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1-15-2021

## Punishing the Victim: Model Rule 1.16(a)(2) and Its Relation to Lawyers with Anxiety, Depression, and Bipolar Disorder

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### Recommended Citation

Daniel G. Esquivel, *Punishing the Victim: Model Rule 1.16(a)(2) and Its Relation to Lawyers with Anxiety, Depression, and Bipolar Disorder*, 11 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 108 (2021).

Available at: <https://commons.stmarytx.edu/lmej/vol11/iss1/4>

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# COMMENT

*Daniel G. Esquivel\**

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and Its Relation to Lawyers with Anxiety,  
Depression, and Bipolar Disorder

## CONTENTS

I.	Introduction.....	109
II.	Background.....	112
	A. Mental Health in the Legal Profession .....	113
	B. The ABA Model Rules of Professional Conduct and Model Rule 1.16(a)(2) .....	117
III.	Analysis: Duties Invoked Under the Model Rule .....	122
	A. Model Rule 1.16(a)(2) in Form and in Substance .	122
	B. Interplay of Model Rule 1.16(a)(2) and the Other Model Rules .....	125
	C. Case Law Implications on the Functioning of Model Rule 1.16(a)(2) .....	129
IV.	Recommendations .....	135

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\* The author would like to thank his parents, Gerardo “Jerry” Esquivel and Rosario “Rose” Ramirez, and grandparents for teaching him the value of hard work; his friends for their unyielding support during the pursuit of his legal education; the Volume 52 Board for their time and effort; and God for allowing all this to come to pass.

A. Mandatory Visits to Mental Health Physicians as a Condition to Practice.....	135
B. Making Depression, Anxiety, and Bipolar Disorder Mitigating Factors in Disciplinary Proceedings.....	138
V. Conclusion .....	141

## I. INTRODUCTION

“The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”<sup>1</sup> As Justice Stevens eloquently wrote in the majority opinion of *Jaffee v. Redmond*,<sup>2</sup> mental health should be more than a mere afterthought when considering the health and well-being of society. Mental and physical health intertwine in equal parts to form the overall well-being of a person; therefore, the two should be considered of equal importance.<sup>3</sup> Unfortunately, historically speaking, the general population has all too often failed to recognize the importance of mental health. This societal reluctance is still evident in professional circles today, particularly in the legal community.

Lawyers occupy one of the most stressful and confrontational professional occupations. Unlike other professions such as medicine, accounting, or engineering, where collaboration is essential to a successful result for all affected parties, the adversarial common law system pits lawyers against each other.<sup>4</sup> In this zero-sum system, parties commit to zealously opposing equally qualified and trained colleagues.<sup>5</sup> Some commentators

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1. *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996).

2. *Jaffee v. Redmond*, 518 U.S. 1 (1996).

3. *See id.* at 11 (justifying the extension of psychotherapist-patient privilege through emphasis on its positive effects in providing for mental and emotional benefits to the general population).

4. *See* ALEX WILSON ALBRIGHT & DUSTIN B. BENHAM, TEXAS COURTS: A SURVEY 2 (2018) (outlining the partisan and competitive nature of the American judicial system which seeks not so much the truth, but rather success through effective advocacy on the part of participating lawyers).

5. Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33, 47–48 (2001) (describing the American adversarial legal system as a zero-sum game where there must be winners and losers between competing litigants).

traced the historical roots of the modern American legal system to the old English tradition of “trial by battle,” with lawyers representing litigants and serving as proverbial gladiators in the modern ring of the American courtroom.<sup>6</sup> The constant strain placed upon lawyers in this professional environment commonly leads to mental fatigue and mental illness. As studies reveal, lawyers are among the most susceptible in America to mental health issues.<sup>7</sup>

Despite recent progress in addressing lawyers’ mental health, there remains an inherent tension between the legal profession’s concern with the mental health of practicing lawyers and a lawyer’s duty to advocate effectively on behalf of clients. This tension is most prevalent in a lawyer’s duty to forgo or withdraw from representing clients where “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client,” as set forth in Rule 1.16(a)(2) of the American Bar Association (ABA) Model Rules of Professional Conduct.<sup>8</sup>

This Comment spurs critical discussion and consideration of the need to take progressive steps in combatting instances of mental illness in the legal profession through changing the way state disciplinary actions treat mental health. The ABA Model Rules of Professional Conduct serve as the basis of this Comment’s analysis of how mental health conditions trigger professional duties for lawyers during client representation.<sup>9</sup> Without question, many lawyers experience serious substance abuse and addictive dependence, but this Comment will focus on other equally serious mental health conditions that, to date, have not received as much attention in academic discourse. Lawyers are increasingly recognized as struggling with

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6. See Jim Wilets & Areto A. Imoukhuede, *A Critique of the Uniquely Adversarial Nature of the U.S. Legal, Economic and Political System and Its Implications for Reinforcing Existing Power Hierarchies*, 20 U. PA. J.L. & SOC. CHANGE 341, 345 (2018) (drawing comparisons between the modern adversarial legal system and the feudal British legal system, “which incorporated a literal ‘trial by battle’ in its earliest genesis”).

7. See Sarah Cearley, *Lawyer Assistance Programs: Bridging the Gap*, 36 U. ARK. LITTLE ROCK L. REV. 453, 456 (2014) (lamenting the professional environment of the adversarial legal profession which contributes to substantial physiological strains on attorneys’ mental health).

8. MODEL RULES OF PROF’L CONDUCT R. 1.16 (AM. BAR ASS’N 2020).

9. See *id.* (detailing the mandatory duty to withdraw or forgo representation where a lawyer has a physical or mental health condition materially impairing her ability to represent her client).

general anxiety,<sup>10</sup> major depression,<sup>11</sup> and bipolar disorder.<sup>12</sup> With increased awareness and sensitivity to the severe effects of mental health disorders, the implications of Model Rule 1.16(a)(2) are liable to have an increased impact on the legal profession as lawyers who become aware of their mental health problems must cope with professional responsibilities owed to clients.<sup>13</sup>

Some may argue state bar associations are well within their discretion to decide it is in the best interest of the profession to protect clients by imposing additional responsibilities on lawyers with mental health conditions such as depression, anxiety, and bipolar disorder. Indeed, they may rely on the long-held aphorism maintaining the practice of law is not a right but a privilege that rests within the province of the several states to regulate and control.<sup>14</sup> However, in times gone by, leaders in the legal profession used these individualistic notions to justify preventing certain groups of people from entering the legal profession altogether.<sup>15</sup>

The fact that the Model Rules of Professional Conduct contain provisions for disciplining attorneys with mental conditions due to the presence of the condition, under certain circumstances, might dissuade attorneys with mental health conditions from continuing practice.<sup>16</sup> Thus, this Comment argues taking disciplinary action against lawyers with mental health

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10. See generally NAT'L INST. OF MENTAL HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., GENERALIZED ANXIETY DISORDER: WHEN WORRY GETS OUT OF CONTROL (2016) [hereinafter NAT'L INST. OF MENTAL HEALTH, WHEN WORRY GETS OUT OF CONTROL] (describing the signs, symptoms, and treatment of generalized anxiety disorder).

11. See generally NAT'L INST. OF MENTAL HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., DEPRESSION: WHAT YOU NEED TO KNOW (2015) [hereinafter NAT'L INST. OF MENTAL HEALTH, WHAT YOU NEED TO KNOW] (explaining the signs, symptoms, and treatment of depression).

12. See generally NAT'L INST. OF MENTAL HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., BIPOLAR DISORDER (2018) [hereinafter NAT'L INST. OF MENTAL HEALTH, BIPOLAR DISORDER] (informing the public of the signs symptoms, and treatment of bipolar disorder).

13. See MODEL RULES OF PROF'L CONDUCT R. 1.16 (maintaining lawyers must seek to withdraw from representation when they know of a mental health impairment that would materially impair their representing a client's interests).

14. *In re Lee*, 806 S.W.2d 382, 385 (Ark. 1991) ("The practice of law is a privilege, not a matter of right.").

15. *Cf. Bradwell v. Illinois*, 83 U.S. 130, 137, 139 (1872) (holding the right to practice law was not a privilege within the meaning of the United States Constitution, therefore permitting states to withhold law licenses from women).

16. See *In re Evans*, 169 P.3d 1083, 1090 (Kan. 2007) (reaffirming the notion that a lawyer who engages in professional misconduct is subject to appropriate discipline); see also MODEL RULES OF PROF'L CONDUCT R. 1.16 (providing lawyers with mental conditions are subject to discipline when the presence of their mental condition materially impairs their ability to represent their client).

conditions is not the best system to address incidents of lawyer mental health conditions if the profession is serious in its desire to combat these problems. The inherent tension between an increased desire for lawyers to receive treatment for their mental health conditions and the possible sanctions imposed on lawyers practicing with these conditions is an idea ripe for reconsideration.

Part II of this Comment will examine the historical development of the Model Rules of Professional Conduct, emphasizing their relation to mental health. Then it will shift into a discussion of the current trends in mental health within the legal community; a recent landmark study conducted among state Lawyer Assistance Programs will serve as a useful guide in this endeavor. Part III will examine applicational problems in how Model Rule 1.16(a)(2) affects relevant groups of lawyers. Part IV will offer possible revisions of the Model Rules to protect clients and the legal profession. This Comment concludes by acknowledging the great strides the legal profession has made in supporting lawyers with mental health conditions but will remain steadfast in emphasizing the need for even more support. Hopefully, this Comment prompts increased sensitivity in dealing with lawyers with mental health conditions.

## II. BACKGROUND

Conceptualizing mental health disorders is undoubtedly difficult for those without firsthand experience of the emotional and physical symptoms of conditions like anxiety, depression, and bipolar disorder. People unfamiliar with these mental health conditions may take the stereotypical symptoms associated with a depressive or anxiety disorder and attempt to rationalize the emotional aspects of these experiences. It is not controversial to state nervousness and sadness—two key symptoms associated with these mental health conditions—are a normal part of life for most people. However, as medical research continues to improve, studies have discovered a wide range of psychological and psychosomatic symptoms attributable to depression, anxiety, and bipolar disorder that might surprise those unimpaired by the daily added difficulties these symptoms and conditions impose on those suffering from these conditions.<sup>17</sup>

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17. Office of Law. Regulation v. Cotten (*In re Cotten*), 650 N.W.2d 551, 552–53 (Wis. 2002) (disciplining an attorney suffering from depression who, due to her condition, was prevented from answering phone calls, opening mail, and attending court hearings).

