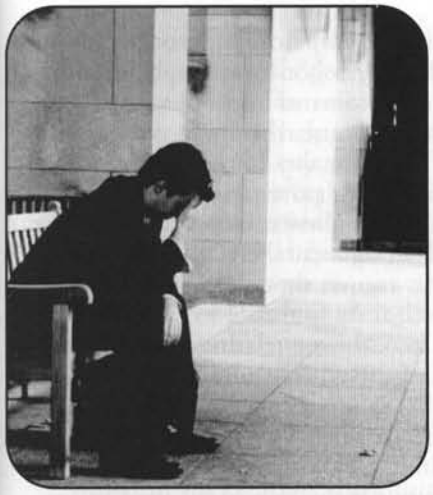

Legal Ethics and Depression

By Michael H. Hoeflich

Depression is a serious disease. Dr. Peter D. Kramer has recently written:

> Depression destroys families. It ruins careers. It ages patients prematurely. It attacks their memories and their general health ... the truth that depression is a disease is unqualified. Depression is debilitating, progressive, and relentless in its downhill course, as tough and worthy an opponent as any doctor might choose to combat.[1]

Generally, psychiatrists identify nine symptoms of major depression: "depressed mood, problems experiencing pleasure, low energy, disrupted sleep, diminished or increased appetite, mental and physical agitation or slowing, feelings of worthlessness and guilt, difficulty concentrating, and suicidality."[2]

The Depressed Lawyer

We may contrast the symptoms of depression listed above to the first standard for ethical behavior by lawyers set forth in Kansas Rules of Professional Conduct (KRPC) 1.1:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.[3]

This has been further elaborated by the American Law Institute – American Bar Association as requiring that a lawyer possess:

> ... knowledge, skill, efficient practice management [skills], ability to identify issues beyond one's own competence, preparation and follow-through, and **intellectual, emotional, and physical capability** ... [emphasis added][4]

Here, of course, comes the conflict. Can a lawyer who is suffering from a major depression continue to practice law ethically without some intervention? The answer, I believe, is "no" in many, if not most cases. And herein lies the problem.

Recent scientific studies have made it very clear that most forms of major depression have definite physical pathologies that often involve progressive chemical and physical changes to the brain.[5] Further, a substantial number of those individuals who suffer from major depression have a genetic predisposition to do so. In addition, stress, particularly stress that also involves a sense of loss or humiliation, may trigger major depression.[6]

No lawyer or lawyer's spouse needs to be told that the practice of law today involves great stress.[7] Further, many lawyers also develop a sense of alienation when they are overburdened with work and forced to spend time away from families, friends, etc. When one adds to this the inevitable competitiveness of law practice today as well as the problems, often humiliating and exasperating, practice brings, one must expect that a substantial number of lawyers will fall prey to major depression.[8] Depression often leads to substance abuse as a way of avoiding negative or suicidal thoughts.[9]

Depression is real, although many people — both who suffer from depression and those who live with them — try to hide from the harsh reality of the disease. Those who are lawyers are particularly prone to such denial because they fear that admitting to suffering from depression and then seeking help to escape from depression will have a negative effect on their careers and ability to earn a living. Men and women who might quickly disclose that they suffered from cancer or diabetes will attempt to hide that they suffer from depression, even though depression is no less a physical ailment than the others. Let me give an example from my own experience.

Several years ago, a student of mine began to come to see me in my office to chat. It was obvious to me that he was more anxious than usual, but I didn't understand why. Eventually he began to telephone me at home. The student was doing extremely well in law school and excelled in everything he attempted. Yet it quickly became apparent that he truly believed that he was a failure, that he would not be admitted to the bar, that his life was ruined. There was absolutely no reality to these fears, but they were all too real to this student. He was unable to sleep, to eat, to study. Indeed, it was obvious that he was rapidly becoming unable to cope and that his fears might, ironically, be realized because they were keeping him from doing even simple tasks.

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1. Peter D. Kramer, AGAINST DEPRESSION 1 (Viking Books 2005).
2. *Id.* at 159.
3. KANSAS RULES OF PROFESSIONAL CONDUCT R. 1.1 (2004) [hereinafter KRPC].
4. Annotated MODEL RULES OF PROFESSIONAL CONDUCT, 3rd ed., p.3 (ABA Ctr. for Prof'l Responsibility, 1996)(quoting ALI-ABA Comm. on Continuing Prof'l Educ., A MODEL PEER REVIEW SYSTEM. (1980)).
5. Kramer, *supra* note 1, at 48-62.
6. *Id.* at 116-123.
7. For an excellent novelistic treatment of the stress and alienation experienced by practicing lawyers today, *see* Kermit Roosevelt, IN THE SHADOW OF THE LAW (Farrar, Straus, and Giroux 2005).
8. Recent studies confirm this. *See* G. Andrew H. Benjamin, et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 233, 233-246 (1990).
9. Kramer, *supra* note 1, at 142-144.

