

The American Bar Association  
Standing Committee on Lawyers' Professional Liability,  
Commission on Lawyer Assistance Programs,  
General Practice, Solo and Small Firm Section,  
Section of Labor and Employment Law,  
The ABA Center for Continuing Legal Education  
Present

# **The Impaired Lawyer From the Law Firm's Point of View**





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Center for Continuing Legal Education  
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## Impaired Lawyers from the Firm's Point of View

### HYPO 1

You are the managing partner of a prosperous and prestigious 50-lawyer law firm in a major metropolitan area. One of the junior associates knocks on your office door one afternoon and asks to speak to you confidentially about a couple of matters. The associate asks you not to divulge to the individual in question or to other lawyers in the firm that he is the one who reported the following information to you.

The associate begins by telling you that he suspects that the partner (Adam) who is in charge of the firm's litigation section and one with whom he has worked for at least a year, might have a serious alcohol problem. He has seen Adam drinking in his office in the morning on several occasions within the last few months and confesses that he and other associates have noticed and commented that there is frequently an odor of alcoholic beverage about his person. On most days, Adam appears somewhat tired and listless and lately, the associate has noticed that Adam's speech becomes slurred by late afternoon. The associate also recently heard a rumor that Adam was reportedly arrested about three few weeks ago for DWI/DUI while driving on a street just a few blocks away from the office.

The associate also indicates that he has personal knowledge concerning Adam's improper billing practices and that he also knows that Adam has recently missed numerous client appointments and court appearances. In many of these instances, the associate felt obligated to appear and make excuses for Adam's absences. Finally, the associate indicated that several administrative assistants have come to him to talk about Adam's increasingly inappropriate behavior toward certain female office personnel.

You are shocked and saddened by this news about your friend and law partner but you have been aware for some time that *something* was going on with him. You knew he had been going through a difficult and lengthy divorce proceeding and had tried to make allowances for his declining job performance as a result. As the associate leaves your office, you remember that the firm's executive management committee meeting is scheduled for tomorrow afternoon.

## **HYPO 2**

Mary, an associate, has been practicing for six years in a fifteen-person general practice firm. Though only in his late 50s, she has noticed over the last few months that when Bob, one of the partners with whom she works, stops by her office to share office gossip he occasionally tells her the same story he had told just a few days earlier. He did this even after she jokingly told him on a couple of occasions that he had already told her the story. Bob shrugged it off, but the problem continued. She thought little of it at first, but it came to concern her as it went on. Bob, a real estate lawyer, is one of the principal business generating partners at the firm through his representation of several major developers.

One day, Bob came in to tell Mary that he had recently closed a deal for a client and that the title company had complained that he hadn't given them all the required documents. Bob was upset with the title company saying that they had dropped the ball and misplaced the documents. Mary commiserated with Bob, but wondered to herself if it was really the title company at fault. Mary spoke with Bob's secretary and she said Bob hadn't told her to do the documents. She volunteered that this wasn't the first time. She said, "Bob's a little forgetful, but aren't we all?"

What if anything should Mary do?

### **HYPO 3**

John has been a long time real estate practitioner with a small general practice firm. One of the lawyers he has worked with over the years is Bob Smith, a partner in a fifteen-person general practice firm. They have been on the opposite sides of a number of deals over the years.

They have become golfing buddies with a regular game once a month during the summer. Both in their late 50s, they joke about some day being able to shoot their ages on the golf course. John has been noting that Bob has been making the same joking reference to shooting their ages every time they get together. He also has shared the same gossip each of the three times they got together this past summer. John is concerned about whether Bob might be having some memory problems.

In the most recent deal they had worked on together, Bob complained about how the title company had lost some documents on another deal. At a recent meeting of the local bar association a representative of the title company who knew Bob and John were friends commented that Bob had had to be repeatedly reminded to get documents to the title company in a timely manner. He said one deal almost didn't close because Bob had not done the documents. The title company lawyer said he was concerned about Bob. John would be seeing Bob the next day as they were again on opposite sides of a transaction with Bob representing one of his developer clients and John negotiating the terms of a land sale contract for a local farmer whose 160 acres is now in the path of urban development.

