

# **IDENTIFYING & MANAGING DISRUPTIVE COUNSEL & CLIENTS:**

IMPACTS ON COMPETENCY IN COURT,  
NEGOTIATION AND ADR, AND STEPS TO REDUCE  
AND MANAGE PROBLEMATIC BEHAVIOR

CCCBA ADR SECTION | ADR SERVICES, INC. | JULY 28, 2021


**THE HON. PAUL BEEMAN, RET. | BETTE EPSTEIN  
AUDREY GEE | MARK LEHOCKY**


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## INTRODUCTION

- OBJECTIVES OF OUR PROGRAM
- BACKGROUND OF OUR PANEL
- AN INTERACTIVE PROGRAM



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## MEET TODAY'S PANELISTS



Hon. Paul Beeman



Bette Epstein, Esq.



Audrey Gee, Esq.



Mark LeHocky, Esq.

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## OBJECTIVES

- UNDERSTAND MENTAL HEALTH ISSUES IMPACTING COUNSEL AND CLIENTS
  - The available data, Covid's impact and its aftermath
  - Resources for assessment, assistance and further learning
- IDENTIFYING PROBLEMATIC BEHAVIOR
- ADVICE FOR REDUCING AND MANAGING BAD BEHAVIOR
  - Preparing clients and managing expectations
  - Dealing with adverse interests in court, negotiations, and ADR settings
  - Strategies to reduce stress and improve outcomes



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## BACKGROUNDS OF OUR PANEL

- THE HON. PAUL BEEMAN, (RET.), *ADR Services, Inc.*
- BETTE EPSTEIN, *ADR Services, Inc.*
- AUDREY GEE, *Brown, Gee & Wegner*
- MARK LeHOCKY, *ADR Services, Inc.*



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## FOOD FOR THOUGHT

“It has always seemed strange to me...The things we admire in men, kindness and generosity, openness, honesty, understanding and feeling, are the concomitants of failure in our system. And those traits we detest, sharpness, greed, acquisitiveness, meanness, egotism and self-interest, are the traits of success. And while men admire the quality of the first, they love the produce of the second.”

— John Steinbeck, *Cannery Row*



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## PART ONE: THE INCREASING PREVALENCE OF MENTAL HEALTH ISSUES FOR COUNSEL AND CLIENTS

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### MENTAL HEALTH ISSUES IMPACTING ATTORNEYS (PRE-COVID)

- 2016 Study of 15,000 lawyers\* surveyed reported:
  - 19% reported having severe anxiety symptoms
- 2020 Study (conducted pre-Covid) of 3,800 lawyers\*\* reported:
  - 64% reported having some form of anxiety
  - 31.2% reported symptoms of depression
  - 10.1% reported having an alcohol problem and 2.8% reported have a drug problem

\*Joint Study of ABA Commission on Lawyers Assistance Programs and Hazelden Betty Ford Foundation

\*\*ALM Mental Health and Substance Abuse Survey (published 2020)



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## COVID HAS MADE MATTERS WORSE FOR LAWYERS AND CLIENTS

- Lawyers: ALM's 2021 Mental Health & Substance Abuse Survey reports:
  - 71% of responding attorneys experienced anxiety (up from 64% in 2019)
  - 37% reported symptoms of depression (up from 31% in 2019)
  - 14% reported other types of mental illness (up 2% from 2019)
  - 70.35% reported that Covid has made their mental health worse
- Everyone: Center for Disease Control (CDC) March 2021\* reports:
  - Adults with symptoms of anxiety rose to 41.5% from 36.5% in preceding 6 months
  - Adults who report needing mental health counseling rose from 9.2% to 11.7%

\*Sarah Toy Pandemic's Toll on Mental Health Continues to Increase, Wall Street Journal, March 26, 2021  
<https://www.wsj.com/livecoverage/covid-2021-03-26/card/CurKR5fan9TiTMj5IHAb>



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## IT'S NOT JUST COVID IMPACTING MENTAL HEALTH

- More feedback from ALM's 2021 Survey\*:
  - "I am expected to be on 24/7. I get calls and emails all night and over the weekend, and late nights and weekend deadlines have become the norm. It is starting to ruin my personal relationships. ...Pre-Covid, similar concerns applied, but it wasn't as bad. The root of it is client expectations."
  - 61% report they "can't disconnect" from clients or work, up from 58% in 2020

