifer K. Robbennolt. *To Err Is Human, to Apologize Is Hard: The Role of Apologies in Lawyer Discipline*, 34 GEO. J. LEGAL ETHICS 513, 521-24 (2021)(examining the role of remorse and apologies in attorney discipline actions).

While attorney Kenney repeatedly expressed remorse, his defense attorney in the oral argument pursued an aggressive strategy, attempting to minimize the seriousness of the outcome and addressing perceptions of the justices' attitudes toward discipline. When asked about the seriousness of the harm of removing a three-year-old from adoptive parents, the attorney replied, "But it's a baby. This baby will bounce back." When the court noted that "verified petitions take on some real necessity of integrity," the defense attorney suggested that the judges did not understand the practical realities of the practice of law, noting that "Those of us who have really practiced law . . ." would better understand and that the court considered a suspension a "no big deal" penalty and would "cavalierly" consider the impact of the sanction. Kenney Oral Argument, *supra* note 85.

<sup>87</sup> The attorney reported that "Since the inception of the disciplinary claim, I have refined my pleading practice." However, rather than indicating that allegations lacked evidentiary support, the attorney adopted the practice of alleging that the birth father "has made or *is expected to make* no reasonable efforts to support or communicate with the Child after having knowledge of the Child's birth." (emphasis added). The hearing panel was concerned that this change did not "sufficiently correct the situation." *Kenney*, 490 P.3d at 1202.

ethical practice when children are involved also obviously increased the court's concern.<sup>88</sup>

How it is that an attorney could have practiced for so long with a consistent but improper practice of using a standard form with a checklist of bases for termination, never investigating or tailoring that form to the individual circumstances of each case?<sup>89</sup> A likely explanation is that it worked.<sup>90</sup> While a newer attorney might have questioned their approach to each petition and each client, after decades of practice, the attorney may have developed a schema that presumed that birth mothers lie, that biological fathers abandon, and that he was serving the interests of both through his pleading practices.

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<sup>88</sup> Justice Dan Biles noted during the oral argument, that, when triaging cases before the court, the court gives expedited review to adoption cases “because of their importance and their significance to people.” “The integrity of lawyers in the judicial system is a given, and we rely on it, but boy we really rely on it when we’re starting to talk about terminating parental rights and adoptions . . . .” Kenney Oral Argument, *supra* note 85.

<sup>89</sup> An exchange between attorney Kenney and Justice Evelyn Wilson at the oral argument in the disciplinary appeal was especially telling:

Q: “What was going through your mind as you were preparing those petitions?”

A: “My approach was a kitchen-sink approach. I know that was not the way to do that then.”

Q: “Were you aware that it required a good-faith basis?”

A: “Yes, but it wasn’t an intentional decision”

Q: “But what was going through your mind when you had your clients verify?”

A: “I understand your concern. I should not have done that.”

*Id.*

<sup>90</sup> Yet another explanation is that, the practice failed but the attorney was never called out for the errors. If this explanation applied, it would be even though Kansas has one of the broadest rules requiring reporting of attorney misconduct in the United States. *Compare* KAN. RULES OF PRO. CONDUCT r. 8.3 (2021) (“A lawyer having knowledge of *any action, inaction, or conduct which in his or her opinion constitutes misconduct* of an attorney under these rules shall inform the appropriate professional authority.”), with MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS’N 2023) (“A lawyer who knows that another lawyer has committed a violation of the Rules 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.”) (emphases added).

Especially in a highly specialized practice, such as adoption law, attorneys may become blind to the evolution of changes in law and society.

[A]ttorneys perceive the very nature of family creation through either adoption or ARTs as “happy work” where everyone is working towards a common, shared goal. This rather rosy perception can cause attorneys to let down their guard, shave corners, and assume that everyone is working towards the same “happy” goal. In fact, these cases are fraught with legal novelty and traps concurrent with ethical issues compounded by great frustration and emotion, thereby creating the potential for liability from agitated and disappointed clients and third parties. . . . It is also too easy for attorneys to become caught up in the view that family formation work always exemplifies goodness and morality, possibly causing them to disregard the interests of the other parent as the lawyer marches toward the goal of creating a new and legally recognized parent/child relationship.<sup>91</sup>

While the thoughtless use of forms and reliance on insider practices in the *Kenney* case was extreme, as was the sanction, the risk exists for any attorney who does not mindfully consider their routines and intuitions.

