

*The Litigator and Mental Health*¹

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Introduction

These past two years, in which our lives have been dominated by the global pandemic, have enhanced our awareness of the importance of mental health in our society and in our profession. Perhaps it can be attributed to the cloud of stress and anxiety that has hung over us during the pandemic. Perhaps it is isolation from family, friends, and colleagues – our usual sources of comfort and support. Perhaps it is because many of us have been working from home and there has been no divide between “work” and “life”, making it almost impossible to balance the two. Perhaps many of us, having survived the past two dreadful years, are saying: “I have to make some changes in my life.” The description of 2022 as the “Great Resignation” may well prove apt.

Thankfully, whatever the causes, there has also been an increased commitment to addressing mental health in our society, in our profession, and in our own lives. People have been talking about mental health in an unprecedented way: openly, compassionately, and practically.

My focus in this paper is to discuss mental health and the work of barristers, but what I have to say probably applies to all areas of practice. My message is that we need top-down change in our approach to mental health in the legal profession. And that change needs to be driven by leaders of law firms and by leaders of the bar.

I do not purport to be an expert when it comes to mental health or to have all the answers. But I have close to fifty years of experience in the law, and I offer these observations in the hope that they inspire reflection and much-needed change in the mental health of litigators.

I begin with a question: Why is it that we never talk about mental health and litigation in the same conversation? I think it’s partly because mental health, like physical health, is common to everyone. We don’t think of mental health as something we all experience. Instead, we think mental health means mental illness or poor mental health, and that both undermine one’s ability to be a litigator.

¹ I wish to acknowledge the significant contributions to this paper made by Courtney Harris, a staff lawyer at the Court of Appeal for Ontario, and Jenna Topan, a law clerk at the Court. I also wish to acknowledge the comments provided by other colleagues and clerks, including law clerks Sara Little, Sonia Patel, and Aya Schechner.

Mental illness is stigmatized by our society and by our profession. Stereotypical thinking about mental health in the legal profession associates poor mental health or illness with an inability to control emotions or thoughts, a lack of judgment, the inability to work hard or withstand pressure, and unreliability.

By contrast, the stereotypical barrister is held in high esteem: a fearless gladiator, wielding a razor-sharp intellectual broadsword. Always in control of their emotions. Erudite and articulate. Powering through long hours of work with pride and not breaking a sweat under pressure. Sometimes wounded, but never defeated. Suffering in silence and quietly bandaging their own wounds, ready to fight another day. And able to “play hard” as well as “work hard”.

The grip of these two myths on our profession – that mental health is something that affects others, not us, and the gladiator litigator myth – means that we rarely discuss mental health in the same conversation as litigation because we believe one precludes the other. For too long, members of our profession have been beholden to the idea that our experiences in navigating mental health challenges, whatever they may be, are incongruous with a successful career in litigation. We have internalized the myth that only the invincible are successful. We need to call out these myths – not only because they are false, but also because they send the wrong message about who “belongs” in litigation. And because they cause terrible suffering for those who believe that they cannot or do not measure up to the gladiator ideal.

Let me digress for a moment and provide some context.

Some Facts About Mental Health

The Canadian Mental Health Association – a world leader in mental health research and advocacy – has helped to challenge some myths about mental health. It tells us that the presence or absence of a mental illness is not a predictor of mental health; someone without a mental illness can have poor mental health, and a person with a mental illness can have excellent mental health.²

It's important to understand the difference between the terms “mental illness” and “mental health”. Mental illnesses are health problems that affect the way we think about ourselves, relate to others, and interact with the world around us. Depression and anxiety disorders are the most common mental illnesses. “Mental health”, on the other hand, “is a concept similar to ‘physical health’: it refers to a state of well-being [and] includes our emotions,

² “Fast Facts about Mental Health and Mental Illness” (19 July 2021), online: *Canadian Mental Health Association* <www.cmha.ca/brochure/fast-facts-about-mental-illness/>.

feelings of connection to others, our thoughts and feelings, and being able to manage life's highs and lows.”³

Society's imperfect understanding of mental illness tends to see it as static. Most mental illnesses are in fact episodic. People who live with mental illness can have long periods of being well and productive, and other periods when they are unwell and need time to recover. Mental illnesses are treatable. Just like physical illnesses, people who are ill require recovery time. Recovery from any illness is tiring and returning to work may need to be gradual. Early support means an earlier path to recovery.

