

# Causes of Poor Lawyering

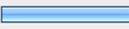
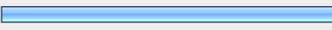
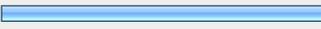
By David N. Shearon, JD, MAPP

Both mandatory continuing legal education and specialization were responses by the organized bar to Justice Burger's criticisms of the competence of trial lawyers in the early 1970s. Both programs, therefore, rest upon an assumption that the range of performance by lawyers in a given area practice is unacceptably large, i.e., that lawyers at the low end of the performance spectrum are performing at an unacceptable or "poor" level. MCLE, in particular, is based on the assumption that a significant cause of poor lawyering is lack of knowledge.

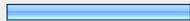
Knowledge, however, is only one component of competence. Organizational skills, business management skills, people skills, and plain, old-fashioned effort are also significant components. Over the years, however, MCLE programs in most jurisdictions have been much less willing to accredit programs focused in these areas than those focused on areas of substantive law. Is this because substantive law courses are more important to good lawyering, or only because they're easier to defend as appropriate subjects for study by lawyers? One way to address this question is by asking lawyers about the causes of poor lawyering.

Between August 21 and August 30 1, 2007, the Tennessee Commission on Continuing Legal Education and Specialization conducted an online survey of Tennessee attorneys on the causes of poor lawyering. Email invitations to participate were sent to 1793 randomly-selected Tennessee attorneys. Based on undeliverable messages received back, we estimate that 1581 e-mail invitations may have been received by the addressee. 636 attorneys answered some part of the survey (40.2%). 530 completed the entire survey (33.5%).

Here are the responses to the first question.

1. The biggest source of poor lawyer performance is:			Response Percent	Response Count
Lack of knowledge of substantive law			16.3%	102
Poor legal management skills			42.7%	267
Lawyer's lack of commitment, energy, and engagement			41.0%	256
			<i>answered question</i>	625
			<i>skipped question</i>	11

Of course, it is possible that attorneys identify one set of causes when talking about others but answer differently when the question is focused on them. However, that was not strikingly true in this case:

3. On those occasions when you have performed less well as a lawyer than you would have liked, what contributed most to that performance?				
			Response Percent	Response Count
Lack of knowledge of substantive law			23.3%	112
Poor legal management skills			46.4%	223
Lack of commitment, energy, and engagement			30.4%	146
			<i>answered question</i>	481
			<i>skipped question</i>	155

Of the attorneys identifying a lack of substantive knowledge as the main cause for poor lawyering, only 47.4% selected the same cause when the question was focused on them. However, those who selected poor legal management skills for others selected the same answer for themselves 65.3% of the time. Those who thought lack of commitment, energy, and engagement was a key reason for poor lawyering selected the same response for themselves at the rate of 50.3%.

Clearly, MCLE regulatory agencies should carefully consider whether our accreditation standards make it unduly difficult for sponsors to offer programs to improve legal management skills and to boost commitment, energy, and engagement in the practice of law.

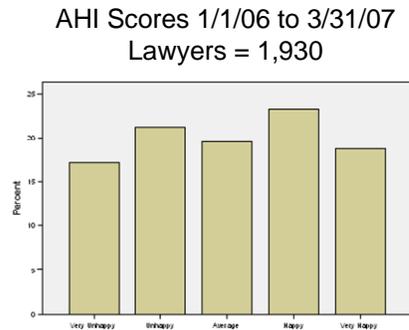
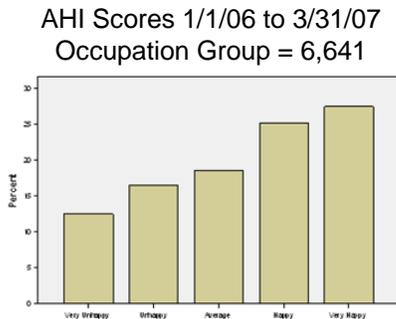
### Data from the Authentic Happiness Web Site

For some years now, the University of Pennsylvania has operated a web site at [www.authentichappiness.org](http://www.authentichappiness.org). This site has been used to develop instruments measuring well-being and to conduct research into the components of well-being and methods of increasing it.

Although “happiness” often carries connotations of “light-weight” or “air-head” in our society, research over the last 15 years has clearly established that there are many good reasons why we have the capacity to feel happy. Happy individuals live longer, have better marriages, are more involved as citizens and more helpful to others, tend to be more successful and are healthier than their less-happy peers. Moreover, the research strongly suggests that happiness causes these results, rather than the other way around. Researchers in the field of positive psychology have broken happiness down into component parts of pleasure, engagement, and meaning. The latter two are particularly important for adults and particularly relevant to high-quality, ethical lawyering.

With data from the Authentic Happiness web site, we can compare attorneys to others in the same occupation group (CEO’s, managers, other professionals, professors, etc.). This following analysis is based on data for individuals who took the Authentic Happiness Inventory, an instrument that measures well-being along the dimensions of pleasure, engagement, and meaning, for the first time between January 1, 2006, and March 15, 2007. Engagement and meaning likely address the same experiences, feelings,

and motivations as “commitment, energy, and engagement” in the survey conducted by this Commission.



Keeping in mind the correlates of happiness – creativity, collaboration, good relationships, community contribution, etc. – mentioned above, we should be concerned about the relatively low scores of lawyers compared to their professional peers. This data says that attorneys are not functioning nearly as well in their professional roles as might be expected. Further, for business leaders and others who have built their careers around being engaged and finding meaning, and who build teams and provide leadership around those same elements, attorneys likely send off the wrong “vibes.” We do not fit the pattern that they have learned indicates someone they can count on, someone they want on their team.

Only a tiny fraction of the accredited CLE courses – certainly less than 1% – explicitly address attorney commitment, energy, and engagement. Unlike general knowledge levels of attorneys, which are the target of most CLE programs, commitment, energy, and engagement can be measured quickly and inexpensively by instruments such as those on the Authentic Happiness web site. It appears to me that it would be helpful to this to know:

- Can we test the opinion of Tennessee attorneys that lack of commitment, energy, and engagement on the part of Tennessee attorneys is a substantial contributing factor to poor lawyering?
- If so, what evidence exists that commitment, energy, and engagement can be changed?
- Can such changes be obtained in a cost and time efficient manner?
- Would the extent of achievable changes significantly affect attorney competence?

Future work in this area should include identifying instruments that could measure attorney commitment, energy, and engagement and designing efforts to address these questions.