What if anything should/must John do in light of what he knows and has been told about Bob's conduct?



## **THE IMPAIRED LAWYER: PROFESSIONAL LIABILITY**

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- I. WHAT DOES AN “IMPAIRED ATTORNEY” MEAN IN THE CONTEXT OF PROFESSIONAL LIABILITY?**
- A. Webster’s Dictionary defines “impaired” as “being in a less than perfect or whole condition; handicapped or functionally defective.”
- B. Common Examples of Impairment Which Impact Reasoning, Judgment, Memory or Other Elements of Mental Performance and/or Attention
1. Alcoholism
  2. Drug Addiction
  3. Depression or other psychological problems
  4. Senility/Alzheimer’s Disease
- C. The Few Studies That Have Been Conducted Indicate That There Is A Greater Incidence of Certain Types Of Impairment Among Lawyers Than Among Other Professionals
1. Alcoholism -- Studies indicate that while approximately 8-10% of the general population suffer from alcohol-related problems, the rate of alcoholism among lawyers is more than twice that percentage.<sup>2</sup>

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<sup>1</sup> Mr. Warin gratefully acknowledges the assistance of March Coleman in preparing this outline.

<sup>2</sup> See Michael A. Bloom & Carol L. Wallinger, *Lawyers and Alcoholism: Is It Time For A New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988) (stating that alcoholism is three to thirty times higher in professional groups such as lawyers than the ten to thirteen percent rate in the general population); *ABA Says No To Litigation ‘Reforms’ in Republican Contract With*

2. Depression -- A study of the prevalence of major depressive disorder (“MDD”) across 104 different occupations found that 10% of lawyers suffer from MDD, a rate more than twice that of the general population.<sup>3</sup>
3. Illegal Drug Use/Addiction -- Study found that 26% of lawyers had used cocaine at least once, a rate more than twice that of the general population.<sup>4</sup>

D. Studies Also Suggest A Strong Correlation Between Mental Impairment Among Lawyers And Disciplinary Proceedings and/or Legal Malpractice Claims.

1. Study found that between 50-75% of all attorney-related disciplinary cases in Georgia involved substance abuse by the attorney.<sup>5</sup>
2. Study conducted by the Oregon State Bar Professional Liability Fund found that of 100 lawyers who entered into its lawyer assistance program for mental impairment, 60 had malpractice claims filed against them before entering into the program, and 61 had disciplinary proceedings filed against them.<sup>6</sup>

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*America* -- Section on Mandatory CLE For Substance Abuse, 63 U.S.L.W. 2506, 2509 (Feb. 21, 1995) (referring to study that shows the alcoholism rate among lawyers to be more than twice the rate in the general population).

<sup>3</sup> See William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. Occupational Med. 1079 (1990).

<sup>4</sup> See 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, 241(1990).

<sup>5</sup> See Report Attached to the 1990 Recommendation to the ABA House of Delegates by the Standing Committee on Lawyer Competence to Adopt the Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines, citing to a 1989 article in the Georgia State Bar Journal.

<sup>6</sup> See Oregon State Bar Professional Liability Fund, *Profile of Legal Malpractice -- A Statistical Study of the Determinative Characteristics Of the Lawyer’s Professional Liability Fund* (May 1981).

## II. LEGAL MALPRACTICE CLAIMS AND THE IMPAIRED LAWYER

### A. Requisite Elements Of A Legal Malpractice Claim

1. An attorney-client relationship;
2. the failure of the attorney to exercise ordinary skill and knowledge of that of a reasonable lawyer; and
3. the alleged negligence proximately caused damage to the plaintiff.<sup>7</sup>

### B. Potential Liability Issues Involving Impaired Attorneys

1. *Does an attorney breach the standard of care if impairment causes the attorney to render legal services below his/her legal capabilities, but the attorney's skill in rendering the service nevertheless exceeds the skill and knowledge that would have been rendered by other attorneys in the community?*

Although there is no unitary definition of what the standard of care is for purposes of assessing whether an attorney has acted negligently, California courts and a number of other jurisdictions have applied the following standard: "The general rule with respect to the liability of an attorney for failing to properly perform his duties to his client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."<sup>8</sup>

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<sup>7</sup> *Loyd v. Paine Webber, Inc.*, 208 F.3d 755 (9<sup>th</sup> Cir. 2000) (applying California law).