\*Dylan Jackson, Legal Professionals Were Already Struggling With Stress and Isolation, and the Pandemic Has Made Things Much Worse, The American Lawyer [May 3, 2021] <https://www.law.com/americanlawyer/2021/05/03/lawyers-were-already-struggling-with-stress-and-isolation-and-the-pandemic-has-made-things-much-worse/>



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**RESOURCES FOR  
ASSESSMENT,  
ASSISTANCE AND  
FURTHER LEARNING**


SEE THE  
ATTACHED LINKS  
AND MATERIALS




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**PART TWO:  
SIGNS OF POTENTIAL  
COMPETENCY ISSUES**





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## IDENTIFYING COMPETENCY ISSUES IN DIFFERENT SETTINGS

- View from the bench
- The litigator's perspective
- Linking attorney anxiety to mental health
- Organizational dynamics impacting group and individual behavior



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## POTENTIAL INDICATORS OF COMPETENCY ISSUES

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>■ Swearing</li> <li>■ Rapid speech</li> <li>■ High level of anger</li> <li>■ Repeating themselves many times</li> <li>■ Yellers; personal, misogynistic, discriminatory attacks</li> <li>■ Liars; misrepresenting facts; false accusations</li> <li>■ Sloppy – unkempt – inappropriate clothing</li> <li>■ Nasty attitude – biting – sarcastic comments</li> </ul> | <ul style="list-style-type: none"> <li>■ Habitually interrupting Court, counsel or neutral</li> <li>■ Habitually ignoring orders or rules</li> <li>■ Keeping jurors, counsel, Court, neutral waiting</li> <li>■ Incoherent or disingenuous arguments</li> <li>■ Non-responders</li> <li>■ Blatant violation of Evidence Code</li> <li>■ Constant excuses</li> </ul> |
|---|---|



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## PART THREE: HOW TO REDUCE AND MANAGE PROBLEMATIC BEHAVIOR

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## REDUCING AND MANAGING PROBLEMATIC BEHAVIOR

- Preparing clients and managing expectations
- Dealing with adversaries in court, negotiations, and ADR settings
- ADR strategies to reduce stress and improve outcomes

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THANK YOU FOR ATTENDING – KEEP IN TOUCH



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## **IDENTIFYING & MANAGING DISRUPTIVE COUNSEL & CLIENTS: Impacts on Competency in Court, Negotiation and ADR, and Steps to Reduce and Manage Problematic Behavior**

***CCCBA ADR SECTION | ADR SERVICES, INC.***

***JULY 28, 2021***

### **Panelists**

- The Hon. Paul Beeman, (Ret)., *ADR Services, Inc.* - <https://www.adrservices.com/ neutrals/beeman-paul/>
- Bette Epstein, *ADR Services, Inc.* - <https://www.adrservices.com/ neutrals/epstein-bette/>
- Audrey Gee, *Brown, Gee & Wegner* - <https://www.bgwcounsel.com/ audreygee>
- Mark LeHocky, *ADR Services, Inc.* - <https://marklehocky.com/>

### **Outline**

- Introduction
  - Objectives of our program
  - Background of our panel
  - An Interactive program
- Part One: The Increasing Prevalence of Mental Health Issues for Counsel and Clients
  - Mental health issues impacting attorneys (Pre-Covid)
  - Covid has made matters worse for lawyers and clients
  - It's not just Covid impacting mental health
  - Resources for assessment, assistance, and further learning
- Part Two: Signs of Potential Competency Issues
  - View from the bench
  - The litigator's perspective
  - Linking attorney anxiety to mental health issues
  - Organizational dynamics impacting group and individual behavior
- Part Three: How to Reduce and Manage Problematic Behavior
  - Preparing clients and managing expectations
  - Dealing with adversaries in court, negotiations, and ADR settings
  - ADR strategies to reduce stress and improve outcomes