One of the greatest barriers to treatment is the stigma associated with mental illness. This stigma casts blame on the person who is unwell and makes them fearful and ashamed to ask for help, out of concern that it will impact their career. As a result, people often hide mental health issues and suffer in silence. A culture of shame, blame, and criticism leads to isolation and harm to our colleagues and our clients.

Mental Health in Our Society and Our Profession

The statistics are probably familiar to all of us. One in five Canadians deals with mental illness such as depression, severe anxiety, or stress disorders.⁴

But the incidence of mental illness in the legal profession is considerably greater than in society as a whole. A study done by the American Bar Association found that almost one-third of practicing lawyers in the United States were dealing with some level of depression or anxiety and between 21-36% qualified as problem drinkers.⁵ A 2021 survey conducted by the International Bar Association found that incidence of mental health concerns is greater among younger and mid-career lawyers than older lawyers.⁶

In the Canadian context, a study at the University of Toronto compared two studies of lawyers in Canada and the United States.⁷ It found that there was a strong correlation between signs of depression and the traditional markers of career success in the legal

³ *Ibid.*

⁴ “Understanding mental health in the legal profession”, *LAWPRO Magazine* 19:1 (1 January 2020) 5 at 6, online: <www.practicepro.ca/wp-content/uploads/2020/01/2020-01-understanding-mental-health.pdf>. See also “Mental Illness and Addiction: Facts and Statistics”, online: *Centre for Addiction and Mental Health (CAMH)* <www.camh.ca/en/driving-change/the-crisis-is-real/mental-health-statistics>.

⁵ *LAWPRO Magazine*, *ibid.* See Patrick R. Krill, Ryan Johnson & Linda Albert, “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys” (2016) 10:1 *Journal of Addiction Medicine* 46, DOI: <10.1097/ADM.0000000000000182>.

⁶ “Mental Wellbeing in the Legal Profession: A Global Study” (October 2021), 1 at 31, online: *International Bar Association* <www.ibanet.org/document?id=IBA-report-Mental-Wellbeing-in-the-Legal-Profession-A-Global-Study>.

⁷ Jonathan Koltai, Scott Schieman & Ronit Dinovitzer, “The Status-Health Paradox: Organizational Context, Stress Exposure, and Well-being in the Legal Profession” (2018) 59:1 *Journal of Health and Social Behavior* 20, DOI: <10.1177/0022146517754091>.

profession. In other words, the more successful they are in their field, the more likely lawyers are to experience mental health challenges.

A study by the Barreau du Québec, commenced in 2015, focused on psychological distress, burnout, and well-being among lawyers, found that 43% of the participants in the study reported “psychological distress” including a combination of symptoms similar to burnout and depression, ranging from fatigue to irritability to anxiety, difficulty sleeping and difficulty concentrating.⁸ The proportion of psychological distress was marginally higher (about 5% higher) in women than in men, but a proportionately higher number of young men experienced severe distress. The stress level among lawyers practicing for ten years or less was higher (49.9%) than more senior lawyers (36.7%). The same study found 22.4% of lawyers with 10 years or less experience were affected by “burnout”, described as a “state of fatigue and physical, emotional and mental exhaustion” in the personal, organizational, and relationship spheres.

The COVID-19 pandemic has unquestionably had a serious impact on most Canadians. An early survey referenced by CAMH (in “Mental Health in Canada: Covid-19 and Beyond”) indicated that 50% of Canadians reported worsening mental health due to the pandemic, citing worry and anxiety.⁹ One in ten said their mental health had deteriorated “a lot”. Related studies found that 25% of Canadians in the 35–54-year age bracket and 21% of those 18-34 had increased their alcohol consumption during the pandemic.¹⁰ More recent surveys reveal similar concerns.¹¹

The Law Society’s Mental Health Strategy Task Force reported an evidentiary basis for its conclusion that “legal professionals may be at an even higher risk than the general population of experiencing career and life challenges and struggles with mental illness and addictions.”¹² Most concerning is its commentary on the negative impacts of stigma in our profession:

⁸ “Study of Factors Affecting the Mental Health of Québec Lawyers in the Workplace – Study Summary: Highlights”, online: *Barreau du Québec* <www.barreau.qc.ca/media/2416/sommaire-sante-psychologique-travail-avocats-anglais.pdf>. A national study into the well-being of legal professionals is ongoing, also with lead researcher Dr. Nathalie Cadieux: “Law Society participates in National Well-Being Study of legal professionals” (7 June 2021), online: *Law Society of Ontario* <www.lso.ca/news-events/news/latest-news-2021/law-society-participates-in-national-study-on-well>.