<sup>8</sup> *Lucas v. Hamm*, 56 Cal. 2d 583 (1961). If the lawyer engages and/or holds himself/herself out as a specialist, however, most courts find that an attorney who undertakes a task in a specialized area of the law must exercise the degree of skill and knowledge possessed by those attorneys who practice in that specialty. *See, e.g., Tibor v. Superior Court*, 52 Cal. App. 4<sup>th</sup> 1359 (1997) (criminal

What does “ordinary” mean in this context? Query whether a client would have a viable legal malpractice claim under the following circumstances: client retains a well-respected, high-profile trial attorney to defend him in a criminal case; unbeknownst to the client, the lawyer has recently begun abusing illegal drugs; the trial lasts three-weeks and during the trial the lawyer takes illegal drugs during lunch breaks and each night after court adjourns; and the client is ultimately convicted.<sup>9</sup>

Assuming the client can establish causation, which is discussed *infra* (i.e., but for his lawyer’s drug use he would have been acquitted), can the client prevail on a malpractice claim the gist of which is “I hired Clarence Darrow, but because of his drug use, I got Clarence Average and got convicted.” Does the lawyer win if he establishes that even though he was “off his game” because of the drug abuse, he still defended the case as well as the “average” defense attorney within the community? We found no reported court decisions dealing directly with this issue. However, the Restatement (Third) of the Law Governing Lawyers suggests that the applicable standard of care for lawyers is less than that possessed by the hypothetical “average” attorney. “[T]he duty does not require ‘average’ performance, which would imply that the less skillful part of the profession would

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law); *FDIC v. O’Melveny & Myers*, 969 F.2d 744 (9<sup>th</sup> Cir. 1992) (securities laws), *rev’d on other grounds* 512 U.S. 79 (1994); *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707 (9<sup>th</sup> Cir. 1992) (instruction that supervisory lawyer for insurer must perform “in accordance with care common to supervisory lawyers”); *Goebel v. Lauderdale*, 214 Cal. App. 3d 1502 (1989) (bankruptcy); *Day v. Rosenthal*, 170 Cal. App. 3d 1125 (1985) (tax law).

<sup>9</sup> This fact pattern is based on the facts in *Arizona v. D’Ambrosio*, 156 Ariz. 65, *aff’d in part, rev’d in part*, 156 Ariz. 71 (1988) (affirming trial court’s granting criminal defendant’s post-conviction motion for relief based on the fact that defendant’s lawyer did not provide an adequate defense at his trial because lawyer was consistently intoxicated during the course of the trial).

automatically be committing malpractice.”<sup>10</sup> The attorney in the above hypothetical would have a strong argument that the test for determining whether his/her conduct fell below the applicable standard of care should be based on an objective standard, rather than on a subjective standard of the attorney’s personal abilities as a lawyer.<sup>11</sup> If that were not the standard, query whether the alcohol impaired attorney could argue “I was a drunk when he hired me and you knew it and, therefore, you cannot hold me to the higher standard of care of an attorney of ordinary skill and diligence.”

2. *Does the violation of a Rule of Professional Conduct by a lawyer constitute legal malpractice?*

Courts in most jurisdictions, including California, have held that although an attorney’s violation of applicable professional rules of conduct does not create an independent cause of action against the attorney for malpractice, the rules of professional conduct are admissible as relevant evidence as to whether the attorney breached the standard of care.<sup>12</sup> A California state court has further held that the violation of a Rule of Professional Conduct by an attorney conclusively establishes negligence on the part of the attorney and obviates expert testimony regarding the issue of whether the attorney breached the standard of care.<sup>13</sup>

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<sup>10</sup> *Id.* § 52 cmt. B (2000).