The symptoms of depression are characterized as persistent sadness, anxiety, or “empty mood”; constant feelings of hopelessness or pessimism; lingering feelings of guilt, worthlessness, or helplessness; loss of pleasure or interest in activities and hobbies; decreased energy, fatigue, or being “slowed down”; difficulty remembering, concentrating, or decision-making; changes in appetite and/or weight; thoughts of death, suicide, or suicide attempts; and restlessness or irritability.<sup>18</sup> Those suffering from anxiety disorder may experience excessive worry about daily activities, trouble controlling feelings of worry or nervousness, constant restlessness, difficulty concentrating, being easily startled, insomnia, stomachache or other pains, trembling, twitching, difficulty swallowing, profuse sweating, light-headedness, and/or breathlessness.<sup>19</sup> Bipolar disorder—formerly known as manic depressive disorder—causes an afflicted person to suffer periodic episodes of contrasting, extreme symptoms.<sup>20</sup> The symptoms involved can be either manic or depressive, such as, respectively: elation and sadness, excitement and restlessness, hyperactive thoughts and inability to concentrate or make decisions, increased interest in pleasurable activities and a lack of interest in nearly all experiences.<sup>21</sup>

#### A. *Mental Health in the Legal Profession*

Stress, a nearly ubiquitous concept in modern life, is one of the most common potential instigating factors in developing these mental disorders.<sup>22</sup> In fact, the National Institute of Mental Health (NIMH) found a common form of stress involves the stress experienced at work.<sup>23</sup> A typical perception of those in the legal profession, and attorneys, specifically, casts them as among the most stressed, overworked, and mentally strained professionals. These perceptions of the legal field validate the NIMH’s proposition when examining the sober realities of attorney mental health in the United States. As mental health became a topic of greater significance towards the turn of the twentieth century, empirical studies of the rates of

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18. NAT’L INST. OF MENTAL HEALTH, WHAT YOU NEED TO KNOW, *supra* note 11.

19. NAT’L INST. OF MENTAL HEALTH, WHEN WORRY GETS OUT OF CONTROL, *supra* note 10.

20. NAT’L INST. OF MENTAL HEALTH, BIPOLAR DISORDER, *supra* note 12.

21. *Id.*

22. *See* NAT’L INST. OF MENTAL HEALTH, U.S. DEP’T OF HEALTH & HUMAN SERVS., 5 THINGS YOU SHOULD KNOW ABOUT STRESS (2019) (finding “[o]ver time, continued strain on your body from routine stress may contribute to serious health problems, such as heart disease, high blood pressure, diabetes, and other illnesses, as well as mental disorders like depression or anxiety”).

23. *Id.*

depression, anxiety, bipolar disorder, and other stress-related mental conditions among lawyers became an area of focus in the mid- to late-1990s.<sup>24</sup>

G. Andrew H. Benjamin, Elaine J. Darling, and Bruce Sales conducted one of these studies, using a sample of Washington lawyers during this time period. The results of this study notably revealed higher rates of depression among lawyers compared to rates of depression present in the general population of Western industrialized countries.<sup>25</sup> The surveyed lawyers reported suffering depression at a rate of 19%, easily surpassing the average rate of depression in the Western world, which ranged between 3% and 9%.<sup>26</sup>

Despite the serious findings implicit in these figures, a notable lull in the scientific study of the legal community's mental health occurred in the decades following this study. In 2015, however, the Hazelden Betty Ford Foundation, in conjunction with the American Bar Association Commission on Lawyer Assistance Programs, completed the most comprehensive study to date regarding the state of mental health among legal professionals.<sup>27</sup> Researchers gathered survey responses from fifteen state bar associations and the two largest counties of another state, resulting in a sample size of 12,825 licensed, employed lawyers.<sup>28</sup>

The Ford survey results reaffirmed the significant mental health struggles legal practitioners face. Tested and measured using the Depression Anxiety Stress Scales-21 self-report system, 28.3% of surveyed lawyers reported experiencing mild to extremely severe depression, 19.2% had experienced

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24. See generally Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 1 (1995) (“[I]ncrease in employee assistance programs and professional associations that are now actively addressing psychological distress and providing confidential counselling and alcohol treatment for their members is a testament to the rising concern about these issues.”); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT’L J.L. & PSYCHIATRY 233, 233 (1990) (“In recent years, the American Bar Association has begun to address the problems created by physical and psychological impairment of practicing lawyers.”); William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1079 (1990) (describing a study from 1990 analyzing rates of depression across various occupations, with lawyers showing a significant elevation in depression rates).

25. Benjamin et al., *supra* note 24, at 240–41.

26. *Id.*

27. See Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 46 (2016) (indicating researchers conducted the study in order to increase the amount of data in the area of mental health in the legal community).

28. *Id.* at 47.



mild to severe anxiety, and 22.7% had experienced mild to severe levels of stress; bipolar disorder was not a measured outcome on this exam.<sup>29</sup> The survey revealed a piece of data perhaps even more striking when it directly questioned respondents about their personal mental health struggles throughout their legal careers. Of the lawyers surveyed, 61.1% indicated they had dealt with anxiety, 45.7% indicated they had experienced depression, and 2.4% indicated they had dealt with bipolar disorder at some point during their career.<sup>30</sup>

The dearth of scientific studies in the early- to mid-1990s was confronted by state bar associations' effort to track statistics of lawyer mental health conditions in the landmark 2015 Ford survey.<sup>31</sup> Additionally, Lawyer Assistance Programs have significantly expanded since the 1960s. Now these programs help lawyers with various issues, including substance abuse, addiction, mental health, mental illness, marriage, and finances.<sup>32</sup> Their mission to aid lawyers in practicing law has expanded into the realm of mental health so as to combat instances of mental health conditions like depression, anxiety, and bipolar disorder in the legal profession.

To this end, in coordination with Lawyer Assistance Programs, the ABA has taken the initiative to ensure legal professionals gain access to available resources by forming the Commission on Lawyer Assistance Programs to examine the effectiveness and functioning of these programs.<sup>33</sup> What started as irregular collections of information has, as of 2010, turned into a biannual survey conducted by the ABA with the willing participation of the various state Lawyer Assistance Programs.<sup>34</sup> In 2012, Lawyer Assistance Programs reported opening files related to mental health impairments at the following rates: 41% depression, 23% anxiety, and 6% bipolar disorder.<sup>35</sup> These figures demonstrate many lawyers who request assistance from Lawyer Assistance Programs are seeking to address these mental health conditions. This tacit acknowledgement proves significant when

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29. *Id.* at 49–50.

30. *Id.* at 50.

31. *See supra* note 27 and accompanying text.

32. Cearley, *supra* note 7, at 453.

33. ABA COMM'N ON LAW. ASSISTANCE PROGRAMS, 2010 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS 5 (2011).

34. *Id.*; *see* Terry L. Harrell, *Foreword* to ABA COMM'N ON LAW. ASSISTANCE PROGRAMS, 2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS (2015) (indicating the ABA conducted the survey in 2010, 2012, and 2014).

35. ABA COMM'N ON LAW. ASSISTANCE PROGRAMS, 2012 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS 20–21 (2013).

considering disciplining these lawyers for practicing with these mental health conditions.<sup>36</sup>

Comparing the results of these recent studies further demonstrates the steadily increasing plight of lawyers with mental health issues. From 2012 to 2014, survey reports of files opened for anxiety and bipolar disorder remained relatively constant at 21% for anxiety and 4% for bipolar disorder in 2014, and 23% for anxiety and 6% for bipolar disorder in 2012.<sup>37</sup> However, figures regarding depression notably surged from 2012 to 2014, with cases increasing from 41% to 50%.<sup>38</sup> The foregoing discussion reveals the notable impact mental health issues pose on the legal profession, an increased awareness within the profession, and steps the profession has taken to understand what the increase in mental health issues among practicing lawyers means for the profession as a whole.

As awareness and understanding of lawyers' mental health issues has increased, so too has the desire to connect afflicted lawyers with the vast array of resources Lawyer Assistance Programs have developed in recent decades.<sup>39</sup> The homepage of the website for Lawyer Assistance Programs emphasizes available avenues for struggling lawyers to seek help.<sup>40</sup> Also, at least one jurisdiction has an independent trust set up for lawyers, judges, and law students to finance mental health treatment of all sorts.<sup>41</sup> To this end, overriding policy considerations often make information shared in these

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36. See MODEL RULES OF PROF'L CONDUCT R. 1.16 (AM. BAR ASS'N 2020) (indicating, to violate the Rule, a lawyer must knowingly represent a client while afflicted with a mental condition rendering the lawyer materially incapable of representing the client's interests).

37. 2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS, *supra* note 34, at 23; 2012 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS, *supra* note 35, at 21.

38. Compare 2014 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS, *supra* note 34, at 23 (examining figures from Lawyer Assistance Programs for the 2014 reporting cycle) with 2012 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS, *supra* note 35, at 21 (considering figures from Lawyer Assistance Programs for the 2012 reporting cycle).

39. See generally Ann D. Foster, *Assisting the Depressed Lawyer*, 70 TEX. BAR J. 221, 223 (2007) (explaining the Texas Lawyers' Assistance Program can assist lawyers who are suffering from mental health afflictions).

40. See TEX. LAWS.' ASSISTANCE PROGRAM, <https://www.tlaphelps.org/> [<https://perma.cc/NKW5-42AE>] (listing ways through which the Texas Lawyers' Assistance Program tries to help attorneys with mental health struggles).

41. See *What We Do*, THE SHEERAN-CROWLEY TR., <https://www.sheerancrowley.org/what-we-do> [<https://perma.cc/GV9G-N9AG>] (explaining how the Sheeran-Crowley trust funds various forms of mental treatment for law students, lawyers, and judges).

programs confidential.<sup>42</sup> This ostensibly signals a preference toward treatment rather than reporting and assessing punishment.

Apart from servicing lawyers with mental illnesses, state Lawyer Assistance Programs have also increased attempts to dispel the myths and stigma surrounding mental health in the legal profession.<sup>43</sup> The preceding testimony shows the newfound dedication state bars are devoting to lawyers facing mental health conditions like anxiety, depression, and bipolar disorder.

As new generations of lawyers come of age in an era where mental health is less stigmatized, the need to discuss these issues is more acute given the higher rate young and inexperienced lawyers suffer from mental health conditions.<sup>44</sup> Acceptance of the legitimacy of mental health conditions needs to keep pace with—or perhaps outrun—the increased rates of affliction in the legal profession. Recognizing the ubiquity of mental health issues as a natural, controllable, and treatable characteristic inherent to the legal practice will hopefully increase focus on mental health in the legal profession going forward.