⁹ “Mental Health in Canada: Covid-19 and Beyond” (July 2020), online: *Centre for Addiction and Mental Health (CAMH)* <www.camh.ca/-/media/files/pdfs---public-policy-submissions/covid-and-mh-policy-paper-pdf>.

¹⁰ *Ibid.*

¹¹ See e.g., “COVID at Two: Vast majorities say the pandemic has pulled Canadians apart, brought out the worst in people” (10 March 2022), online: *Angus Reid Institute* <www.angusreid.org/covid-19-two-year-anniversary>.

¹² “Mental Health Strategy Task Force – Final Report to Convocation” (28 April 2016), 335 at 336, 343, online: *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation-april-2016-mental-health.pdf>.

The culture of and stressors on the legal professions raise barriers to openly addressing these issues for those who may be affected by them and those with whom they work and interact. The stigma surrounding mental illness and addictions, the too common confusion of diagnosis with impairment and the concerns that careers will be permanently and negatively affected by disclosure have a particular impact on licensees' willingness to reveal such illness or addictions.¹³

Stigma associated with mental health is a major reason why people don't seek help for it. In a survey of working Canadians in 2019, 75% of the respondents said that they would be reluctant, or would refuse, to disclose a mental illness to an employer or a co-worker, largely because of the stigma associated with mental illness and being afraid of the consequences, including being treated differently or losing their job.¹⁴

Of particular concern is the fact that lawyers appear reluctant to take advantage of mental health resources, such as the Law Society's Member Assistance Program. Statistics published by LAWPRO Magazine suggest that legal professionals in Ontario seek mental health assistance at a rate that is approximately half that of other professions.¹⁵

The lesson from these numbers is that the mental health and well-being of the legal professions is a serious institutional issue.

Mental Health and Litigation

Let's face it: Law is a stressful profession. If you are reading this paper, you already know that. I am not sure that litigation is any more stressful than any other aspect of the practice. I know that my friends and former colleagues who practiced in areas like commercial law, taxation, securities law, and commercial real estate lived with enormous stress caused by the huge amounts of money that turned on their opinions and advice, the increasingly frenetic pace of the practice, and the demands of their highly sophisticated clients.

Litigation is a wonderful career but is unquestionably stressful.¹⁶ It can have great highs and deep lows. You can have a great win at trial, only to lose on appeal. On the criminal side, losing may mean your client loses their liberty, sometimes for a very long time. On the family side, the stress is incredible – the lives of children and families changed by a signature on a judgment. In the civil realm, vast fortunes are won or lost as a result of the

¹³ *Ibid* at 343.

¹⁴ "Mental Illnesses Increasingly Recognized as Disability, but Stigma Persists" (24 September 2019), online: *IPSOS* <www.ipsos.com/en-ca/news-polls/Mental-Illness-Increasingly-Recognized-as-Disability>.

¹⁵ *LAWPRO Magazine*, *supra* note 4 at 7.

¹⁶ The Barreau du Québec study, mentioned above, found that litigation was the practice area with the highest proportion of psychological distress: *supra* note 8 at 3.

lawyer's work. And behind these wins and losses there are real people – our clients – who have trusted their counsel and whom counsel have come to like and respect.

Litigation is stressful because the financial and personal stakes for the parties are high, and the outcome is generally uncertain. The outcome depends a lot on the “performance” of counsel in a high-performance, win/lose, zero-sum environment. A premium is placed on confidence and excellence. The demands of the client, opposing counsel, and the court can be wearing. Long hours are required, particularly but by no means exclusively, during trials. The work takes place live and in real time: there is no opportunity for a re-do if things don't work out.