<sup>11</sup> *See, e.g., Little v. Matthewson*, 114 N.C. App. 562 (1994), *affirmed* 340 N.C. 102 (1995).

<sup>12</sup> *See, e.g., David Welch & Co. v. Erskine & Tulley*, 203 Cal. App. 3d 884 (1985); *Mirabito v. Liccardo*, 4 Cal. App. 4<sup>th</sup> 41 (1992); *Stanley v. Richmond*, 35 Cal. App. 4<sup>th</sup> 1070 (1995). *But see Borden v. Clement*, 261 B.R. 275 (N.D. Ala. 2001) (Under Alabama law, attorney’s violation of the rules of professional conduct is inadmissible as evidence in a legal malpractice action); *Hizey v. Carpenter*, 119 Wash. 2d 251 (1992) (same).

<sup>13</sup> *See Tulley, supra*, (holding that violation of the Professional Rules of Conduct conclusively established attorney’s negligence and, therefore, expert testimony was not necessary).

3. *If an attorney commits negligence due to a mental impairment, is the attorney automatically liable for damages?*

Like any other negligence claim, to prevail on legal malpractice claim a plaintiff must allege and prove that the attorney's negligence *proximately* caused the plaintiff to sustain damages.<sup>14</sup> For example, referring to the hypothetical discussed above, even if the client shows that the lawyer was legally intoxicated during each day of the three-week trial, the lawyer would not be liable for legal malpractice unless the plaintiff can show that “but for” the lawyer's mental impairment, he would have not have been convicted. This causation requirement often implicates the “case within the case” doctrine. Specifically, to prevail on a legal malpractice claim, the plaintiff must not only prove that the lawyer was negligent, but also that the plaintiff would have prevailed with respect to the underlying claim but for the attorney's negligence. Another example is that even when a lawyer breaches the standard of care (for example, not filing an action within the applicable statute of limitations), if the client cannot establish that the underlying claim was meritorious, no damages are shown and no recovery is available.<sup>15</sup>

4. *Can an attorney in a malpractice action assert mental impairment as a defense to liability?*

There is a dearth of reported court decisions addressing whether an attorney's mental impairment/disability at the time of the alleged negligent conduct giving rise to a malpractice claim is a valid defense to liability.<sup>16</sup> The few courts to address the issue have generally held

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<sup>14</sup> See *Lombardo v. Huysentruyt*, 91 Cal. App. 4<sup>th</sup> 656 (2001).

<sup>15</sup> See *Nika v. Danz*, 199 App. 3d, 199 Ill. App. 3d 296 (Ill. Ct. App. 1990).

<sup>16</sup> Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 21.9 (5<sup>th</sup> ed. 2000) (noting the “paucity” of cases addressing this issue).

that mental impairment does not excuse compliance with the standard of care or otherwise exculpate a lawyer for committing negligence.<sup>17</sup> However, such an impairment may be a defense to a tort requirement specific intent, such as fraud, and the imposition of punitive damages.<sup>18</sup>

5. *Is a law firm liable for malpractice committed by a mentally impaired attorney whom the firm employs?*

Under the doctrine of *respondeat superior*, a law firm and its partners are generally vicariously liable for a tort committed by an attorney who commits a tort while acting within the scope of his employment<sup>19</sup> Thus, if an attorney commits a tort within the scope of his/her employment due to a mental impairment (e.g., missing a filing deadline due to a substance abuse problem), the law firm employing the attorney may be held vicariously liable for damages resulting from the tort. However, courts have rejected attempts by plaintiffs to hold law firms vicariously liable when the alleged tort committed by the attorney is not within the scope of the attorney's employment by the law firm.