B. *The ABA Model Rules of Professional Conduct and Model Rule 1.16(a)(2)*

Notwithstanding the great strides institutional concern has taken for lawyers' mental health in the past few decades, inherent tension still exists between efforts to reduce the prevalence of mental health conditions among practicing lawyers and concerns regarding upholding the professional identity of the legal field. The intersection between lawyer mental health and regulation of the legal profession is most prevalent in the ABA Model Rules of Professional Conduct. Specifically, Model Rule 1.16(a)(2)—the mandatory withdrawal and refusal provision—implicates lawyers who knowingly practice while suffering from mental health conditions that

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42. Fred C. Zacharias, *A Word of Caution for Lawyer Assistance Programming*, 18 GEO. J. LEGAL ETHICS 237, 237 (2004); see also MODEL RULES OF PROF'L CONDUCT R. 8.3 (AM. BAR ASS'N 2020) (relieving the duty for a lawyer to report knowledge of professional misconduct gained in the course of participating in a lawyer assistance program).

43. See generally Foster, *supra* note 39, at 222 (providing examples of common myths about depression as well as actual facts).

44. Cf. Krill et al., *supra* note 27, at 51 ("Furthermore, these mental health concerns manifested on a similar trajectory to alcohol use disorders, in that they generally decreased as both age and years in the field increased.").

materially impair their ability to represent clients.<sup>45</sup>

The ABA originally composed the Model Rules to serve as the definitive guide influencing professional conduct development for the bench and bar of lawyers throughout the United States.<sup>46</sup> As principles of federalism meant the several states retained regulation of their state bars,<sup>47</sup> this idea of providing a sense of uniformity in the area of ethics might have seemed to some a tall task. The ABA proved successful to a degree; the current form of the Model Rules represents a culmination of the ABA's efforts over the last century in the study, debate, and formation of these standards.<sup>48</sup>

The 1908 Canons of Ethics represented the ABA's first attempt at establishing a standard operating procedure relating to American lawyers' professional conduct.<sup>49</sup> The 1887 Code of Legal Ethics of the Alabama State Bar Association inspired the 1908 Canons, which itself sparked the creation and adoption of similar ethical codes among at least ten other state bar associations.<sup>50</sup> With no major substantive changes, the ABA adopted the Alabama Code's substance into canonical form with adjoining state

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45. See MODEL RULES OF PROF'L CONDUCT R. 1.16 (providing the need to withdraw from representation where a lawyer knows they have a mental health condition that would materially impair the representation of the client).

46. See *Chair's Introduction*, A.B.A. (Nov. 15, 2019), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble/chair\\_introduction/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble/chair_introduction/) [https://perma.cc/BNJ8-5FKB] (proclaiming "[t]he Model Rules of Professional Conduct are intended to serve as a national framework for implementation of standards of professional conduct" while acknowledging the large number of individuals from various states who comprise the legal profession).

47. Cf. U.S. CONST. amend. X (reserving all powers not delegated to the federal government to the states).

48. In a historical tracing of contemporary American legal professional standards, Alabama Law School Professional Responsibility professor, Carol Rice Andrews, explores the founding of the modern Rules of Professional Conduct from its foundation in western Europe, comprised of primarily English law traditions in the pre-nineteenth century, to the evolution of standard conceptions of professionalism among lawyers in Victorian England. Andrews then ties these English professional standards to the development of legal ethics and professionalism in the post-revolutionary United States and through the contemporary era. See generally Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1392, 1397, 1413–14, 1434–39 (2004) (describing the historical development of English and American legal professional standards).

49. *Id.* at 1439; see also CANONS OF PROF'L ETHICS Preamble (AM. BAR ASS'N 1908) ("The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.").

50. See Andrews, *supra* note 48, at 1439 (explaining the 1908 Canons were largely modelled after the 1887 Alabama State Bar Association Code of Legal Ethics with some amendments and additions aimed at converting the code to a national standard).

decisions and commentary addressing each of the various rules.<sup>51</sup> As Professor Andrews posits, the canonization of these standards was the initial step in forming a national conception of what professional responsibility would mean in the American legal profession.<sup>52</sup>

For a time, the 1908 Canons remained the premier set of national professional standards. While they were subject to periodic amendment and revision, they substantively remained relatively consistent.<sup>53</sup> However, in response to constant criticism of the Canons for their largely aspirational and broad nature, the ABA established a committee that promulgated the 1969 Model Code of Professional Responsibility.<sup>54</sup>

Almost every state adopted the newly minted Model Code soon after its promulgation.<sup>55</sup> Accompanying this new Code were updated attitudes regarding the need to conform to the tenants of professional conduct.<sup>56</sup> Apart from the change in format to a three-part style containing the Canons, Ethical Considerations, and the Disciplinary Rules, the 1969 Model Code differed from the 1908 Canons by placing a newfound emphasis on punishing lawyers with disciplinary action for violations of the mandatory minimum requirements of lawyer professional conduct.<sup>57</sup> The ABA never attained the national uniformity the association strove for under this promulgation of rules of professional conduct; states adopted annual amendments the ABA proposed at a less consistent rate than amendments to the 1908 Code.<sup>58</sup>

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51. *Id.* at 1440–41.

52. *See id.* at 1442 (“The ABA also did more, moving the standards forward. The ABA critiqued the standards, updated them to some degree, and, more importantly, nationalized them. This widespread publication and application led to further debate and development of the standards.”).

53. *See id.* at 1442–43 (indicating the 1908 Canons remained relevant and without substantial revision until 1964).

54. *Id.* at 1442–44, 1443 n.440 (recalling the influence of ABA President-elect, and later U.S. Supreme Court Justice, Lewis Powell in studying the “adequacy and effectiveness” of the then-current version of the ABA Canons).

55. *See* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 56 (1986) (highlighting the speed with which the majority of states adopted the 1969 Code).

56. *See id.* (“When the Code was adopted in 1969, the ABA appointed a special adoption committee and launched a highly organized campaign to persuade the states to adopt the Code . . .”).

57. *See* MODEL CODE OF PROF'L RESP. Preliminary Statement (AM. BAR ASS'N 1980) (stating the Disciplinary Rules are mandatory in nature and serve as the baseline standard for lawyer conduct, with any lawyer acting beneath those standards being subject to disciplinary action).

58. *See* Andrews, *supra* note 48, at 1446 (indicating states' failure to adopt amendments to the Model Code resulted in a lack of national uniformity and stability of the Code).

In its continuing drive for national uniformity in the professional conduct of American lawyers, the ABA proposed the now-ubiquitous Model Rules of Professional Conduct in 1983—less than two decades after the adoption of the Model Code.<sup>59</sup> In this version, the ABA eschewed the canonical format in favor of a “restatement format,” wherein the Rules provided accompanying commentary explaining and illustrating the application of each rule.<sup>60</sup> State bar associations generally accepted the new version of the Rules, with the majority of states assenting by the year 2000.<sup>61</sup>

The ABA subsequently elected to form yet another committee to review the standards of professional conduct—this time set forth in the Model Rules—called the Ethics 2000 Commission.<sup>62</sup> Despite the adoption of the Model Rules in virtually every state in the years leading up to the turn of the century, states were adopting different versions of the Model Rules and making alterations to suit their local conditions.<sup>63</sup> Furthermore, changes in the legal profession since the promulgation of the 1983 Model Rules—particularly due to the advance of technology—forced a need to deal with new contentions in legal practice.<sup>64</sup> At the conclusion of a five-year process beginning in 1997, the Ethics 2000 Commission worked through all the Rules of Professional Conduct, recommending and making both substantive and stylistic changes to almost every rule.<sup>65</sup> The changes resulted in the contemporary Model Rules of Professional Conduct in their current form.<sup>66</sup>

As previously discussed, Model Rule 1.16(a)(2) falls under the mandatory withdrawal rule when an attorney must decline or terminate representation

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59. *See generally id.* at 1446–52 (indicating forty-four states adopted these “Model Rules of Professional Conduct” in some form as of 2003, though the ABA continued to adjust them as of the time of this writing).

60. *Id.* at 1446–47.

61. *Id.* at 1448.

62. *See generally* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441, 442–43 (2002) (summarizing the work of the Ethics 2000 Commission as it relates to amending the 1983 ABA Model Rules of Professional Conduct).

63. *See* Robert A. Creamer, *Form Over Federalism: The Case for Consistency in State Ethics Rules Formats*, 13 PROF'L LAW. 23, 23 (2002) (describing the current non-uniformity of the various state ethics rules, with a small minority of states having completely unique professional conduct systems and a majority of states having adopted the Model Rules but with varying degrees of compliance with ABA recommended amendments).

64. Andrews, *supra* note 48, at 1448–49.

65. Love, *supra* note 62, at 441–42.

66. *See generally* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2020) (setting forth the present-day Model Rules).

of clients.<sup>67</sup> Among the explicitly enumerated instances requiring mandatory withdrawal, Model Rule 1.16(a)(2) mandates a lawyer withdraw or forgo representation when a physical or mental condition materially impairs the ability of a lawyer to represent his or her clients.<sup>68</sup> The substance of contemporary Model Rule 1.16(a)(2) has been present in the national standards of professional conduct since the 1908 Canons of Professional Ethics, though its less-defined form created a duty to withdraw for good cause if the lawyer found him or herself incapable.<sup>69</sup> The canonical form of what is today Model Rule 1.16(a)(2) took its more familiar form in the 1969 Model Code Disciplinary Rule 2-110(B)(3).<sup>70</sup>

Today, every state and the District of Columbia has adopted Rule 1.16.<sup>71</sup> Certain stylistic variations exist between Model Rule 1.16(a)(2) and its various state counterparts, as the states have continued to adapt the Rules to their local conditions; however, there are no significant substantive variations between Model Rule 1.16(a)(2) and the various state equivalents.<sup>72</sup> The ABA achieved its express goal of creating national uniformity, at least regarding the substance of Rule 1.16(a)(2). The Model Rules serve as the base of analysis for dealing with the professional disciplinary treatment of lawyer mental health, specifically as it relates to the duty to withdraw, incumbent on suffering practitioners whose conditions materially impair their ability to represent clients.<sup>73</sup>

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67. MODEL RULES OF PROF'L CONDUCT R. 1.16.

68. *See id.* (stating, in pertinent part, "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client . . .").

69. CANONS OF PROF'L & JUD. ETHICS Canon 44 (AM. BAR ASS'N 1908) (adopting phrasing closely resembling what is present in the contemporary Model Rule: "The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause . . . if the lawyer finds himself incapable of conducting the case effectively").

70. MODEL CODE OF PROF'L RESP. DR 2-110(B)(3) (AM. BAR ASS'N 1980) ("A lawyer representing a client before a tribunal . . . shall withdraw from employment, if: [h]is mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively").

71. *See generally* ABA CPR POL'Y IMPLM. COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 1.16 DECLINING OR TERMINATING REPRESENTATION (2018) (providing various states' versions of Rule 1.16).