And, let's face it, your opponents sometimes come across as obstreperous, uncivil, and offensive jerks. Just getting an email or phone call from them can send your blood pressure and stress level rocketing. Believe me, I've been there.

It's Time for Law Firms to Do More About Mental Health

Some very talented lawyers – at all levels – are leaving their firms or even leaving law, because they see no purpose in their work, don't feel valued, and are realizing that their workplace is actually harmful to them. And those are the self-aware ones who have the ability or means to walk out the door. Many, many other lawyers, at all levels of the firm structure, are suffering in silence because they are afraid to ask for help, are fearful of being stigmatized, and feel that they have no personal or financial alternative. And none of this is good for the overall health of the law firm.

Much of the advice that has been given on mental health in the profession has focused on “self-help” for lawyers – learning and observing better work habits, eating and sleeping well, getting exercise, and developing hobbies. This is approaching the issue at the micro level. It is well-intentioned but is ultimately ineffective unless it is accompanied by change in the workplace. And this is where leadership is needed.

We need to approach mental health in the profession from the top down. Management committees and partners need to take a hard look at their workplace cultures, their leadership styles, and how they treat their partners and associates farther down the food chain. They need to ask themselves whether they are protecting and preserving their most important assets. And they need to develop strategies to do so and put senior people in charge of making those strategies work.

I think there is a great deal law firms can do to improve the mental health of their lawyers. And, frankly, it is just good business to do so.

So I suggest law firms can do the following.

1. Create an environment in which mental health can be discussed openly and safely

Law firms need to create an environment in which mental health is discussed in an open and safe way. To do that, law firm leaders need to lift the façade of invincibility and be open and candid about their own mental health experiences and challenges and about how they have learned to navigate those challenges. This openness will serve to destigmatize mental health issues and will help lawyers recognize the signs of a mental health crisis before it occurs. It will also encourage them to take measures to address their own challenges.

Those who live with a mental illness are natural leaders within a law firm and can draw from their own insights into mental illness and recovery. Their experience equips them to recognize the signs of mental health problems that can arise at times of personal and professional distress. They are often better prepared to manage them because they know how to access mental health services and support networks.

The resilience of people who live with adversity like mental illness can provide lessons to the profession on how to maintain good mental health to counter the stress, uncertainty, and pessimism that can accompany litigation. Doron Gold, a senior clinician with the LSO's Member Assistance Program, has noted that a job in law calls for pessimism to assess legal risk, which can lead to a pessimistic outlook on life. A person who has grappled with pervasive pessimistic thoughts common to depression and anxiety has often developed a healthy mental outlook and a degree of optimism that can be applied to the practice of law and equips them to maintain balance as legal professionals.

As a profession, we can only benefit from these lessons if we create an environment that welcomes candid conversations about mental health. Discussions in which we do not see someone's struggle with mental health as a liability, but as an experience that provides knowledge on brain health and an example of perseverance relevant to the profession. None of us is immune to the pressures of litigation. Talking about mental health candidly and learning from the experience of others helps us all to face challenges and be better, more supportive colleagues.

Talking about mental health must be accompanied by action to improve workplace functioning and the well-being of legal professionals. We must recognize that yes, people do need rest, time away, and exercise, but they cannot get it unless the firm makes space for them. Institute a regular and confidential check-up by a more senior lawyer for each associate to ensure that they are getting a fair share of the work – not too much or too little. Be prepared to adjust or re-assign work to ensure that it is shared appropriately. Examine billable hour targets and count hours for non-billable work such as mentoring, business development, CPD, and committee work within the target. Have a mental health policy and a mental health committee and give it the authority it needs to change the

workplace culture, fight stigma, and provide confidential peer support, as well as the resources to get the job done.

I will comment later in this piece about some of the advice typically given to young lawyers about maintaining good mental health – sufficient sleep, moderate exercise, a healthy diet, time with family and friends, mentorship, inclusion, engagement, civility, trust, and respect for colleagues. Accommodating these needs is not a tall order. If a law firm had a mental health committee, with real responsibility and accountability for making these things possible, what a culture change it could accomplish!