To mitigate these potential ethical risks, attorneys should regularly assess their practices, remain vigilant, and actively engage in ongoing professional development. They should balance the benefits of routines with flexibility, adaptability, and a commitment to providing competent, diligent, and personalized representation to their clients. If a checklist is used, attorneys should think carefully about whether each checkbox is applicable to the case at hand. Regularly consulting ethical guidelines and seeking input from colleagues or ethics committees can also help attorneys navigate potential ethical challenges. To avoid the risks of ethical fading within communities of practice, the family law bar should invite examination and critique from colleagues from other practice areas.<sup>92</sup>

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<sup>91</sup> Prescott & Debele, *supra* note 55, at 152-53.

<sup>92</sup> In a study of representation of indigent individuals in juvenile court and abuse and neglect actions, I compared closed systems for securing representation (such as an identified office or a closed panel of attorneys) with an inclusive appointment system in which nearly all attorneys in a community could be appointed to represent these clients. While a specialized or closed system for these cases provided more consistently experienced representation, I noted that a risk of these systems is that these attorneys “may adopt an ‘insiders’ mindset the undermines effective advocacy.” Barbara Glesner Fines, *Al-*

### III. Wellness Risks

A second circumstance that is prevalent in disciplinary cases involving experienced attorneys is that of health crises that lead to ethical lapses. Attorneys are required by the rules of professional conduct to monitor their own and each other's fitness to practice law. When an attorney's "physical or mental condition materially impairs the lawyer's ability to represent the client," he or she must withdraw from representation.<sup>93</sup> Ethics opinions of the American Bar Association Standing Committee on Ethics and Professional Responsibility discuss the obligation of attorneys when they are aware of the incapacity of other attorneys—either in their own firm<sup>94</sup> or elsewhere.<sup>95</sup>

An attorney with lengthy experience in the practice of law is not necessarily more likely to experience impairment than a new attorney, and one must take care to avoid falling into stereotypes in discussing this issue. Biases that associate age with decreased health or vitality can themselves be a source of poor health determinants.

Ageism against older people has been widely recognised as a major threat to active ageing and an important public health issue. Several studies have shown that ageistic attitudes, and in particular ageistic stereotypes, have negative impacts on older people in many different domains. . . . [T]hese negative stereotypes about ageing are acquired at a very early age and tend to act as self-fulfilling prophecies in old age, leading to poor outcomes for older people in many different areas

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*most Pro-Bono: Judicial Appointments of Attorneys in Juvenile and Child Dependency Actions*, 72 UMKC L. REV. 337, 362 (2003). In contrast, occasional players, with no long-term interest in how their advocacy will be viewed by institutional players could present the opportunity for "more creative or radical positions in advocating for their clients." *Id.* My continuing personal experience in this system is that these attorneys also provide comparative critiques of the system of juvenile justice compared to the systems in which they more regularly practice.

<sup>93</sup> MODEL RULES OF PRO. CONDUCT r. 1.16(a)(3) (AM. BAR ASS'N 2022).

<sup>94</sup> ABA Comm. on Ethics & Pro. Resp., Formal Op. 03-429 (2003) (discussing obligations with respect to mentally impaired lawyers in the firm).

<sup>95</sup> ABA Comm. on Ethics & Pro. Resp., Formal Op. 03-431 (2003) (discussing a lawyer's duty to report rule violations by another lawyer who may suffer from an impairment).

such as memory and cognitive performance, health, work performance and even their will-to-live.<sup>96</sup>

Wellness is a critical factor in attorney disciplinary cases regardless of experience.<sup>97</sup> Accordingly, it is not surprising that many of the reported cases of discipline involving experienced attorneys involve health challenges.

Thus, one finds cases such as *Attorney Grievance v. Guida*,<sup>98</sup> in which the central issue in a discipline case was whether sanctions should be mitigated because of an attorney's mental and physical health challenges. Attorney Guida had a nearly thirty-year successful practice that ended with his disbarment in 2006.<sup>99</sup> Guida had been engaged to represent his client in a "relatively straightforward"<sup>100</sup> stepparent adoption. He charged the client a flat fee and did not deposit this in his trust account. He then neglected the case for months even while reassuring his client that he was working on the case. Finally, he prepared a fraudulent petition that he presented to his client, representing that he had filed the action when he had not.