72. *Id.*

73. *See* Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 679 (2008) (discussing the teaching of professional responsibility in law school courses as being based primarily on the ABA Model Rules of Professional Conduct).

## III. ANALYSIS: DUTIES INVOKED UNDER THE MODEL RULE

Under Model Rule 1.16(a)(2), the ABA formed the duties to protect both clients and the profession generally from lawyers practicing with mental health conditions that materially impair their ability to represent clients.<sup>74</sup> However, in an era where state bar associations are increasingly concerned with providing rehabilitative aid and resources to lawyers, these duties may inhibit lawyers from seeking the aid they may desperately need. The construction of Model Rule 1.16(a)(2), in conjunction with the interplay of other rules, ensures this result. Furthermore, the ABA's lack of guidance requires state courts to take the initiative in defining the components of the duties invoked under Model Rule 1.16(a)(2) through case law, leading to inconsistent results.

A. *Model Rule 1.16(a)(2) in Form and in Substance*

To begin, a plain reading of Model Rule 1.16(a)(2) dictates two necessary elements for a violation of this rule to occur: a lawyer must have a “mental condition” that “materially impairs” the lawyer’s ability to provide representation for his or her clients.<sup>75</sup> The Iowa Supreme Court put forward this proposition in *Iowa Supreme Court Attorney Disciplinary Board v. Cunningham*,<sup>76</sup> where the court held the state disciplinary board is required to prove, in tandem, the existence of a mental condition materially impairing the lawyer’s representation of the client.<sup>77</sup> A mere reference to “health reasons” in place of the “mental condition” element proved insufficient for the Iowa Supreme Court in *Cunningham* to justify a reprimand of the lawyer’s inadequate performance under the Iowa state equivalent to Model Rule 1.16(a)(2).<sup>78</sup> *Cunningham* is further instructive in dicta where the Iowa Supreme Court laments the dearth of case law interpreting the Rule.<sup>79</sup> This lack of guidance is not unique to Iowa; case law involving the state equivalents to Model Rule 1.16(a)(2) reveals a lack of a definitive

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74. *See* Law. Disciplinary Bd. v. Scott, 579 S.E.2d 550, 559 (W. Va. 2003) (McGraw, J., dissenting) (maintaining the purpose of lawyer discipline is to protect the client and profession, not to punish a lawyer for possessing a mental health condition—bipolar II disorder in the context of this opinion).

75. MODEL RULES OF PROF'L CONDUCT R. 1.16 (AM. BAR ASS'N 2020).

76. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Cunningham, 812 N.W.2d 541 (Iowa 2012).

77. *See id.* at 548 (denoting the findings necessary to hold a lawyer violated the duty to withdraw while having a mental condition under the state equivalent to Model Rule 1.16).

78. *Id.* at 548–49.

79. *Id.* at 548.



proposition as to what constitutes a mental condition or material impairment.<sup>80</sup> Given the crucial importance of those two features and the lack of instruction, Model Rule 1.16(a)(2) is unworkable from the start.

This Comment addresses the element of materiality only to the extent necessary to consider in relation to mental conditions that might trigger the Model Rules. The lack of definition of “mental condition” under Model Rule 1.16(a)(2) indicates lawyers may risk exposing themselves to a mandatory duty under the Rules if they even seek counsel regarding suspected mental health conditions such as anxiety, depression, or bipolar disorder.<sup>81</sup> The required mental state for a violation of this Model Rule—knowledge<sup>82</sup>—means as soon as the lawyer becomes aware of his or her condition and feels it will materially impair representation of any client, the lawyer is placed under the mandatory duty to withdraw.<sup>83</sup>

The pertinent comments to Model Rule 1.16 provide no guidance as to what constitutes a mental condition triggering the duty to withdraw or decline representation.<sup>84</sup> At least one commentator has noted, despite the significant role the existence of a mental condition plays in an analysis of violations under this rule, neither the Rule itself nor the pertinent commentary defines what constitutes a “mental condition.”<sup>85</sup> This leaves disciplinary authorities to their own devices when determining what qualifies as a mental condition when a lawyer may not have considered his or her situation a violation. Disciplinary bodies considering common mental health disorder symptoms afflicting the legal profession would be acting well within reason to consider anxiety, depression, and bipolar disorder as qualifying conditions.<sup>86</sup>

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80. In addition to this lack of clarity in Model Rule 1.16 itself, the subsequent comments fail to expand on, explain, or clarify the terms. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.16 cmts.

81. *See Sheridan's Case*, 813 A.2d 449, 453–54 (N.H. 2002) (assuming the lawyer's bipolar disorder constituted a “mental disorder” for the purpose of disciplining the lawyer).

82. MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (defining knowledge as “actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances”).

83. MODEL RULES OF PROF'L CONDUCT R. 1.16 (providing the mandatory duty to withdraw or forgo representation when a lawyer suffers from a mental condition materially impairing the ability of the lawyer to represent clients).

84. MODEL RULES OF PROF'L CONDUCT R. 1.16 cmts. 2–3.

85. *See* Christina M. Costa, *Preparing for the Senior Tsunami: Cognitive Decline in Aging Lawyers*, 28 GEO. J. LEGAL ETHICS 471, 478–79 (2015) (discussing the failure of the Rule to elaborate on the applicability of Model Rule 1.16(a)(2) in the context of what constitutes a qualifying mental condition).

86. *See Fla. Bar v. Shanzer*, 572 So. 2d 1382, 1383–84 (Fla. 1991) (acknowledging the mental health problems plaguing the legal profession in a lawyer disbarment proceeding).

Symptoms of these mental health conditions possess a similar capacity to affect the mind of suffering lawyers. Bipolar disorder includes symptoms such as chronic or episodic instances of extreme manic or depressive episodes, which affect the energy, mood, focus, and concentration of an afflicted person.<sup>87</sup> When in a manic state, a person can feel an outsized sense of confidence, talent, and ability, which manifests in higher-than-normal activity levels, possibly accompanied by an irritable disposition.<sup>88</sup> However, the converse is also true; when in a depressive state, the same person can feel unable to complete even simple tasks, and feelings of hopelessness can border on thoughts of death or suicide.<sup>89</sup>

When considering lawyers suffering from anxiety also often cope with stressful occupational situations, maintaining good mental health becomes even more difficult. With pressing deadlines, high-stakes, a contentious process, and court filing dates often present in a lawyer's life, most lawyers may interpret the symptoms of generalized anxiety disorder as a product of conducting their profession.<sup>90</sup> The National Institute of Mental Health, however, has classified the extreme state of worry and nervousness as a mental disease necessitating treatment. Trouble concentrating, insomnia, chronic fatigue, irritability, and fainting spells are just a few of the physical symptoms of generalized anxiety disorder.<sup>91</sup> Already predisposed to situations that lead to anxiety, lawyers are at even greater risk of experiencing a negative impact on their performance if their simple anxiety transforms into generalized anxiety disorder.<sup>92</sup>

Depression—the most common mental impairment lawyers' assistance programs report calls for services for—shares similar symptomologies with

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87. NAT'L INST. OF MENTAL HEALTH, BIPOLAR DISORDER, *supra* note 12.

88. *Id.*

89. *Id.*

90. See Dan Defoe, *[Lawyer] Anxiety, Self-Protective Behavior, Ethical Sinkholes, and Professional Responsibility*, PSYCHOLAWLOGY (Aug. 10, 2015), [https://www.psycholawlogy.com/2015/08/10/lawyer-anxiety-self-protective-behavior-ethical-sinkholes-and-professional-responsibility/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+Psycholawlogy+%28Psycholawlogy%29](https://www.psycholawlogy.com/2015/08/10/lawyer-anxiety-self-protective-behavior-ethical-sinkholes-and-professional-responsibility/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Psycholawlogy+%28Psycholawlogy%29) [https://perma.cc/CP6V-6VEK] (“Lawyers experience nervousness, tension, dread, or apprehension because of their work or workplace environment.”).

91. See NAT'L INST. OF MENTAL HEALTH, WHEN WORRY GETS OUT OF CONTROL, *supra* note 10 (listing various symptoms of generalized anxiety disorder).

92. See generally Bree Buchanan & Chris Ritter, *Ten Tips for Lawyers Dealing with Stress, Mental Health, and Substance Use Issues*, STATE BAR OF TEX., <https://www.texasbar.com/> (search for “Ten Tips for Lawyers Dealing with Stress, Mental Health, and Substance Use Issues”, and click the first link) [https://perma.cc/3DBG-YJXJ] (explaining the prevalence and potential impact of generalized anxiety disorder).

anxiety and bipolar disorder. Lawyers experiencing depression may experience feelings of helplessness and worthlessness, have difficulty concentrating, remembering, or making decisions, have a loss of energy, insomnia, aches and pains, and may begin contemplating death or suicide.<sup>93</sup> All these mental conditions can potentially hinder a lawyer from completing responsibilities to his or her clients. Absent guidance from the Model Rules, any one of these mental conditions could, on its face, satisfy the definition of a qualifying mental condition.

Examining other Model Rules dealing with mental health yields little assistance in understanding what specific mental conditions qualify under Model Rule 1.16(a)(2). For instance, Model Rule 1.14—Client with Diminished Capacity—speaks to the duties involved when a lawyer deals with a client of diminished mental capacity.<sup>94</sup> Unfortunately, other than a reference to minority, Model Rule 1.14 gives no indication what a mental impairment specifically constitutes. Thus, no analogous definition is transferable to “mental condition” as used in Model Rule 1.16(a)(2). Moreover, Model Rule 1.0—Terminology—fails to define mental condition or materially impairs.<sup>95</sup>

Given the critical role the presence of a mental condition has as an element in determining whether a violation of the duty a lawyer has under Model Rule 1.16(a)(2) has occurred, the lack of definition or guidance leads to unworkable results. The ABA’s Formal Ethics Opinion 03-429 briefly mentions some mental conditions, like Tourette’s Syndrome, might appear to impair the ability of a lawyer to represent clients but in reality do not materially impair the lawyer-client relationship.<sup>96</sup> Unfortunately, there is no mention of the effects of anxiety, depression, or bipolar disorder—three of the most common mental conditions lawyers report suffering.<sup>97</sup>

#### B. *Interplay of Model Rule 1.16(a)(2) and the Other Model Rules*

The interplay of Model Rule 1.16(a)(2) and Model Rule 8.3 further exacerbates the tensions and desires lawyers suffering from mental health issues like anxiety, depression, and bipolar disorder experience when contemplating whether to seek treatment or continue practicing law

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93. Foster, *supra* note 39, at 222.