2. Get serious about mentoring

In my discussion of practice issues with lawyers – young and old – a common message is that “we are not getting enough mentoring”. My colleagues at the Court of Appeal and in the trial courts have observed this as well. Some newer lawyers with obvious intellectual and forensic capacities would clearly benefit from the wisdom and practical advice that only a mentor can give. Unfortunately, the economics of law and the increasingly frenetic pace at which lawyers operate has seen mentoring relegated to a low priority.

Mentoring, so vital to the nourishment of young litigators, has been in decline for years. It has been further diminished by a loss of connection and the inadequacies of “virtual teamwork” during the pandemic. You are more likely to feel part of a team if you are working together, meeting together, in offices, boardrooms, courthouses and cafeterias. It is unlikely that it will happen hopping from one Zoom call to the next. The social aspect of litigation, which frankly makes it fun, has been replaced with TV screen transactions.¹⁷

Mentoring is not just about teaching. It is about creating an environment in which litigators feel they are learning, growing in the profession, and fulfilling their potential. They also need to know that their work is appreciated and respected. A lack of control over work combined with limited contact with the litigation team and clients contributes to low morale and a risk of depression.¹⁸ In contrast, when junior litigators are brought into discussions with the client, discussions about strategy, conversations about the law or the facts, they begin to take ownership of the case. This simple step makes work more meaningful and leads to greater work satisfaction.

¹⁷ While there are undoubted benefits to collegiality, mentoring, and productivity to working in the office at least some of the time, there are also mental health benefits to working from home, which allows us to avoid the stress of long commutes, fulfill childcare and elder care responsibilities more easily, and look after our personal needs and obligations. A firm’s mental health committee might consider how working from home would help address the needs of all lawyers, including those experiencing mental health challenges.

¹⁸ See e.g., Megan Seto, “Killing Ourselves: Depression as an Institutional, Workplace and Professionalism Problem” (2012) 2:2 UWO J Leg Stud 5, online: <<https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1053&context=uwojls>>.

As barristers, members of a profession, we have a duty to mentor and train those who follow in our footsteps. And we have a duty to do that at every opportunity.

Mentoring is also about protecting those who work with us. One lawyer, who is a mother of a two-year-old and a four-year-old, recently told me about this experience. She and a more senior lawyer in her firm were involved in a piece of complex litigation. One of opposing counsel had a habit of sending substantive emails in the evening and at night. One evening, as she was busy overseeing a fairly boisterous supper, opposing counsel sent an email demanding to know her position on a motion he proposed to bring. Just before the children's bedtime, he emailed her again, saying that because she had not responded he would proceed to serve his motion record. At this point, her more senior colleague, who knew that she would be occupied with her children, intervened and advised the lawyer by email that she was getting her children ready for bed, and she would respond when she was able. The clear implication was that the email chain would be brought to the court's attention if there was a complaint about the timeliness of the response. It was enough to defuse the situation. While I lament a state of affairs in which lawyers are expected to have a spoon in one hand and a cell phone in the other, I use this as an example of the responsibility mentors have to protect their juniors from bullying and oppressive conduct.

Mentoring is also about sharing the work and giving junior partners and associates a piece of the file. The Court of Appeal's recent statement on the desirability of senior counsel sharing a portion of oral argument with junior counsel is intended to emphasize the importance of training and mentorship of new advocates. But it also strengthens the junior's sense of purpose and value. While money is important to lawyers, doing satisfying and meaningful work, feeling part of a team, and feeling personally valued and respected is essential to retaining good people. In my experience, good barristers cared about and respected the mental and physical health of everyone they worked with. Unfortunately, the high-stakes, high-pressure nature of legal work today is making it increasingly common that the mental health and well-being of young lawyers is regarded as an expendable sacrifice for the good of the client or the firm.

3. Give lawyers an opportunity to disconnect

I apologize for reverting to the "good old days", because in many ways they were not so good. But when I started practice, from about 1976 until email became common in the early 1990s, you could generally go home at night and not expect to receive phone calls or messages from work, unless something was urgent, like the office was on fire or a client had a real emergency. The same was true on weekends. You could go home on Friday afternoon or evening and reasonably expect that no one would bother you – neither a lawyer nor a client, until Monday morning.

That did not mean we did not work evenings or weekends – we did, when necessary – but it did mean that except during trials, evenings and weekends could be times for R & R, family times, and “me” times. And holidays were actually holidays – you could go away for two or three or four weeks and colleagues would cover for you.