For example, an intermediate Washington appellate court ruled that a law firm was not vicariously liable for injuries sustained by a person

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<sup>17</sup> See, e.g., *Schumann v. Crofoot*, 602 P.2d 298, 300 (Or. Ct. App. 1979) (holding that attorney's alleged psychological problems was not a valid defense to a legal malpractice claim); see generally *Harlow v. Connelly*, 548 S.W.2d 143 (Ky. Ct. App. 1977) (stating that "the law imposes the same degree of care upon a voluntarily intoxicated person as is imposed upon a sober person of ordinary prudence under similar circumstances"); *Jolley v. Powell*, 299 So. 2d 647, 649 (Fla. Ct. App. 1974) (same); Restatement (Second), Torts § 283B (1965) ("Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.").

<sup>18</sup> *Schumann, supra*, at 301-302.

<sup>19</sup> *Tri-Growth Centre City Ltd., v. Silldorf, Burdman, Duignan & Eisenberg*, 216 Cal. App. 3d 1139 (1989); *Blackmon v. Hale*, 1 Cal.3d 548 (1970).

who was shot by an intoxicated attorney, who was employed by the firm, during an altercation at a bar.<sup>20</sup> The evidence showed that the attorney had gone to the bar to discuss several of his cases with other lawyers and while there became intoxicated. The court found that there was no although there was a question of fact as to whether the attorney had acted within the course of his employment when he consumed alcohol and became intoxicated, the law firm was not vicariously liable because it was not reasonably foreseeable that the lawyer's "drinking would lead to his becoming involved in an altercation that would result in his firing a gun at another patron."<sup>21</sup> The court also summarily rejected the plaintiffs' argument that the law firm was liable based on its decision to hire the lawyer or its alleged failure to supervise the lawyer.

The Supreme Court of Rhode Island similarly denied a claim for vicarious liability against a law firm in a legal malpractice action in which the plaintiff alleged that a lawyer employed by the firm engaged in sexual relations with her while representing her in a divorce proceeding.<sup>22</sup> The Court held that there was no evidence that the lawyer, when engaging in sexual conduct with the plaintiff, was acting within the scope of his employment.

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<sup>20</sup> See *Hayes v. Far West Services, Inc.*, 50 Wash. App. 505 (Wash. Ct. App. 1988).

<sup>21</sup> *Id.* at 509.

<sup>22</sup> See *Vallinoto v. DiSandro*, 688 A.2d 830 (R.I. 1997). As a general matter, courts have refused to find a lawyer negligent for engaging in voluntary sexual relations with a client unless the attorney makes his/her professional services contingent upon having sexual relations with the client or the relations adversely affect the lawyer's representation of the client. *Id.* at 834. See also *McDaniel v. Gile*, 230 Cal. App. 3d 363 (Cal. Ct. App. 1991) (holding that legal malpractice claim was sufficient to withstand summary judgment where attorney withheld legal services, rendered sub-standard legal service to the client, and delayed rendering legal services whenever his requests for sexual favors went unanswered).

6. *Can a law firm be held liable for failing to monitor and/or report an attorney whom it knows or reasonably believes is suffering from a mental impairment?*

We are not aware of any reported decisions in which a law firm has been held liable for failing to monitor an attorney employed by the firm whom it knows or has reason to know suffers from a mental impairment that might result in an actionable tort. In at least one reported decision, however, a law firm was held liable for malpractice committed by its associate on the ground that the firm was aware that the associate was suffering from chronic headaches that hindered his ability to competently represent clients, but took no action to rectify the situation.<sup>23</sup>

A claimant could rely on this decision to support a direct claim against a law firm when an attorney at the firm commits a tort due to a mental impairment and the firm knew or should have known of the impairment.

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<sup>23</sup> *Gautum v. DeLuca*, 521 A.2d 1343, 1347 (N.J. Super. Ct. 1987). *See generally, FDIC v. Nathan*, 804 F.Supp. 888, 897-98 (S.D. Tex. 1992) (stating that law partner could be directly liable to client for negligently failing to supervise other lawyers in the law firm who were violating ethical rules).