94. See MODEL RULES OF PROF'L CONDUCT R. 1.14 (AM. BAR ASS'N 2020) (detailing the specific duties a lawyer has when his or her client is mentally impaired).

95. MODEL RULES OF PROF'L CONDUCT R. 1.0.

96. ABA Comm. on Ethics & Prof'l Resp., Formal Op. 03-429 (2003).

97. Krill et al., *supra* note 27, at 50.

untreated. Model Rule 8.3—Reporting Professional Misconduct—obligates lawyers to file a report with the appropriate authority if they have knowledge of any other lawyer's violation of any Model Rule of Professional Conduct that may raise a substantial question about the violating lawyer's fitness to practice law.<sup>98</sup> The implication of this duty, taken to its furthest reaches, might mean when lawyers know a colleague who is suffering from anxiety, depression, or bipolar disorder, those lawyers risk violating their duty under Model Rule 8.3 if they do not take actions against their impaired colleague whether or not there is an actual violation of the Model Rules.<sup>99</sup>

The proposition is seemingly confirmed based on publications from a pair of related ABA Formal Ethics Opinions. The first opinion, Formal Ethics Opinion 03-431, speaks to the interplay of Rules 1.16(a)(2) and 8.3—where an attorney knows another attorney has a mental condition that materially impairs the lawyer's ability to represent his or her clients.<sup>100</sup> The opinion states:

Although not all violations of the Model Rules are reportable events under Rule 8.3, as they may not raise a substantial question about a lawyer's fitness to practice law, a lawyer's failure to withdraw from representation while suffering from a condition materially impairing her ability to practice, as required by Rule 1.16(a)(2), ordinarily would raise a substantial question requiring reporting under Rule 8.3.<sup>101</sup>

In effect, the legal profession's self-regulatory nature serves to make lawyers watchdogs over each other's mental health to protect clients and the profession.<sup>102</sup> Lawyers unaware they are suffering from the effects of diagnosable mental health conditions may attempt to write off their feelings or, even worse, attempt to hide their issues from professional colleagues for fear of the implicated duty thereby raised.

Practically, the disciplinary implications for practicing while suffering from mental conditions such as anxiety, depression, and bipolar disorder

98. MODEL RULES OF PROF'L CONDUCT R. 8.3.

99. See Thomas P. Sukowicz, *The Ethics of Reporting on Your Colleague—or Yourself*, 26 GPSOLO 36, 38–39 (2009) (arguing since a lawyer violating Model Rule 1.16(a)(2) involves a material impairment to the representation of a client, violation itself calls into question the fitness of the lawyer to carry out the representation).

100. ABA Comm. on Ethics & Prof'l Resp., Formal Op. 03-431 (2003).

101. *Id.*

102. See *id.* (stating while lawyers are not health care professionals, they still have a duty to look out for recognizable symptoms of mental health impairment).

might act as a deterrent from seeking help. The ABA opinion itself admits the difficulty of confronting the affected lawyer about the circumstances of the condition or the effect on his or her clients, going on to say the afflicted lawyer may deny the allegations or seek to assure themselves or others that any problem has been resolved.<sup>103</sup> After all, once the lawyer gains knowledge of their mental condition or allows their symptoms to manifest such that they force other lawyers to report them, the Model Rules may no longer permit the afflicted lawyer to continue practicing law.<sup>104</sup>

Relatedly, ABA Formal Ethics Opinion 03-429 speaks to the obligations of lawyers within the same firm when dealing with their mentally impaired coworkers. This opinion admits lawyers with mental conditions impairing their ability to represent their clients may be oblivious to or in denial of their condition.<sup>105</sup> Still, the opinion reaffirms “[i]mpaired lawyers have the same obligations under the Model Rules as other lawyers”; a mental impairment does not alleviate the responsibility of a lawyer to conduct themselves in conformity with the Model Rules.<sup>106</sup> State supreme court decisions echo this sentiment regarding lawyers accused of violating Model Rule 1.16(a)(2).<sup>107</sup>

Although this logic serves to protect clients and the legal profession, it is at odds with the desire to protect suffering lawyers’ mental health. It places lawyers suffering from anxiety, depression, and bipolar disorder on the receiving end of possible disciplinary actions due to their struggles with mental health. The ABA admits, however, the unpredictable nature of how a mental condition will impair an afflicted lawyer. Lawyers’ mental health conditions are not always so severe as to materially impair their ability to

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103. *Id.*

104. *See* MODEL RULES OF PROF’L CONDUCT R. 1.16 (AM. BAR ASS’N 2020) (indicating an attorney who suffers from a mental condition materially impairing her ability to represent her client is required to withdraw from representing the client); MODEL RULES OF PROF’L CONDUCT R. 8.3 & cmt. 1 (indicating a reporting attorney “shall inform the appropriate professional authority” of another attorney’s “violation of the Rules of Professional Conduct”).

105. ABA Comm. on Ethics & Prof’l Resp., Formal Op. 03-429 (2003).

106. *Id.*

107. *See In re Kelly*, 917 N.E.2d 658, 659 (Ind. 2009) (holding the personal conditions of lawyers are irrelevant to the client’s entitlement to protection from lawyer misfeasance vis-à-vis professional conduct); *Iowa Sup. Ct. Att’y Disciplinary Bd. v. Kingery*, 871 N.W.2d 109, 120 (Iowa 2015) (holding as irrelevant the mental condition of a lawyer with bipolar disorder in a disciplinary action based on her failure to withdraw under the state equivalent to Model Rule 1.16(a)(2)).

represent their clients.<sup>108</sup> A lawyer with a mental condition does not have an obligation to withdraw or forgo representation when the mental condition does not materially affect their ability to represent clients.<sup>109</sup> The reporting duty under Model Rule 8.3, therefore, ebbs and flows along with the episodic nature of triggering mental health conditions like anxiety, depression, and bipolar disorder.<sup>110</sup>

When a mental condition is not enough to materially impair the conduct of the lawyer, the current rules effectively treat those mental conditions as a matter of private concern.<sup>111</sup> Only when the lawyer is materially impaired does the lawyer violate Model Rule 1.16(a)(2). However, the lack of an adequate definition of what constitutes a mental condition leaves state disciplinary panels and state supreme courts in control of what constitutes a qualifying condition.<sup>112</sup> The inner workings of the Model Rules miss the goal of uniformity by leaving these critical issues for the states to decide. Concomitantly, this leaves lawyers wondering whether they are subject to professional discipline as a result of their having mental health conditions.

Advances in medical technology unavailable at the time of the drafting of the Model Rules have provided a deeper understanding of many medical conditions. Particularly in the field of genetic sequencing, people can gain increased access to information regarding their genetic predispositions.<sup>113</sup> As genetic sequencing becomes able to detect certain mental predispositions, courts must decide how far they will go in extending a lawyer's duty to include properly informing themselves of their conditions

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108. See ABA Comm. on Ethics & Prof'l Resp., Formal Op. 03-429 (2003) (acknowledging the symptoms of mental health conditions, such as anxiety, depression, and bipolar disorder, fluctuate between good and bad days when the manifestation of symptoms is impactful).

109. See Sukowicz, *supra* note 99, at 39 ("Sometimes a lawyer's psychological condition or addiction is either not serious enough for a transfer to inactive status or the attorney has begun treatment for the condition or addiction and is recovering.")

110. See *In re Barnes*, 691 N.E.2d 1225, 1226 (Ind. 1998) (disciplining a depressed lawyer for failing to withdraw from a bankruptcy matter only once it occurred to the lawyer he could no longer pursue the action).

111. Sukowicz, *supra* note 99, at 40.

112. See Att'y Grievance Comm'n v. Olver, 831 A.2d 66, 70 (Md. 2003) (addressing the issue of whether Major Depression, a chronic mental illness, constituted a mental condition satisfying the requirements of a conditional diversion agreement for attorney discipline).

113. See Sarah L. Scott, *I Am Not Sick Now but I Might Be Later: Personal Genome Sequencing and Ethical Obligations for Lawyers*, 26 GEO. J. LEGAL ETHICS 979, 984-85 (2013) (discussing the Human Genome Project and the increased accessibility to a person's genetic information for purposes of determining genetic predispositions to certain diseases).

in the interest of protecting clients and the legal profession.<sup>114</sup> Again, the ABA's lack of guidance leaves states with a vast degree of control and produces an unworkable result for lawyers suffering from mental health conditions and trying to maintain professional responsibility.

C. *Case Law Implications on the Functioning of Model Rule 1.16(a)(2)*

Model Rule 1.16(a)(2) presents problems for attorneys suffering mental health conditions not only in its substance and form but most consequently in its execution. The mandatory duty to withdraw from representation under Model Rule 1.16(a)(2) also proves unworkable to protect a lawyer's interest in receiving treatment due to the requirement to persist in representation if the court disapproves withdrawal.<sup>115</sup> Even when a mentally impaired lawyer admits to the need to comply with the withdrawal provision, courts have the discretion to refuse the ability to withdraw. A lawyer suffering anxiety, depression, or bipolar disorder who attempts to comply with the Model Rules may, consequently, be unable to do so.

Overriding policy considerations grant courts this discretion, but when a tribunal refuses to permit withdrawal, a lawyer maintains the full extent of his or her duty to provide representation to the client.<sup>116</sup> In the ABA's terms, this results in a mentally impaired lawyer with the continued duty to represent clients and, as a potential consequence, ineffectively represented clients and damage to the profession.<sup>117</sup> Courts have not shied away from exercising their authority under this provision to deny lawyers who claim mental conditions the ability to withdraw.<sup>118</sup> In *Wenzy v. State*,<sup>119</sup> the defendant's lawyer made several motions to the court requesting leave to withdraw as counsel, citing the duty to withdraw due to his mental and

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114. *See id.* at 989–90, 992 (speaking to the duty lawyers have towards their clients under various provisions under the Model Rules which seem to implicate a professional responsibility for the lawyer to have themselves tested for predispositions to medical issues).

115. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (AM. BAR ASS'N 2020) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.>").

116. *See* *Wenzy v. State*, 855 S.W.2d 47, 50 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) ("Once his motions to withdraw were denied, Cato was under a duty to represent Wenzy to the fullest of his ability.") (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(c), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9)).

117. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.16 & cmts 2–3 (AM. BAR ASS'N 2020) (indicating protecting clients and the profession are reasons for the mandatory duty to withdraw).

118. *See, e.g., Wenzy*, 855 S.W.2d at 48 (describing an instance when a trial court consistently denied an attorney's motion to withdraw from representation).