You know the situation today much better than I do. There is essentially no division between the workday and the personal or family day. Clients, bosses, and other lawyers think nothing about sending emails or making phone calls after hours (if there is such a thing), in the middle of the night or on weekends.

If firms had a mental health policy, could the policy include a moratorium on phone calls and emails and other communications after six p.m. and on weekends, except in emergencies?¹⁹ Wouldn't this be a relief to everyone, including more senior lawyers? What it would require is planning ahead, realistically assessing what is urgent and setting practical deadlines. Respecting your staff's “downtime”, their “right to disconnect”, will go a long way to making them feel respected and appreciated and will improve their mental health.

The pandemic seems to have exacerbated intrusions on downtime. While the blurring of lines between home and work has allowed us to avoid long commutes or fulfill childcare and elder care responsibilities more easily, the time saved seems to have been swallowed up by work. Indeed, many litigation firms reported that 2021-2022 has been a record year. It seems that, for some, working from home meant working even longer hours. Any work from home policy must prioritize protecting downtime and promote understanding of its benefits to mental health.

And, while I am at it, make vacations mandatory and meaningful. For everyone.

I articulated in 1974 with the firm of MacKinnon McTaggart, what would then be described as a “medium-sized” firm of about 25 lawyers, with a strong litigation department. When I returned as an associate in 1976, the first thing I was told by one of the more senior partners was, “Plan your summer vacation now – we all take four weeks in the summer.” The message was clear – you and your family are important to us, and you need a good break. We worked hard, without a doubt. Because the practice was litigation, we would sometimes work full-out for weeks at a time. But we knew, and our families knew, that when the job was over there would be time for rest and breaks. No one was expected to work at night or on the weekends, although we assuredly did at times. And we were able to manage unexpected demands and emergencies because our default pace was not to

¹⁹ 2021 amendments to the Ontario *Employment Standards Act* require certain businesses to have a “Right to Disconnect Policy”. It appears that this legislation does not create a right to disconnect, but simply requires certain employers have a policy: *Employment Standards Act, 2000*, S.O. 2000, c. 41, Part VII.0.1.

work 24/7. In my experience, weekends were the exception, not the rule, and our clients didn't suffer for it.

Lawyers should be required to take vacations, guilt-free.

Everyone who does litigation knows that there are emergencies or times when everyone has to work full-out for days on end, particularly in trials. But in my view, people can get through that, and even enjoy it, if they know that when the crisis is over, their need to refresh and re-charge, and get back to their families and lives, will be respected.

If your litigation team seems to be running in crisis mode at all times, then take a hard look at it. Is the team too lean? Is the work being allocated fairly or are some lawyers overworked and some underutilized? Is there a system in place to regularly monitor work allocation and to re-assign files where appropriate? These are serious concerns for a law firm to address. The answer cannot be to regularly work evenings and weekends and skip vacation. Overworked lawyers are less able to mentor others, contribute to a healthy work environment, prioritize their own mental health, or respond to urgent demands.

4. Let go of the Gladiator

It bears noting that many gladiators were slaves, prisoners of war or convicts – pressed into action for the amusement of the masses and to distract them from their misery. Maybe in 2022 we should get rid of the image and find a better role model for litigators.

Isn't it time to question our belief that the quintessential litigator is one who relishes the fight, is articulate and calm at all times, does not break a sweat under pressure, is proud of how little sleep they require to function, makes light of disturbing subject matter in the case, does not complain or admit that it bothers them to spend so much time away from family, friends and other social connections when in a long trial? We see these behaviours as inherent character traits and even boast about them. What we fail to do is talk honestly about these behaviours and the toll they can take. They may lead to success for a period of time, but they can also lead to burnout, disillusionment, and depression.

The myth of the gladiator litigator also leads to feelings of imposter syndrome. Imposter syndrome is doubting one's abilities and feeling like a fraud, a feeling like you do not belong in the profession or your workplace, or they made a mistake in hiring you. It can cause tremendous pressure to perform or work excessive hours to prove your worth. This feeling too can lead to burn out, disillusionment, anxiety, and depression. Put simply, the myth is harmful to mental health.

I will set out below some tips that individual lawyers can use to tackle the image of the gladiator litigator, but first, I want to look at some of the facts behind the myth.