In explanation of the reasons for his misconduct, the attorney testified that, after his father had died in 1999, he suffered increasing debilitating depression, resulting in several instances of neglect of client cases, including the adoption case that precipitated a disciplinary complaint.<sup>101</sup> The court found substantial evidence of multiple health problems that contributed to the violations of diligence or communication. However, it concluded that these problems did not mitigate his misconduct. The court noted that:

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<sup>96</sup> Sibila Marques et al., *Determinants of Ageism Against Older Adults: A Systematic Review*. 17(7) INT'L. J. ENV'T. RES. PUB. HEALTH 2560 (2020).

<sup>97</sup> BREE BUCHANAN & JAMES C. COYLE, NATIONAL TASK FORCE ON LAWYER WELL-BEING, *THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE* 8 (2017), <https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf> [<https://perma.cc/JW3D-L3LN>] ("At least one author suggests that 40 to 70 percent of disciplinary proceedings and malpractice claims against lawyers involve substance use or depression, and often both.").

<sup>98</sup> *Attorney Grievance Comm'n v. Guida*, 891 A.2d 1085 (Md. 2006).

<sup>99</sup> *Id.* at 1089.

<sup>100</sup> *Id.* at 1096.

<sup>101</sup> *Id.* at 1099.

We intentionally set a high bar for a respondent in a case where the flagship violation is of Rule 8.4(c) (“conduct involving dishonesty, fraud, deceit or misrepresentation”) before we will excuse or mitigate the sanction of such a violation based on the respondent’s mental or physical condition at the time of commission of the conduct constituting the violation.<sup>102</sup>

It is easy for attorneys to read a case such as this and conclude that it represents an extreme case of incompetence and dishonesty and consider it no further. However, anyone can find themselves in a situation in which a mental or physical health crisis interferes with the ability to provide competent and diligent representation.

The landmark study of attorney wellness conducted in 2016 confirmed the prevalence of mental health problems in the profession.<sup>103</sup> Significant percentages of the respondents in that study reported experiencing depression (28%), anxiety (19%), and stress (23%).<sup>104</sup> Over their career, 61% of attorneys reported concerns with anxiety at some point during their time in practice and 46% reported concerns with depression.<sup>105</sup>

For both mental health concerns and alcohol use disorders, the study reported that as age and years in the practice increased, the percentage of attorneys reporting either of these problems decreased. Of course, that does not mean that an attorney’s individual risks decrease over time, as there are multiple explanations for a decreased percentage of attorneys with these problems among older attorneys. Some attorneys with these problems likely leave or are removed from the profession earlier than other attorneys; others may find solutions to effectively improve their health. Regardless of trends, the percentage of experienced attorneys whose health compromises their ethical practice should be of concern to all attorneys.

Experienced attorneys who employ other attorneys should be especially mindful of their supervisory responsibilities. As the New Mexico court suggested in reviewing a disciplinary action against a new attorney with a pattern of neglect and dishonesty:

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<sup>102</sup> *Id.* at 1098.

<sup>103</sup> Patrick R. Krill, Ryan Johnson, & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10(1) J. ADDICTION MED. 46 (2016).

<sup>104</sup> *Id.* at 51.

<sup>105</sup> *Id.*



law firms would be well advised to have in place a procedure by which associates can alert their supervisors when they are feeling overloaded or overburdened. Doing so not only may save a young lawyer's career but also may save the firm from facing liability issues stemming from those matters assigned to a new associate. . . . [A] firm should do more than simply communicate its expectations for billable hours and work product. It should also ensure that its lawyers are competently handling the tasks assigned to them and are able to obtain assistance when it is needed. To do less can spell disaster, not only for a lawyer in respondent's position, but also for the firm that employs him or her.<sup>106</sup>

In the field of family law practice in particular, cumulative stress from exposure to family trauma can cause burnout or other mental health problems.<sup>107</sup> Regardless of the cause, when health crises arise, they can impact the ability to make sound decisions.<sup>108</sup> Often, they also impact the ability to recognize the extent of the problem. When senior attorneys suffer health impairments, they can find it difficult to recognize and address these challenges if they perceive that the solution is to retire from practice. As the National Taskforce on Lawyer Wellbeing noted:

Many lawyers who are approaching retirement age have devoted most of their adult lives to the legal profession, and their identities often are wrapped up in their work. Lawyers whose self-esteem is contingent on their workplace success are likely to delay transitioning and have a hard time adjusting to retirement.<sup>109</sup>

The need to adjust one's practice pace or attend to health challenges can be even more difficult for the one-quarter of the lawyer population who have an addiction to work.<sup>110</sup>

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<sup>106</sup> Matter of Hyde, 950 P.2d 806, 809 (N.M. 1997).