119. *Wenzy v. State*, 855 S.W.2d 47 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd).

psychological conditions materially impairing his ability to represent the client.<sup>120</sup> The appeals court overrode the lawyer's duty to withdraw under the state equivalent to Model Rule 1.16(a)(2), citing the duty of a lawyer to gain permission of the trial court prior to withdrawing as counsel.<sup>121</sup>

This means, for lawyers suffering legitimate cases of anxiety, depression, or bipolar disorder, the duty incumbent on them to withdraw from representation is not fully theirs. Not only must a lawyer recognize the mental health issues he or she suffers from and its stifling effect on the ability to practice law, but the lawyer must also hope the court grants the motion to withdraw if the lawyer's representation of a client involves a case pending before a trial court. While the need to protect the profession and clients is indeed of paramount importance, Model Rule 1.16(a)(2), to a degree, fails to protect the professionals.

Without intending to cast an unfairly broad generalization over the national legal profession through recent history, it is fair to say acceptance of the legitimacy of mental health conditions is far from ubiquitous today and was even less so historically.<sup>122</sup> Courts have historically been relatively harsh in their treatment of lawyers who knew of their underlying mental and physical conditions while continuing to practice law. In *Stark County Bar Association v. Lukens*,<sup>123</sup> a lawyer suffering from a combination of diabetes and porphyria was indefinitely suspended from the practice of law.<sup>124</sup> The court confronted whether a lawyer who obviously knew of his physical or emotional condition could continue to hold himself out as a competent practitioner.<sup>125</sup> Answering in the negative, the court stated the lawyer should have stopped taking new cases altogether.<sup>126</sup> Case law is fraught with skeptical attitudes regarding the ability of lawyers possessing mental health conditions to practice law at all; as one judge analogized, the medical profession would never let a doctor with palsy conduct surgery.<sup>127</sup>

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120. *Id.* at 48.

121. *Id.* at 49.

122. See David A. Grenardo, *You Are Not Alone: What Law Schools Must Do to Help Law Students with Mental Health and Substance Abuse Issues*, 10 HOUS. L. REV. 7, 8 (2019) (discussing the struggles President Abraham Lincoln had with depression, or melancholy as it was then known, during his stint as a law student and lawyer).

123. *Stark Cnty. Bar Ass'n v. Lukens*, 357 N.E.2d 1083 (Ohio 1976).

124. *Id.* at 1089.

125. *Id.*

126. *Id.*

127. See *In re Sherman*, 404 P.2d 978, 983 (Wash. 1965) (Rosellini, C.J., dissenting) (advocating suspension of an attorney and drawing an analogy between a lawyer practicing with the "handicap" of



As society has begun to recognize, understand, and accept the prevalence of mental health conditions in the legal profession, courts have shown increasing acknowledgment of the mental health conditions facing legal practitioners.<sup>128</sup> However, mere acknowledgement does not necessarily translate to improvements in disciplinary outcomes for lawyers related to the duties incumbent on lawyers with mental health conditions.

Not only can the courts frustrate a lawyer's ability to withdraw under the provisions of the Model Rules, but a lawyer must also contend with the wishes of his or her clients in determining whether to withdraw. In *People v. Mendus*,<sup>129</sup> a Colorado lawyer suffered anxiety to the point of having a mental breakdown while representing two clients in divorce proceedings.<sup>130</sup> Despite the lawyer's repeated pleas to her clients begging them to authorize her withdrawal from the case due to her mental health problems, the clients insisted the lawyer continue representing them.<sup>131</sup>

After failing to withdraw and suffering a mental breakdown, the lawyer was ultimately sanctioned for her violation of the state equivalent of Model Rule 1.16(a)(2).<sup>132</sup> Critics may contend the lawyer had a duty to withdraw no matter the client's wishes. This ignores the lawyer's frazzled mental state and her desire to do right by her clients. In assigning a two-year suspension for violation of Model Rule 1.16(a)(2), the court only briefly considered the fact that the lawyer informed her clients of her condition and suggested they retain other counsel.<sup>133</sup>

Even when lawyers attempt to comply with professional obligations, their clients' interests are of concern. For better or worse, lawyers rely on their

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mental illness with a doctor practicing surgery while suffering from some form of palsy); *Lukens*, 357 N.E.2d at 1089 (questioning whether an attorney suffering from diabetes and porphyria "should continue to hold himself out as an attorney in general practice" given the implications those conditions had on his mental health).

128. See Fla. Bar v. Shanzer, 572 So. 2d 1382, 1383–84 (Fla. 1991) (acknowledging the prevalence of depression and other mental health problems in many lawyers).

129. *People v. Mendus*, 360 P.3d 1049 (Colo. 2015).

130. See *id.* at 1051–52 (examining a case where a lawyer claimed her anxiety and depression impaired her ability to represent her clients; the clients insisted she nevertheless continue to represent them).

131. See *id.* (describing conversations between the lawyer and her clients which detail the lawyer's struggles with her work due to her mental condition).

132. *Id.*

133. See *id.* at 1051–52, 1055 (indicating the court briefly considered the lawyer's conversations with her clients regarding her mental condition before finding the lawyer's actions warranted a two-year suspension).

reputations to attract clients.<sup>134</sup> Clients may neither understand nor care to understand the complexities of a mandatory duty of withdrawal; lawyers in an already precarious mental position are thus tasked with the additional burden of caring for client sensibilities.<sup>135</sup> The proposition that a lawyer would want to protect his or her reputation to prevent a loss of current and future clientele is not so farfetched. Therefore, while no formal requirement dictates a lawyer must comply with a client's wishes to persist in representation, it is an implicit requirement in the legal profession.

Recent case law demonstrates courts in disciplinary proceedings are more willing to accept mental health conditions, like depression or anxiety, primarily when physical conditions accompany or give rise to the mental state. When an attorney has an underlying mental condition, courts are much more willing to accept it when a physical condition explains psychosomatic symptomology adversely affecting their representation of a client.<sup>136</sup> Despite the effects mental conditions like anxiety and depression can have, courts in the past have expressed skepticism in taking a lawyer's own testimony during a disciplinary action regarding his or her mental health status without an accompanying diagnosis.<sup>137</sup>

In *Mulkey v. Meridian Oil, Inc.*,<sup>138</sup> the trial court chastised a firm that had two lawyers working on a personal injury case who were both involved in significant tragedies.<sup>139</sup> Morris, the lawyer originally assigned, was in a plane crash shortly before the suit commenced that resulted in his wife's death and critical injuries to himself and his children; Keirse, assigned to cover Morris, was experiencing severe emotional strain during the time he represented the plaintiff.<sup>140</sup> Citing Oklahoma's version of Model Rule 1.16(a)(2), the court took issue with the firm continuing to operate

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134. See Zacharias, *supra* note 42, at 176 (exploring the significance of a lawyer's reputation in an effective law practice).

135. See Young Laws Network, *Should I Fire My Client?*, 24 PROB. & PROP., Jul./Aug. 2010, at 8 (discussing the subtle difficulties present in terminating representation of a client).

136. See *State ex rel. Okla. Bar Ass'n v. Southern*, 15 P.3d 1, 4, 7 (Okla. 2000) (examining an attorney with a vitamin deficiency illness that aggravated his depression).

137. See *In re Winterburg*, 41 P.3d 842, 846–47 (Kan. 2002) (expressing skepticism regarding the self-diagnosis of depression even where a lawyer testified it left her in a state of near paralysis, she was receiving treatment from a psychiatrist, and she was being prescribed medication for depression and a hormonal imbalance).

138. *Mulkey v. Meridian Oil, Inc.*, 143 F.R.D. 257 (W.D. Okla. 1992).

139. See *id.* at 259 (explaining the tragic events counsel assigned to the case experienced).

140. See *id.* at 259–60 (downplaying the relevance of the plane crash, the court conceded it might have given rise to emotional consequences yet still elected to sanction the lawyers after taking issue with the dates Keirse gave regarding his mental condition).

while “unable to competently represent existing clients.”<sup>141</sup> The court sanctioned Morris and Keirse for their deficient performances and required them to explain to the plaintiff why they continued operating while under their “alleged emotional difficulties.”<sup>142</sup> The court balanced the equities against the lawyers despite their explanations. Dismissive attitudes and lack of empathy toward mental health conditions portend the possibility of underlying skepticism accompanying claims of mental health conditions.

Similar trends of skepticism exist in other cases where lawyers suffering mental health concerns had the duty to withdraw triggered; take the case of lawyer Southern, the subject of *State ex rel. Oklahoma Bar Association v. Southern*.<sup>143</sup> The death of an immediate family member and serious illnesses took a toll on the lawyer’s mental health, as the court candidly admitted.<sup>144</sup> However, the court paid attention to Southern’s vitamin B-12 deficiency to explain his extreme depressive symptomology.<sup>145</sup> Despite the common effects of depression,<sup>146</sup> the court chose to focus on Southern’s vitamin B-12 deficiency, which aggravated the depressive symptoms.<sup>147</sup>

This analytical trend is also present in the case of *In re Fitzharris*,<sup>148</sup> where an attorney was disciplined for violating South Carolina’s equivalent of Model Rule 1.16(a)(2).<sup>149</sup> In laying down her definite suspension for unduly delaying disbursement of a client’s settlement funds, the court considered Fitzharris’s physical and mental conditions at the time of the violation.<sup>150</sup> The court accepted the legitimacy of lawyer Fitzharris’s treatment for anxiety and depression when the underlying cause was a series

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141. *Id.* at 260.

142. *Id.* at 262.

143. *See, e.g., State ex rel. Okla. Bar Ass’n v. Southern*, 15 P.3d 1, 2 (Okla. 2000) (providing an underlying physical condition was solely a mitigating factor despite the lawyer’s suffering from an illness which caused severe symptoms).

144. *Id.* at 7.

145. *See id.* (examining an attorney with a vitamin deficiency disorder that aggravated his depression, as both disorders have similar symptoms including weakness, fatigue, and memory lapses).

146. *See* Alec Coppen & Christina Bolander-Gouaille, *Treatment of Depression: Time to Consider Folic Acid and Vitamin B<sub>12</sub>*, 19 J. PSYCHOPHARMACOLOGY 59, 60–61 (2005) (describing several studies finding depressive patients often had low vitamin B-12 levels).

147. *Southern*, 15 P.3d at 7.

148. *In re Fitzharris*, 782 S.E.2d 596 (S.C. 2016).

149. *Id.* at 597.