# **The Impaired Lawyer: Implications Under the Rules of Professional Conduct**

## **A Brief Overview**

by

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This outline presents an overview of the ethical implications under the American Bar Association (ABA) Model Rules of Professional Conduct for impaired lawyers, lawyers at the firm of an impaired lawyer, and outside lawyers who are aware of an impaired lawyer's continuing representation of clients. This outline relates only to mental impairments arising from age-related dementia, drug abuse, alcohol abuse or other mental illness.<sup>2</sup>

### **I. The Impaired Lawyer's Duties**

#### **A. Like all Lawyers, the Impaired Lawyer has a Duty to Provide Competent Representation**

1. Lawyers are required to provide competent representation to their clients. *Model Rules of Prof'l Conduct* R. 1.1 (2003); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2001).
  - a. Competent representation includes a requirement that lawyers act with reasonable diligence and promptness while representing a client. *Model Rules of Prof'l Conduct* R. 1.3 (2003); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(2) (2001).
    - (1) *See, e.g., Columbus Bar Ass'n v. Korda*, 760 N.E.2d 824 (Ohio 2002) (impaired lawyer who filed a brief on behalf of her clients but failed to take any further actions in the case suspended for failing to act diligently); *see also Attorney Grievance Comm'n v.*

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<sup>1</sup> The author acknowledges the assistance of Emily Taylor, a third-year student at Northwestern University School of Law, in the preparation of this outline.

<sup>2</sup> It is important to note that not all mental impairments will prevent a lawyer from competently representing clients. Also, some disorders that may appear to be mental impairments are not. Finally, some impairments may not result in the impaired lawyer evidencing symptoms of impairment every day; lawyers should note that an impairment may still exist despite the fact that on some days the lawyer does not appear to be impaired. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003).

*Wallace*, 793 A.2d 535 (Md. 2001) (lawyer who claimed to be undergoing personal and psychological problems was disbarred for being negligent in his representation in six cases).

- b. Lawyers are also required to communicate with clients in order to: discuss the means by which the client's goals will be achieved, update clients, reply to requests from the client, and inform the client of any limitations that prevent the lawyer from undertaking the requested action. *Model Rules of Prof'l Conduct* R. 1.4(a) (2003).
    - (1) *See, e.g., In re Sheridan*, 813 A.2d 449 (N.H. 2002) (impaired lawyer who failed to successfully file the articles of incorporation for his client and did not notify the client of his failure suspended for failing to communicate with his client); *see also In re Francis*, 4 P.3d 579 (Kan. 2000) (depressed lawyer failed to respond to client's request for information, misrepresented the status of the client's case to her, and failed to communicate the problems he was experiencing in providing representation); *and State v. Southern*, 15 P.3d 1 (Okla. 2000) (lawyer with B-12 deficiency publicly censured after failing to respond to requests for information from client and bar association).
  - c. Lawyers' duties to maintain the confidentiality of client information and to avoid conflicts of interest can also be implicated with an impaired lawyer. *Model Rules of Prof'l Conduct* R. 1.6 (2003) (confidentiality); *Id.* at R. 1.7 (conflicts of interest regarding current clients); *Id.* at R. 1.9 (duties to former clients).
2. A lawyer's impairment does not excuse failure to meet a lawyer's duty to a client. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003) (Obligations with Respect to Mentally Impaired Lawyer in the Firm); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-431 (2003) (Lawyer's Duty to Report Rules Violations by Another Lawyer Who May Suffer From Disability or Impairment); and *In re O'Brien*, 29 P.3d 1044 (N.M. 2001) ("an unfortunate example of [misconduct] which might have been avoided had respondent been willing to seek assistance in addressing her physical and mental problems as they related to her law practice.")