<sup>107</sup> Glesner Fines & Madsen, *supra* note 6, at 984–85.

<sup>108</sup> BUCHANAN & COYLE, *supra* note 97, at 18 (“few lawyers and legal organizations have sufficiently prepared to manage transitions away from the practice of law before a crisis occurs. The result is a rise in regulatory and other issues relating to the impairment of senior lawyers.”).

<sup>109</sup> *Id.* at 19.

<sup>110</sup> *Id.* at 32, noting that:

Research reflects that about a quarter of lawyers are workaholics, which is more than double that of the 10 percent rate estimated for U.S. adults generally. Numerous health and relationship problems, including depression, anger, anxiety, sleep problems, weight gain, high blood pressure, low self-esteem, low life satisfaction, work burnout, and family conflict can develop from work addiction.

The National Taskforce on Lawyer Well-Being has produced a number of recommendations for addressing these issues, which begin with the need to “acknowledge the problems and take responsibility”<sup>111</sup> and “facilitate, destigmatize, and encourage help-seeking behaviors.”<sup>112</sup> Family law attorneys in particular, most of whom regularly encourage their clients to seek professional assistance in managing the emotional and financial aspects of their cases, need to listen to their own advice.

Every state has some form of lawyer assistance program that provides free, confidential assistance to attorneys who are facing substance use disorders or mental health issues.<sup>113</sup> Unfortunately, ignorance of these resources is not the primary barrier to their use. Rather, the fear that admitting that one is facing a mental health concern can end one’s career and reputation keeps attorneys from accessing assistance.<sup>114</sup> This is a problem that will require the entire legal community to address. Experienced family law attorneys, with their enhanced familiarity with the expertise of mental health professionals and the benefits of access their services, could be leaders in this important work.

#### IV. Conclusion

Examining cases in which attorneys with substantial experience in the practice of law find themselves facing the most severe of sanctions can help to uncover risks that all attorneys face. The case studies used to examine these risks here focused on discipli-

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<sup>111</sup> *Id.* at 12.

<sup>112</sup> *Id.* at 13.

<sup>113</sup> American Bar Ass’n, *Directory of Lawyer Assistance Programs*, [https://www.americanbar.org/groups/lawyer\\_assistance/resources/lap\\_programs\\_by\\_state/](https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/) (last visited June 26, 2023).

<sup>114</sup> BUCHANAN & COYLE, *supra* note 97, at 13:

The two most common barriers to seeking treatment for a substance use disorder that lawyers reported were not wanting others to find out they needed help and concerns regarding privacy or confidentiality. . . . Research also suggests that professionals with hectic, stressful jobs (like many lawyers and law students) are more likely to perceive obstacles for accessing treatment, which can exacerbate depression. The result of these barriers is that, rather than seeking help early, many wait until their symptoms are so severe that they interfere with daily functioning. Similar dynamics likely apply for aging lawyers seeking assistance.

nary sanction. However, civil liability can result from this misconduct as well. The Model Rules of Professional Conduct provide that “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.”<sup>115</sup> However, the section goes on to note that “since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”<sup>116</sup> Despite this caution in the rules, “courts have long looked to the ethics rules in nondisciplinary contexts, including malpractice, breach of fiduciary duty, disqualification, motions to suppress or preclude evidence, motions for sanctions, and disputes over fees.”<sup>117</sup>

While the case studies examined here often present extreme misconduct, they also are examples of forms of ethical blindness to which even the most experienced and expert attorney can fall victim. Experienced family law attorneys need to guard against complacency and over-reliance on routines, intuition, and the general practices they observe in their networks. Likewise, family law attorneys, both individually and as a professional community, must continue to acknowledge the risks that flow from mental and physical health challenges and seek out and support others who seek out resources to assist them in facing these challenges.

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<sup>115</sup> MODEL RULES OF PRO. CONDUCT pmb. ¶ 20 (AM. BAR ASS’N 2023).

<sup>116</sup> *Id.*

<sup>117</sup> ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 49, at Preamble and Scope.