150. *Id.* at 596–97 (punishing a lawyer’s mishandling of a client’s matters due to depression and anxiety).

of back and shoulder surgeries during which serious complications arose and caused her depressed state.<sup>151</sup>

An underlying physical condition was also present in the case of *Lawyer Disciplinary Board v. Dues*,<sup>152</sup> where the court accepted as legitimate the lawyer's claims of depression.<sup>153</sup> The court made it a point to emphasize Dues was an upstanding member of the bar until he suffered a heart attack requiring triple bypass surgery and a related prostate operation.<sup>154</sup> The court accepted these facts as an explanation for his depressed state and ultimately reduced the recommended suspension to a public reprimand and temporary limitation of his practice to "work as a mental hygiene commissioner."<sup>155</sup> The court took as persuasive medical testimony attributing "[his] legal deficiencies *directly* to the serious depression that flowed from Mr. Dues' physical impairments."<sup>156</sup>

The dissenting opinion of *Dues* displays the lingering antipathy toward considering the mental health conditions of lawyers in determining discipline. Justice Benjamin acknowledges the stigmatized and difficult nature of mental illness in American society, yet opines: "our compassion for the person inflicted should not include condoning harm to innocent persons arising from a failure or refusal to get appropriate help for a mental illness, such as depression."<sup>157</sup> While Justice Benjamin's motivations lie in protecting clients from potential harm, his premise that enforcing strict disciplinary standards is the best way to protect the public is debatable.<sup>158</sup> Dues did seek treatment for his depression during the period of his misconduct—in fact, his doctor indicated with proper treatment he could work again as an attorney<sup>159</sup>—yet views like Justice Benjamin's would seek to foreclose this possibility.

Thus, there are a variety of judicial attitudes regarding the legitimacy of lawyer mental health. This almost hostile environment may dissuade

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151. *See id.* at 597 (accepting the lawyer's Agreement for Discipline by Consent after the lawyer acknowledged her "physical and mental health issues contributed to the problems with Client's case").

152. *Law. Disciplinary Bd. v. Dues*, 624 S.E.2d 125 (W. Va. 2005).

153. *See id.* at 133 (finding the lawyer's mental disability was a mitigating factor).

154. *Id.* at 133–34.

155. *Id.* at 134–35.

156. *See id.* at 133–34 (concluding the lawyer's mental disability justified limiting the lawyer's practice rather than suspending his license).

157. *Id.* at 135 (Benjamin, J., dissenting).

158. *See id.* (emphasizing the need to "enforce appropriate consequences for acts and/or omissions which harm . . . clients").

159. *Id.* at 132–33 (majority opinion).

lawyers from seeking treatment for their mental health conditions as they may face discipline for their conduct. The lack of definition present in Model Rule 1.16(a)(2) makes this morass of case law the default guide to understanding how a court should treat a lawyer's mental health. With principles of *stare decisis* guiding judicial decision-making in the American legal system, the analytical idiosyncrasies present in these opinions remain entrenched in how courts deal with violations of Model Rule 1.16(a)(2).<sup>160</sup> Thus the unworkable effects of the Model Rule are continued in virtual perpetuity.

#### IV. RECOMMENDATIONS

##### A. *Mandatory Visits to Mental Health Physicians as a Condition to Practice*

One possible avenue to amend the Model Rules to simultaneously improve the functioning of Model Rule 1.16(a)(2) and to protect the mental health of lawyers is to require mandatory visits with mental health professionals as a condition of continuing to practice law. Such a plan could be effectuated much like how some states have adopted requirements for lawyers to maintain a certain amount of continuing legal education hours to maintain competence under Model Rule 1.1.<sup>161</sup> In maintaining the demand for competency under this Rule, the ABA Model Rule commentary encourages but does not require lawyers to “engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”<sup>162</sup>

Absent mandatory language, failure to comply with these suggestions in maintaining competency would not subject an attorney to disciplinary sanction under a strict Model Rules jurisdiction.<sup>163</sup> Some state bar associations have independently changed their professional responsibility rules to incorporate a mandatory obligation on actively practicing lawyers to

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160. See Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3–4 (2012) (discussing the principle of *stare decisis* as it relates to preserving analytical foundations between like cases).

161. See, e.g., MICH. RULES OF PROF'L CONDUCT R. 1.1 cmt. (2020) (requiring lawyers give competent representation as it relates to skill, aptitude, preparation, and thoroughness in conducting the practice of law and participate in continuing legal education to maintain such knowledge and skill).

162. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (AM. BAR ASS'N 2020).

163. Cf. Longan, *supra* note 73, at 681 (discussing the aspirational nature of the Model Rules vis-à-vis pro bono service and the general lack of lawyer participation in the absence of a mandatory duty to participate).

attain a certain amount of education in pertinent legal and ethical fields to remain in good standing.<sup>164</sup> Texas, for instance, requires attorneys to accomplish fifteen hours of continuing legal education annually, specifically requiring twelve to come from accredited sources to maintain compliance with State Bar Rules and remain in good standing.<sup>165</sup>

A Texas lawyer failing to comply with these continuing legal education requirements faces the possibility of suspension from the practice of law.<sup>166</sup> When cast in these mandatory terms, non-compliance with legal education would leave members of the Texas State Bar unable to practice, surely providing the ultimate incentive to comply.<sup>167</sup> Should the ABA decide to amend its Model Rules, this is transferable to the concern for lawyer mental health by making lawyers receive a proscribed amount of mental health checkups or therapy sessions every year.<sup>168</sup>

Such a requirement would serve the profession two-fold. It would protect clients from lawyers unaware of or unwilling to deal with their mental health conditions, and it would also force lawyers to acknowledge the presence of any adverse mental health issues from which they are suffering. In light of the lack of clear guidance as to what constitutes a qualifying mental condition, this requirement would potentially save lawyers from having to guess whether they are practicing at an impaired level and from discipline if their conditions are treated before the “materially impairs representation” prong of the Model Rules is triggered.

Indeed, state supreme courts have recently allowed the disciplinary option of continued participation in mental health wellness programs to attorneys suffering anxiety and depression. Continued participation ensures rehabilitation and the ability of the lawyer to practice. In some circumstances, the courts have tacitly acknowledged the benefits practicing lawyers would gain from mental health therapy. The District of Columbia Court of Appeals, for instance, in *In re Peek*,<sup>169</sup> stayed the final two months

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164. See, e.g., TEX. STATE BAR R. art. XII, § 6, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (“Every member must complete 15 hours of continuing legal education during each compliance year as provided by this article.”).

165. *Id.*

166. *Id.* § 8.

167. *Cf. Pro Bono*, TEX. ACCESS TO JUST. COMM'N, <https://www.texasatj.org/pro-bono> [<https://perma.cc/8N8J-L9GE>] (estimating the amount of pro bono hours Texas lawyers provide at approximately 2.5 million annually).

168. *Cf. Longan*, *supra* note 73, at 681 (discussing the lack of compliance with Model Rule provisions regarding pro bono service due to a general lack of enforcement mechanisms).

169. *In re Peek*, 565 A.2d 627 (D.C. 1989).

of a four-month suspension of lawyer Peek for misconduct based in large part on his chronic depression.<sup>170</sup> The court conditioned the stay on a two-year probationary period during which Peek would have to receive mental health counseling.<sup>171</sup>

Likewise, the Wisconsin Supreme Court dealt with a lawyer diagnosed with anxiety and depression that caused his practice to suffer.<sup>172</sup> Testimony from a psychologist explaining the major depressive episode the lawyer suffered would likely not return with proper control and monitoring seemed to convince the court to temper discipline.<sup>173</sup> Thus, the Wisconsin Supreme Court conditioned Loew's resumption of practice on maintaining a therapeutic relationship with a psychiatrist for five years post-reinstatement of the attorney's practice.<sup>174</sup> Given conceptual benefits the courts see in aiding those lawyers already afflicted with mental health conditions, preventative measures will only further serve the goal of protecting the profession and clients.

Granted, an endeavor such as requiring lawyers to submit to mental health screenings is highly aspirational in nature. It entails a great deal of cost and organization, more than likely foisting additional responsibilities on state bars. In the past, the Oklahoma Supreme Court refused to utilize a mental health counseling requirement for an attorney to return to practice, reasoning the adverse effects a reported relapse would have on the lawyer's probation would prove detrimental; instead the court opted for voluntary counseling.<sup>175</sup> Still, the Oklahoma court tacitly admitted the value of therapeutic relationships in managing the stressors and aggravating factors on lawyers' mental health.<sup>176</sup> Rather than disbar an attorney for his work-related anxiety and depression, this court saw the value in continuing to allow him to practice while recognizing the benefits of periodically

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170. *Id.* at 634.

171. *Id.*

172. *See In re Loew*, 780 N.W.2d 523, 527–28 (Wis. 2010) (describing attorney Loew's mental state and the impact of his mental state on his practice).

173. *See id.* at 528 (recommending a sixty-day suspension and restrictions on the attorney's resumption of his practice proposed by a licensed psychologist).

174. *See id.* at 529 (requiring semi-annual reports from the lawyer's psychiatrist regarding the status of the lawyer's mental health and management of symptoms).

175. *State ex rel. Okla. Bar Ass'n v. Townsend*, 277 P.3d 1269, 1281 n.50 (Okla. 2012).

176. *See id.* at 1280–81 (crafting conditions while availing to notions acknowledging the rigors associated with solo practice as it relates to anxiety and depression).

monitoring the lawyer's mental health.<sup>177</sup>

When a lawyer allows a mental health condition to go unacknowledged and unchecked, there is a higher likelihood of severe consequences.<sup>178</sup> Procedures in place to actively monitor the mental health of lawyers creates the possibility of catching instances when mental health conditions go unchecked. The lawyer, the client, and the profession arguably benefit under this system.

With a steadily increased focus on the mental health of practicing lawyers, bold and aspirational advances are necessary to continue to change the negatively stereotyped culture associated with lawyer mental health conditions. Providing lawyers with a constant update on their mental health status will better effectuate the provisions of Model Rule 1.16(a)(2) insofar as it would inform lawyers about their current mental health status and hopefully grant lawyers information on how to deal with mental health conditions. The lack of definition regarding what constitutes a mental condition under Model Rule 1.16(a)(2) leaves anxiety, depression, and bipolar disorder within the realm of possible qualifying conditions. These same conditions are also detectable if this mandatory scheme is adopted.

B. *Making Depression, Anxiety, and Bipolar Disorder Mitigating Factors in Disciplinary Proceedings*

Another course of action the ABA and state bar associations can take is to specifically make common mental health conditions like depression, anxiety, and bipolar disorder mandatory mitigating factors in imposing discipline for lawyers accused of violating Model Rule 1.16(a)(2). The guiding principle and purpose of disciplining lawyers is not to punish the lawyer but to protect the public; some courts, however, view the sanction as a signal to other lawyers that such conduct is intolerable.<sup>179</sup> However, when courts punish lawyers already suffering mental health conditions, they are effectively punishing the victim for a mental health condition the lawyer

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177. *See id.* (recommending the attorney “be disciplined by public reprimand” and encouraging the attorney continue regular meetings with a therapist). *Contra In re Sherman*, 404 P.2d 978, 983 (Wash. 1965) (Rosellini, C.J., dissenting) (advocating suspension of an attorney and drawing an analogy between a lawyer practicing with the “handicap” of mental illness with a doctor suffering from palsy practicing surgery).