When I realized that this student's problems were far beyond my competence to handle, I told him that I thought that he needed to see someone at our student health center so he could be properly evaluated and helped. He refused. He refused because he did not want to be forced to disclose that he had sought psychiatric help on the bar examination application. He feared that if he made this disclosure he would never be able to escape the ill effects of being labeled a depressive. Fear of the reputational consequences of seeking help kept him from getting the help he needed. Indeed, a recent study of law students conducted by a psychiatrist showed that the incidence of clinically diagnosable depression among law students is much higher than among the general population.[10] In this 1990 study, the researchers found that at a time when depression afflicted between nine and 10 percent of the general population, 32 percent of first-year law students were depressed and 40 percent of third-year law students were diagnosed as suffering from depression in the test group.[11] That percentage of law students suffering from depression was so much higher than the percentage for the general population and that this percentage increased by a quarter between the first and third years is particularly worrying.

The situation above is not unique, nor is it limited to law students. The fact of the matter is that many lawyers suffer from depression. The researchers who conducted the law student study followed up by tracking these individuals two years after they graduated. They found that the percentage of these young lawyers who were depressed had gone down, but still hovered at 17 percent, almost twice the percentage found in the general population.[12] The very nature of this disease makes it exceptionally difficult for these lawyers to cope with even the simplest tasks. It will take an otherwise competent lawyer and make him incompetent. If he continues to practice law while under the impairment brought about by the disease, or by attempts to escape the symptoms of the disease through substance abuse, the lawyer violates the KRPC and makes himself liable to discipline and, potentially, malpractice suits by his clients. Good faith and the debilitating mental effects of the disease are no excuse, though they might serve as mitigating factors.[13]

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A second issue relating to the interaction of the ethical rules and depression is what is often called the "one bite of the apple rule." Generally, lawyers who commit a violation of KRPC will not be seriously disciplined for the first violation.[14] Indeed, the American Bar Association has issued an informal opinion to this effect.[15] In cases in which a lawyer has hidden the existence of his depression this could be particularly problematic because he will then have no immediate professional reason to seek out help.

In order to deal with the ethical problems presented by the depressed lawyer, one must consider several things. First, what should lawyers do when they realize that they or a colleague of theirs is suffering from a debilitating depression? Second, is there any way to help prevent depression in lawyers?

The answer to the question of what to do when a lawyer either realizes that he or a fellow lawyer is suffering from depression is that intervention is required. By its very definition, depression means that a lawyer may not be emotionally fit to continue to practice without help. If a lawyer decides that he himself is depressed to the point where it is substantial enough to be debilitating, then the lawyer should seek immediate medical help. The good news is that scientific studies over the last decade have made it clear that depression has a physiological basis and that this pathology can be changed by pharmacological or other therapeutic intervention.[16] There are, in fact, drugs now available that can make a real difference and put depression, even major depression, into remission.

10. Benjamin, *supra* note 8, at 234.
11. *Id.*, at 234.
12. *Id.*, at 234.
13. *In re Wolfram*, 847 P.2d 94 (Ariz. 1993).
14. ABA Ctr. for Prof'l Responsibility, *supra* note 4, at 2-3.
15. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1273 (1973). Of course, this opinion interprets the Model Code rather than the Model Rules. Some courts have criticized this opinion, as well, *see* ABA Center on Professionalism, *supra* note 4, at 3.
16. Kramer, *supra* note 4, at 172-188.

In the common case in which an individual lawyer either does not realize that he is suffering from depression or is unwilling to seek help, then others must intervene. In my opinion, the best such intervention is through a bar-run lawyer assistance program, such as the one in Wichita.[17] In fact, KRPC 8.3(a) would appear to require that a lawyer, aware of a colleague's incompetence because of depression, to take action:

> A lawyer having knowledge of any action, inaction, or conduct, which in his opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.

As a general rule, lawyer assistance committees act with strict confidentiality. Indeed, KRPC 8.3(c) specifically states that:

> ... a lawyer is not required to disclose information concerning any such violation [of the KRPC] which is discovered through participation in a Substance Abuse Committee ... [etc.]

Thus, a depressed lawyer can seek out or be sent to a lawyer assistance committee without fear that his illness will be disclosed.[18] Once one accepts that depression is a physical illness, which the sufferer cannot control, then the appropriate response by the bar must be first to seek to help the depressed lawyer and not to punish him.