**B. The Impaired Lawyer May Have a Duty to Refrain or Withdraw from Representation**

1. A lawyer whose physical or mental health “materially impairs” his capacity to represent clients has a duty to refrain or withdraw from representation. *Model Rules of Prof'l Conduct* R. 1.16 (A)(2) (2003); SEE ALSO RESTATEMENT (*Third*) of the Law Governing Lawyers § 32 (2003).
  - a. *See, e.g., In re Taylor*, 959 P.2d 901 (Kan. 1998) (alcoholic lawyer failed to withdraw from representation although he had failed to appear in court on behalf of his clients or otherwise provide competent counsel); *see also State v. Southern*, 15 P.3d. 1, 8 (Okla. 2000) (lawyer suffering from B-12 deficiency who “knew that at some point his ability to represent clients was significantly compromised” but failed to withdraw was censured and placed on probation).
2. A lawyer who withdraws from representation has continuing ethical obligations to the client.
  - a. Whenever a lawyer withdraws from representation, the lawyer must take “reasonably practicable” steps to protect a client’s interests. *Model Rules of Prof'l Conduct* R. 1.16(d) (2003).
    - (1) *See, e.g., In re Barnes*, 691 N.E.2d 1225 (Ind. 1998) (impaired lawyer “compounded his neglect by failing to take even rudimentary steps to ensure that his clients’ interests were adequately protected after it became apparent to him that he was no longer able to function effectively as an attorney.”); *see also In re Morris*, 541 S.E.2d 844 (S.C. 2001) (impaired lawyer who withdrew from representation without giving the client notice failed to adequately protect the client’s interests).
  - b. If the lawyer has been appointed to represent a client, withdrawal may require the approval of the court. *Model Rules of Prof'l Conduct* R. 1.16 cmt. ¶ 3 (2003).
  - c. If the case involves pending litigation, the court usually requires court approval or notice to the court in order for the attorney to withdraw from representation. *Id.*

**C. An Impaired Lawyer May Have a Duty to Withdraw from Supervision of the Work of Others**

1. A lawyer violates his professional obligations by failing to competently supervise the work of another lawyer who he is charged with directly supervising. *Model Rules of Prof'l Conduct* R. 5.1(c) (2003).
  - a. The duty to supervise adequately is not excused by the existence of an impairment. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003); *See also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-431 (2003).
    - (1) *See, e.g., In re Wetson*, 442 N.E.2d 236 (Ill. 1982) (impaired supervising attorney liable for actions of attorney he supervised who commingled and converted trust assets); *see also In re Farmer*, 950 P.2d 713 (Kan. 1997) (lawyer with severe depression, acute distress disorder, and panic disorder failed to adequately supervise, educate, review, or mentor inexperienced lawyers who he had hired to handle bankruptcy cases).

**II. Duties of Members of the Impaired Lawyer's Firm**

**A. Under Certain Circumstances Partners are Responsible for the Conduct of Other Lawyers in the Firm**

1. Partners, or lawyers in comparable managerial positions within a firm, have a duty to make "reasonable efforts" to make sure that the firm has measures in place that give "reasonable assurance" that all lawyers in the firm conform to the ethical rules. *Model Rules of Prof'l Conduct* R. 5.1(a) (2003); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 11(1) (2001).
  - a. This rule applies to those lawyers who have managerial control over the firm's professional work. *Model Rules of Prof'l Conduct* R. 5.1 cmt. 1 (2003).
    - (1) This includes members of a partnership, shareholders in a professional corporation, members of associations permitted to practice law, and lawyers with managerial positions in legal services organizations, enterprises, or government agencies. *Id.*

**B. A Lawyer who Directly Supervises an Impaired Lawyer has a Duty to Prevent or Mitigate Ethical Violations by the Impaired Lawyer**

1. A lawyer may be liable for the actions of another lawyer who she directly supervises if she orders or ratifies the other lawyer's ethical misconduct, or if she is aware of the lawyer's ethical violations and does not take mitigating steps. *Model Rules of Prof'l Conduct* R. 5.1 (2003); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 11(2)-(3) (2001).
  - a. An established peer review process can be helpful in providing an institutional vehicle for dealing with the impaired lawyer. *See, e.g.,* Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. Colo. L. Rev. 329 (1995); *see also*, Henry Rose, *Supervision: Lawyers as Teachers – the Art of Supervision*, 21 A.B.A. Legal Econ. 5 (1984).
  - b. *See, e.g., In re Yacavino*, 494 A.2d 801, 803 (N.J. 1985) (“Had this young attorney received the collegial support and guidance expected of supervising attorneys, this incident [of negligent representation] might never have occurred.”).
2. When a lawyer's representation of clients is limited or a lawyer is removed from representation due to impairment, there may be a duty to inform the client of both the change and the reason for the change. *Model Rules of Prof'l Conduct* R. 1.4; ABA Standing Comm. on Ethics & Prof'l Resp., Formal Opinion 03-429 (2003).
  - a. A firm should not, in most cases, charge a client for the time devoted by the firm to supervising an impaired lawyer to assure that the client receives competent representation. *Id.*