178. *See In re Murrow*, 336 P.3d 859, 863, 866 (Kan. 2014) (noting a lawyer suffered severe depression for years prior to its climax, which resulted in a violation of the state equivalent to Model Rule 1.16(a)(2)).

179. *Att’y. Grievance Comm’n v. Wallace*, 793 A.2d 535, 542–43 (Md. 2002) (examining the purpose underlying attorney discipline).



never wanted. It is time to reevaluate the effectiveness of discipline in relation to lawyer mental health.<sup>180</sup>

The difficulties involved in disciplining lawyers with mental health conditions is brought to the fore in the pre-Model Rules case of *In re Sherman*.<sup>181</sup> Lawyer Sherman was charged with incompetently representing clients while suffering a personality disorder that caused him to lose control of his emotional stability.<sup>182</sup> The majority opinion expressed reservation regarding disbaring Sherman simply for his having such a mental health condition, especially considering the treatable and manageable nature of the condition.<sup>183</sup> In lieu of disbarment or suspension, the court saw the best course of action would be to allow the otherwise capable lawyer to continue to practice once treatment for his condition was complete.<sup>184</sup>

Since Model Rule 1.16(a)(2), as analyzed in this Comment, is based on a lawyer's mental condition that *materially impairs* their ability to represent their client, allowing such a mental condition to be a mitigating factor in attorney discipline seems counterintuitive. However, in its *Standards for Imposing Lawyer Sanctions*, the ABA has already proposed "mental disabilit[ies]" as a permissive, but not a mandatory, factor in mitigating discipline.<sup>185</sup> Crafting these standards was an effort to promote uniformity in disciplining lawyer misconduct; they are relied upon to some degree even though they are not binding on state disciplinary bodies.<sup>186</sup> Abolishing the mental health provision of Model Rule 1.16(a)(2) is unlikely considering its staying power through the Model Rules variations, but emphasizing treatment and rehabilitation is preferable to continued discipline.

Indeed, some states do use the presence of a mental health condition as a mitigating factor. The Kansas Supreme Court, in *In re Murrow*,<sup>187</sup> handed

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180. See Page Thead Pulliam, *Lawyer Depression: Taking a Closer Look at First-Time Ethics Offenders*, 32 J. LEGAL PROFESSION 289, 294–95 (2008) (taking issue with the appropriateness of continuing to use the limited means available in traditional disciplinary sanctions to treat lawyer mental health problems).

181. *In re Sherman*, 404 P.2d 978 (Wash. 1965).

182. *Id.* at 978, 980.

183. *Id.* at 980–81.

184. See *id.* at 982 (providing for voluntary treatment for mental health conditions prior to allowing an attorney to return to practice).

185. ABA STANDING COMM. ON PROF'L DISCIPLINE, STANDARDS FOR IMPOSING LAWYER SANCTIONS (1992).

186. See Todd Goren & Bethany Smith, *Depression as a Mitigating Factor in Lawyer Discipline*, 14 GEO. J. LEGAL ETHICS 1081, 1085–86 (2001) (considering the *ABA Standards for Imposing Lawyer Sanctions*, which consider chemical dependency and mental disabilities potential mitigating factors).

187. *In re Murrow*, 336 P.3d 859 (Kan. 2014)

down a one-year suspension for a lawyer found in violation of several state equivalent Model Rule provisions, including 1.16(a)(2).<sup>188</sup> After a diagnosis of severe depression requiring medication, psychotherapy, and several medical leaves of absence, lawyer Murrow missed deadlines causing prejudicial outcomes for his clients' cases.<sup>189</sup> Murrow's doctor linked the severe depression to his law practice, yet implied, in his letter dated January 15, 2014, Murrow could potentially successfully recover and return to practice after a hiatus from practicing law and proper treatment.<sup>190</sup>

Instead of taking a dismissive view towards the lawyer's mental health like one trial court judge,<sup>191</sup> the Kansas Supreme Court granted reinstatement provided the lawyer "received adequate health treatment, including psychological treatment, and has been medically and psychologically evaluated and determined fit to engage in the active practice of law."<sup>192</sup> Importantly, the violation of Model Rule 1.16(a)(2) was deemed a direct result of Murrow's suffering from depression.<sup>193</sup> Rather than punish Murrow for this fact, the court allowed him to return to practice, provided he took the necessary steps to rehabilitate his mental condition. This alternative is preferable to enforcing sanctions against lawyers already suffering from mental health conditions.<sup>194</sup>

Using the mental health of a lawyer in mitigating a violation of Model Rule 1.16(a)(2) should become mandatory and adapt to the current situations facing lawyers. In many cases, state supreme courts using mental health as a mitigating factor must consider whether there is a causal nexus between the misconduct and mental impairment.<sup>195</sup> The requirement essentially prohibits considering the mental health of a lawyer in mitigation

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188. *See id.* at 869–70 (conditioning reinstatement to active practice upon receiving treatment for his mental health conditions).

189. *See id.* at 861, 863 (providing an example of a case where the lawyer missed deadlines and providing letters from the lawyer's physician outlining the details of the lawyer's mental illness).

190. *See id.* at 863–64 ("As to [Murrow's] potential return to the practice of law; only time will tell.").

191. *See id.* at 869 (quoting Judge Vano's comments on the record: "[Murrow] may, in fact, have an illness, but he also has a responsibility to his client").

192. *Id.* at 870.

193. *See id.* at 867 (finding the lawyer's personal and emotional problems a mitigating factor in considering discipline for the lawyer).

194. *See Pulliam, supra* note 180, at 301 (arguing the use of harsh disciplinary sanctions against depressed lawyers will deter treatment).

195. *See* Kristy N. Bernard & Matthew L. Gibson, *Professional Misconduct by Mentally Impaired Attorneys: Is There a Better Way to Treat an Old Problem?*, 17 GEO. J. LEGAL ETHICS 619, 624 (2004) (discussing the use of mental impairment as a factor in mitigation).

unless the lawyer proves his mental health was a direct cause of the misconduct.<sup>196</sup> However, this causal requirement ignores the reality that any lawyer suffering a mental health condition like depression, anxiety, or bipolar disorder is continually operating under a hindrance. Whether conscious of it or not, lawyers suffering from mental health conditions have their daily lives colored in front of this backdrop. Consideration of this fact informs the view that mental health should be considered a mitigating factor in disciplining lawyers for violating Model Rule 1.16(a)(2) regardless of proof of a causal connection.

As at least one commenter has posited, completely removing a lawyer with a treatable mental condition from the legal practice seems to serve neither the public nor the practice.<sup>197</sup> Amending the Model Rules to include a minimum amount of psychiatric therapy sessions ensures lawyers keep the ever-present stress associated with the legal profession from manifesting into full-blown anxiety or depression. Like the minimum hour requirements aimed at maintaining competency among legal professionals, a requirement ensuring a lawyer maintain his or her mental health will serve to protect clients from the repercussions of having a lawyer practicing with a mental health condition materially impairing the lawyer's ability.

Further, easing the disciplinary burdens imposed by Model Rule 1.16(a)(2) will hopefully shift the focus from disciplining lawyers for their mental health conditions to encouraging rehabilitation and treatment. Concomitantly, these two recommendations will serve to alleviate the burden on lawyers having to deal with the unworkable situation Model Rule 1.16(a)(2) presents.

## V. CONCLUSION

The guiding light of the legal profession is—and rightfully should be—lawyers acting in the best interests of their clients to effectuate their clients' legal goals. However, as the understanding of mental health conditions like anxiety, depression, and bipolar disorder increases, the legal profession must continue to address the outsized instances of these mental health conditions. The mandatory duty to withdraw or forgo representation when a lawyer

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196. See *In re Kurtz*, 580 N.Y.S.2d 1, 3 (N.Y. App. Div. 1992) (declining to use a lawyer's personal health problems in mitigation absent a showing of a causal nexus between the misconduct and the health condition); Fla. Bar v. Clement, 662 So. 2d 690, 699–700 (Fla. 1995) (refusing to acknowledge a lawyer's bipolar disorder as a factor in mitigation).

197. Bernard & Gibson, *supra* note 195, at 627–28.

suffers a mental health condition is twice enforced against lawyers—once in the state-adopted versions of Model Rule 1.16(a)(2) and again in the precedents set in state supreme court decisions, as they serve as the ultimate arbitrators of attorney discipline in their jurisdictions.

With the increase of Lawyer Assistance Programs providing lawyers with the tools to protect themselves and their clients from the crippling effects of these diseases, lawyers have unclear and often unworkable duties under the Model Rules. If the legal profession is earnest in its desire to combat mental illness, certain changes must occur in how lawyers with mental health issues are treated.

Rather than punish lawyers laboring within the ill-defined standards under the Model Rules, disciplinary bodies should increase deference to lawyers suffering these mental health conditions that often arise from practicing law. Additionally, the ABA should consider amending the Model Rules to include a mandatory provision for lawyers to receive mental health treatment before continuing to practice law. Not only will a change requiring lawyers to receive periodic checkups on their mental health save lawyers from harming their client's interests, it will also improve the functioning of the Model Rules as lawyers can more actively understand their situation rather than leave the issues to fester.

Bold changes like these at the level of the ABA Model Rules of Professional Conduct are the best course of action. Due to the Model Rules' influential nature to spark uniform change throughout the states, changing the Model Rules presents a preferable alternative to piecemeal adoption at the state level. The amount of latitude vested in state courts to interpret the ambiguous nature of Model Rule 1.16(a)(2) is a concept difficult to contend with if, indeed, a nationally uniform system of professional conduct is preferable.

With *stare decisis* binding state supreme courts to antiquated notions of mental health, increased sympathy and a more robust understanding of mental health conditions today must grapple with these past sentiments. The pattern of accepting mental health conditions as legitimate when explained by underlying physical difficulties is evidence of the possible shortcomings of waiting for courts and the ABA to slowly overturn precedent. Some progress is preferable to none, but this problem is worthy of a nudge in the right direction.

To date, lawyers' primary professional duties towards clients have taken precedence even when balanced against lawyers' physiological and psychological health. If the legal profession is serious in its desire to treat

the wide-reaching mental illnesses in the legal profession without shutting out a large proportion of current and aspiring practitioners, it is time to shift the calculus slightly in favor of lawyers. Changing the terms by which lawyers navigate their professional duties under Model Rule 1.16(a)(2) and its precedent are potential starting points.