## Resource Material / Additional Reading

### THE PREVALENCE OF MENTAL HEALTH AND COMPETENCY ISSUES IMPACTING ATTORNEYS

- [Lizzy McLellan](#) *"The State of Mental Health in the Legal Industry"* [NOTE: pre-Covid]
  - February 19, 2020 at 11:00 AM [Law.com]
  - Terry DeMeo, JD, MCC, *Lawyer Anxiety: Causes, Signs, and How to Manage* [Clio Blog Post, updated March 23, 2021] <https://www.clio.com/blog/lawyer-anxiety/>
- [Dylan Jackson](#), *Legal Professionals Were Already Struggling With Stress and Isolation, and the Pandemic Has Made Things Much Worse*, The American Lawyer [May 3, 2021] <https://www.law.com/americanlawyer/2021/05/03/lawyers-were-already-struggling-with-stress-and-isolation-and-the-pandemic-has-made-things-much-worse/>
- [Sarah Toy](#) *Pandemic's Toll on Mental Health Continues to Increase*, Wall Street Journal, March 26, 2021 <https://www.wsj.com/livecoverage/covid-2021-03-26/card/CurKR5fan9TiTMj5IHAb>
- Barry A. Goodfield, Ph.D., *Do Lawyers Have Problems Being People?* (1978) <https://mail.google.com/mail/u/0/?ogbl#search/audr/FMfcgzGkXmgnWQSKrgtRlBncmHHpxklh?projector=1&messagePartId=0.1>
- Scott Mitchell, *Mental Health in the Legal Profession*, Minority Corporate Counsel Assoc. (September/October 2007) <https://www.mcca.com/mcca-article/mental-health-in-the-legal-profession/>

### RESOURCES AND READING TO ASSESS AND IMPROVE MENTAL HEALTH AND WELL-BEING

- Paula Davis-Laack, *The Science of Well-Being and the Legal Profession*, Wisconsin Lawyer [April 2010] <https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=83&Issue=4&ArticleID=2033>
- Greg Dorst, *The Healthy Lawyer (Advocati Sani): Anxiety Is Here! Build Your Own Toolkit*, California Lawyers Association [October 27, 2020] <https://calawyers.org/california-lawyers-association/the-healthy-lawyer-advocati-sani-anxiety-is-here-build-your-own-toolkit/>
- Jeena Cho, Karen Gifford, *The Anxious Lawyer*, American Bar Association [2016]
- Sharon Miki, *Why Being a Lawyer Is Stressful & 7 Tips to Manage Lawyer Stress* [Clio blog post – 5/14/2021] [https://www.clio.com/blog/lawyer-stress/?utm\\_source=internal&utm\\_medium=email&utm\\_campaign=weekly-blog&utm\\_content=cta&mkt\\_tok=MDQ4LUFDUj05MzAAAAF9CwKW0G0qgdZKMnu5pNzR7TJ6G-gYY1lhmXpecY-tYlxjvvnvG3fsJkbJY79QREYInHTrtVA\\_89EdHrMnx-PRelH8HrmfSn6SsBUTenN02s38VQ](https://www.clio.com/blog/lawyer-stress/?utm_source=internal&utm_medium=email&utm_campaign=weekly-blog&utm_content=cta&mkt_tok=MDQ4LUFDUj05MzAAAAF9CwKW0G0qgdZKMnu5pNzR7TJ6G-gYY1lhmXpecY-tYlxjvvnvG3fsJkbJY79QREYInHTrtVA_89EdHrMnx-PRelH8HrmfSn6SsBUTenN02s38VQ)
- Community Resources for education and assistance available to all (covering Anxiety, Addiction, Depression, Family and Mental Illness, etc.): <https://uhs.berkeley.edu/facstaff/employee-assistance/resources/community>



- Mental Health Information – Learn more about mental health and take an online mental health test: *Mental Health America* -- <https://screening.mhanational.org>

Related Resources -- Rules Prohibiting  
Problematic, Uncivil and Unprofessional Behavior

- Lawyers' duty of civility set forth multiple times in the ND Guidelines for Professional Conduct, to clients, opposing parties and counsel, the courts and the public as a whole. <https://www.cand.uscourts.gov/forms/guidelines-for-professional-conduct/>

- **Civility toolbox**

The Attorney Guidelines of Civility and Professionalism provide best practices of civility in the practice of law and are offered to promote both the effectiveness and the enjoyment of the practice of law and economical client representation.

At the request of Shelly Sloan, then president-elect of the State Bar Board of Trustees, the board appointed the Attorney Civility Task Force in August 2006 to study and recommend aspirational civility guidelines for adoption by the board. In July 2007, after the task force made further revisions to incorporate suggestions made in public comment, the Board of Trustees adopted the "California Attorney Guidelines of Civility and Professionalism" as a model set of guidelines for members, voluntary bar associations and courts to use and implement in a way that is effective for the local legal community.