The answer to the second question of how to help prevent depression in the legal profession is more difficult. Since there are links between heredity and depression in many cases it will be impossible to completely eradicate depression in the bar.[19] On the other hand, research has demonstrated that one of the most important "triggers" for major depression is stress, and this can be controlled to some extent. Increasingly, the "law business" has become more competitive and far more stressful. Standards of civility have dropped. Collaborative work among lawyers has become more difficult. Hours worked, particularly among young lawyers, have increased. The time has come when the bar as a whole must recognize the very real dangers to the members of the bar and their clients from such behavior. If we are to minimize depression among lawyers we must begin by improving conditions of work at the bar. This means increasing civility and collaboration and recognizing that younger lawyers, in particular, need to have time away from work.

Secondly, law schools must do a better job in advising students about the dangers of depression and encourage law students to seek help when it is needed. This task will be made much easier if the Kansas Supreme Court helps by removing any questions relating to psychiatric treatment from the bar exam questionnaire. Furthermore, the Kansas Bar Association and local bars throughout the state should take steps to demystify the problem of depression among lawyers and help to remove the stigma of depression by educating lawyers on the subject. The problem of depression and depression-induced violations of KRPC 1.1 will only be solved when lawyers feel comfortable in seeking treatment for it.

The Depressed Client

Depression, of course, is not a disease unique to lawyers. Millions of individuals suffer from depression in the United States today. It is inevitable that lawyers in practice will encounter clients who suffer from depression. This may be especially true for lawyers who deal with elderly clients. Recent studies have indicated that one form of depression, known as "vascular depression," is a direct result of the aging process in some people.[20]

When a lawyer believes that he has a depressed client, he must first recognize that he needs to be guided ethically by KRPC 1.14. This rule sets out the standards for dealing with a disabled client. First, of course, the lawyer must recognize that his client is disabled by his or her depression. Once a lawyer has decided that his client is disabled then KRPC 1.14 sets out a two step process. KRPC 1.14(a) states:

> When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, **mental disability**, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. [emphasis added]

Thus, in the case of a depressed client, if the lawyer has decided that the client may be depressed and, therefore, impaired in his ability to make decisions, the lawyer must first attempt to work with the client to see if there is a way to maintain the normal lawyer-client relationship. This means, of course, that the lawyer must be able not only to recognize the signs of major depression, even if the client is in denial, but also make the judgment whether the client's decision-making is sufficiently normative as to permit the lawyer to continue the representation without further intervention. This is, in all likelihood, asking far too much of most lawyers. Lawyers do not have psychiatric training nor should they, in most cases, attempt to make a diagnosis of a client's depression.

If the client is so depressed that the maintenance of the normal lawyer-client relationship becomes impossible, then KRPC 1.14(b) sets out the means by which the lawyer may "seek a guardian or take other protective action" on behalf of the client.[21] But all of this is useless if the lawyer is unable to determine whether the client is depressed and if so, whether so depressed as to be unable to make normal decisions about his representation. Certainly, many lawyers will hesitate to seek guardianship or other protective action simply on the basis of a client's depression, especially if the client has not accepted that he or she is depressed to begin with. As a profession, we must

17. *See generally* Fred Zacharias, *A Word of Caution for Lawyer Assistance Programming*, 18 GEO. J. LEGAL ETHICS 237, 237-249 (2004).

18. Nonetheless, such a committee will have to take further action, including disclosure, if the impaired lawyer will not obtain the professional health they he require.

19. Kramer, *supra* note 4, at 126-127.

20. Kramer, *supra* note 4, at 176-177.

21. KRPC 1.14(b).

find a way to deal with the subtlety of depression and its symptoms, since the disease is often one not recognized by the sufferer. This is a very serious flaw in KRPC 1.14. At the very least, lawyers need to be educated about the symptoms of depression and be able to realize that they may need to counsel their clients to seek professional evaluation.

Conclusion

Depression, in both lawyers and their clients, is an extremely serious problem to which far too little attention has been given by the bar and by law schools. The increasing understanding of the pathology of depression combined with the greater availability of pharmaceutical treatments for many types of depression mandates that the bar become more knowledgeable about this disease and more aggressive in dealing with the ethical, professional, and human problems it causes. ■

About the Author

Michael Hoeflich *has a B.A. and M.A. from Haverford College, an M.A. from Cambridge University, and a J.D. from Yale Law School. He has taught at the University of Illinois, Syracuse University, and the University of Kansas. He also served as dean of the College of Law at Syracuse University for six years and as dean of the School of Law at the University of Kansas for six years. He stepped down from the deanship at KU on July 1, 2000. He is currently the John H. & John M. Kane Distinguished Professor of Law at the University of Kansas. He has published six books and more than 60 major articles. He teaches and writes in the areas of legal history, legal ethics, contract law, and technology law, among others.*