First, the reality is that litigation has historically been done in Ontario by white men. The litigator was supported at home by a spouse who assumed the lion's share of household and child-rearing work and at work by a loyal secretary and support staff. This litigator saw himself reflected in the faces of the judiciary and the lawyers opposite. He was not immune to the hardships of living up to the gladiator myth but did not bear the psychological scars of acts of exclusion – sometimes subtle and sometimes not so – that women, Indigenous, Black and racialized lawyers, and members of other marginalized groups experience in their day-to-day experiences as litigators, in the workplace, client meetings, and the courtroom.²⁰

Feelings of isolation, uncertainty and stress experienced by Black, Indigenous, racialized, LGBTQ2S counsel, women, those with different accents and internationally trained lawyers are too frequently viewed as an individual issue rather than understood as the result of subtle acts of exclusion.²¹ It is hard not to feel like an imposter where a person's feelings of not belonging are exacerbated by signals that they were never supposed to be there in the first place. Overcoming imposter syndrome requires an environment that fosters a variety of leadership styles in which diverse racial, ethnic, and gender identities are seen as just as professional as the current model.²² There is not one litigation style that wins the case. We risk losing excellent advocates if we continue to hold up an unattainable and inaccessible model.

Second, we need to admit that everyone – even experienced barristers – get nervous going into court. And that our bodies react to the adrenaline rush that helps us to meet the challenge ahead. The reality is that litigation activates our stress response, and we might as well admit it. Many years ago – almost 40 to be exact – I was involved in a high-profile public inquiry, in which I worked closely with a very senior lawyer from another firm. I sat by his side as he rose to the podium to make submissions to the inquiry Commissioner. I looked up as he went through his notes and saw that his hands were trembling. He was having trouble turning the pages. This was someone at the top of the barrister's bar. He had pleaded in the Supreme Court of Canada and the Court of Appeal and had done some of the most complicated and demanding of criminal and civil cases. But there he was, his hands shaking and his knees probably knocking.

From that point on, I never worried about being nervous in court. I knew the nerves were at least partly due to nervous energy, excitement, and anticipation.

²⁰ On microaggressions generally, see e.g., Derald Wing Sue & Lisa Spanierman, *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation* (Hoboken, NJ: Wiley, 2020).

²¹ See e.g., Lindsay Scott & Janani Shanmuganathan, "Virtual litigation through the eyes of racialized women advocates" (Spring 2022) 40:4 Adv J 18.

²² See e.g., Ruchika Tulshyan & Jodi-Ann Burey, "Stop Telling Women They Have Imposter Syndrome", *Harvard Business Review* (11 February 2021), online: <www.hbr.org/2021/02/stop-telling-women-they-have-imposter-syndrome>.

The truth is that many litigators – perhaps most – experience increased heart rate, rapid breathing, trembling hands, knees, lips or voice, sweating, or an uneasy stomach. I remember sweating so badly during one trial that I had to go into the washroom at a break, take off my shirt and run cold water over my wrists to cool myself down and stop the sweating. It worked, by the way. And I have never told that story, by the way.

Because we as lawyers seldom talk candidly about these physiological responses or acknowledge they are a normal response to the stress of performing, we perpetuate the myth of the gladiator litigator.

Third, I firmly believe that professional success as a litigator is grounded in learning and practice, not innate ability. There are very few “gifted” barristers – most of the rest have acquired their skills through practice, observation, and hard work.

One of the benefits of litigation and lawyering in general is a career that is full of challenge and learning. A good mental health approach to this career is to view it as a work in progress or adopt a growth mindset.²³ A growth mindset views intelligence and talent as abilities to be cultivated through effort and practice, learning from mistakes, and sticking to it when it is not going well. By contrast, the gladiator litigator sees every success or failure in litigation as a measure of self-worth. It is easy to chalk up wins, but it is how we respond and learn from losses that will determine our level of stress and success in a litigation career.

What Can Litigators Do About Their Own Mental Health?

The stress of litigation can turn into mental distress, but it does not have to. The secret is not that the successful litigator has an unusual combination of invulnerability and confidence, but that they have developed mechanisms over time to enable them to navigate inherently stressful activity.