- [Attorney Guidelines of Civility and Professionalism \(Civility Toolbox\)](#) (PDF)
- [Sample resolution](#) (Word)
- [Sample court order](#) (Word)
- [Civility and Ethics PowerPoint Presentation](#) (PowerPoint)

<http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Attorney-Civility-and-Professionalism>

Civility Toolbox:

[http://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised\\_Sept-2014.pdf](http://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf)

- **Contra Costa Rules:** <http://www.cc-courts.org/local-rules/docs/2018LocalCourtRules.pdf>

Chapter 8. Standards of Professional Courtesy Rule 2.90. Consideration of History of Breaches in Professional Courtesy. The Court acknowledges that the Contra Costa County Bar Association has adopted "Standards of Professional Courtesy," which are incorporated in these Local Court Rules. In any motion filed pursuant to Code of Civil Procedure Sections 128, 128.7, 177 and 177.5 and various local rules, the Court may take into consideration counsel's history of breaches of these standards in deciding what, if any, sanctions to impose. (Rule 2.90 revised effective 1/1/15) Local Rules of the Superior Court of California, County of Contra Costa 2018 Local Court Rules – Effective



January 1, 2018 Page 25 of 171 Rule 2.91. Standards of Professional Courtesy (a) Purpose of these standards Attorneys are most often retained to represent their clients in disputes. The practice of law is largely an adversarial process. Attorneys are ethically bound to zealously represent and advocate their clients' interest. Nonetheless, there exist certain standards of professional courtesy that are observed, and certain duties of professionalism are owed by attorneys to their clients, opposing parties and their counsel, the Courts and other tribunals, and the public as a whole. Members of the Contra Costa County Bar Association have practiced law with a level of professionalism that goes well beyond the requirements of the State Bar mandated Code of Professional Conduct. The following standards of professional courtesy describe the conduct preferred and expected by a majority of attorneys practicing in Contra Costa County in performing their duties of civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, cooperation and competence. These standards are not meant to be exhaustive. They should, however, set a tone or guide for conduct not specifically mentioned in these standards. (b) Professional courtesy standards These standards have been codified to make the level of professionalism reflected in them the standard for practice within Contra Costa County, with the hope that their dissemination will educate new attorneys and others who may be unfamiliar with the customary local practices. These Standards have received the approval of the Board of Directors of the Contra Costa County Bar Association. They have also been endorsed by the Judges of the Superior Court of Contra Costa County, who expect professional conduct by all attorneys who appear and practice before them. They will be considered by those judges in their rulings pursuant to California Code of Civil Procedure Sections 128, 128.7, 177, and 177.5, as provided for in Local Court Rule 2.90. All attorneys conducting any practice of law in Contra Costa County are encouraged to comply with the spirit of these standards and not simply blindly adhere to the strict letter of them. The goals stated and inherent herein are equally applicable to all attorneys regardless of area of practice. (c) Conformity with other statutes or rules This Code is, of course, not a substitute for the statutes and rules, and no provision of this Code is intended to be a method to extend time limitations of statutes and rules, including fast track time limitations, without appropriate court order. (Rule 2.91 revised effective 1/1/15)

- **Rule of Professional Conduct 1.1: Competence**

RULES OF PROFESSIONAL CONDUCT Rule 1.1 Competence

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably\* necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes\* to be competent, (ii) acquiring sufficient learning and



skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes\* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably necessary in the circumstances.

In addition, we may want to include Rule 5.1 relative to responsibility for supervising other attorneys.

- **Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers (Rule Approved by the Supreme Court, Effective November 1, 2018)**

(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these rules and the State Bar Act.

(b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm, shall make reasonable efforts to ensure that the other lawyer complies with these rules and the State Bar Act.

(c) A lawyer shall be responsible for another lawyer's violation of these rules and the State Bar Act if: (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

- **Additional resources:** Below are links to civility guidelines and ethics opinions prepared by California courts and bar associations. This list is intended to be helpful but is not exhaustive.

**COURTS**

- [Los Angeles Superior Court](#)
- [Orange County Superior Court](#)
- [Santa Clara Superior Court](#)
- [San Francisco Superior Court](#)
- [Sacramento Superior Court](#)
- [CD Cal](#)
- [ND Cal](#)

**E-DISCOVERY**

- [ND Cal e-discovery](#)
- [Delaware e-discovery](#)

**ETHICS OPINIONS**

- [LACBA Ethics page](#)
- [CA Bar Ethics page](#)
- [ABA Ethics page](#)

THANK YOU FOR YOUR TIME



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