The more obvious strategies for dealing with stress, as mentioned earlier, include the following: manage your workload through short-term goals, get enough sleep, eat properly, exercise (even a brisk walk each day will assist), get fresh air, practice mindfulness, listen to music, avoid using alcohol or other substances to cope with stress, connect with family, friends and colleagues, and take vacation.²⁴

²³ See e.g., Carol S. Dweck, *Mindset: The New Psychology of Success* (New York: Random House, 2006).

²⁴ See e.g., Owen Kelly, “Coping with Stress and Avoiding Burnout: Techniques for Lawyers” (13 October 2009), online: *Canadian Bar Association* <www.cba.org/Publications-Resources/CBA-Practice-Link/Work-Life-Balance/Health-Wellness/Coping-with-Stress-and-Avoiding-Burnout-Techniques>. See also Erin H. Durant, *It Burned Me All Down: A self reflection on Big Law, burnout, mental health and how to build an environment to support a high performing and healthy workforce* (Durant Barristers, 2022).

I do not suggest these somewhat obvious strategies to put the onus on individual lawyers to “fix” their own mental health. On the contrary, I have tried to emphasize that mental health is a societal issue and a professional issue. We have to create an environment in which lawyers are able to take the time to look after themselves and the people they care about.

Moreover, although these strategies may appear to be within an individual’s control, it must not be seen as a personal failing when mental wellness does not always respond to them. A person who lives with mental illness can follow every one of these strategies and still end up with periods of mental unwellness. These strategies on their own are not enough and professional help and treatment should be sought.

Professional help such as counselling through the LSO Member Assistance Program is a good idea for anyone who is feeling mentally unwell. Get help by talking to someone. If you are experiencing persistent negative thoughts, doubting self-worth, feeling inadequate, struggling with workload, holding yourself to an impossibly high standard, ruminating over mistakes, or engaging in speculative, negative thinking, then reach out to someone you trust and seek help. A professional can teach you how to interrupt those thoughts and analyze them from an impartial standpoint so you can move beyond them.

A less obvious strategy, although perhaps less so at this point in my paper, is to reject the myth of the gladiator litigator. Instead, acknowledge the role experience plays over innate talent and avoid inapt comparisons between the inexperienced litigator and the experienced. Recognize that sleep deprivation has serious impacts on your health and avoid it. Protect your time away from work with family and friends as a natural buffer to stress.

Rejecting the gladiator litigator model is not only good for mental health, but also the conduct of the litigation. Allow empathy amid the logic of legal analysis. The most impactful litigators are empathetic to the parties and attuned to the facts of the dispute. Recognize that certain subject material can result in vicarious trauma. Strategize at the outset as to how to manage this work, including time to debrief, and schedule counseling. Encourage civility and collegiality; discourage intimidation tactics, abuse, and bullying in litigation or the work environment. Incivility weighs heavily on us all and does not work. It fosters a falsely competitive environment, protracts litigation, and leads to isolation, burnout, and attrition.

Conclusion

Individual measures to prioritize mental health are important, but without top-down change in the lawyers’ and law firms’ work, they are not enough. I propose that change can be implemented from the top down because I have confidence that our profession

accepts its historical responsibility for the education, well-being, and advancement of its more junior members. But if top-down change doesn't work, more drastic measures will be required.

A few years ago, I gave a speech to young advocates in which I exhorted them to “take control of your life, or others will take control of it for you.” I was referring to bosses, family members, friends and others – many of them well-meaning and with the best of intentions – who were using the young lawyer to achieve their ends, not focused on what was important to the life and career of the young lawyer.

Some people might call this a “me first” attitude – putting yourself, your family and friends – those who care about you – first in your life. Looking after yourself and those whom you love.

Today, my message would be modified by adding: “Take control of and be responsible for your mental health too. And if those responsible for your work environment do not demonstrate that they care about you, care about your need to find purpose and value in your work, your growth and education as a barrister, your personal needs and the demands placed on your mental health, then get the hell out of there.”

And my message to more senior members of the professions, and to those responsible for the management of law firms, is this: you must take mental health seriously – your lawyers and staff do, your clients are doing so, and you need to as well. If you lead by example, you will create an environment that is more collegial, more satisfying, and ultimately, more productive.