**C. The Firm May be Required to Inform Clients if the Impaired Lawyer Leaves or is Removed from the Firm**

1. The firm has a duty to its client to explain matters to the extent “reasonably necessary” for the client to make an “informed decision” about representation. *Model Rules of Prof'l Conduct* R. 1.4 (2003); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 (2001).
  - a. If the client is deciding between remaining with the firm or following a departed lawyer, who the firm knows to be impaired, the firm may be required to disclose the facts surrounding the impaired lawyer's departure from the firm

while taking care to limit that disclosure to only that information the client needs to make an informed decision. ABA Standing Comm. on Ethics & Prof'l Resp., Formal Op. 03-429 (2003).

(1) Any statements made by the firm must be factually based, so that the firm is not responsible for damaging the impaired lawyer's reputation or his relationship with clients without foundation. *Id.*

b. If the client has already dismissed the firm and is being represented by the impaired lawyer, the firm has no duty to report the impairment to the former client. *Id.*

(1) However, the firm should not engage in any communications that may be seen as endorsements of the impaired lawyer's ability to represent clients. *Id.*

(a) For example, the firm should avoid sending a joint letter on the firm letterhead announcing the transition. *Id.*

**D. The Firm May Have to Report the Lawyer's Impairment to the Disciplinary Authorities if the Lawyer Leaves or is Removed from the Firm**

1. If the firm believes that it has prevented the impaired lawyer from violating any ethical rules while the impaired lawyer was practicing in the firm, the firm has no duty to report the lawyer's condition to the authorities. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003).

2. However, if the firm believes that the impaired lawyer is likely to violate the ethical rules without the support, supervision, or structure of the firm, the firm may be required to report the lawyer's condition to the appropriate disciplinary authority. *Id.*

**III. Duties of Attorneys Outside the Firm who are Aware of the Lawyer's Impairment**

**A. Lawyers Have a Duty to Report Known Ethical Misconduct under Certain Circumstances**

1. A lawyer who knows that another lawyer has violated the ethical rules in a manner that raises a "substantial question" regarding the lawyer's "honesty, trustworthiness, or fitness as a lawyer" has a duty to report the violation to the appropriate authority. *Model*

*Rules of Prof'l Conduct* R. 8.3 (2003); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5(3) (2001); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* §§ 64.2 - .5 (3d. ed. 2003); *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) (lawyer suspended for one year for failing to report a known ethical violation by another attorney).

- a. Only those violations that raise a “substantial question” as to the lawyer’s ability to represent clients must be reported.
  - (1) “Substantial” refers to the seriousness of the offense, not to the amount of evidence of which the lawyer is aware. *Model Rules of Prof'l Conduct* R. 8.3 cmt. 3 (2003).
  - (2) An impaired lawyer’s failure to refuse or terminate representation of clients ordinarily raises a “substantial question” about the lawyer’s fitness. *See* ABA Standing Comm. on Ethics & Prof'l Resp., Formal Op. 03-431 (2003).
  - (3) If the lawyer is no longer impaired, there is no duty to make a report to the authorities because there is no longer a “substantial question” regarding the lawyer’s capacity to practice. ABA Standing Comm. on Ethics & Prof'l Resp., Formal Op. 03-429 (2003).
- b. “Knows” refers to actual knowledge, which may be inferred from circumstances. *Model Rules of Prof'l Conduct* R. 1.0(f) (2003); *see also* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 597-98 (5th ed. 2003) (describing lack of uniform standard defining “knows”).
  - (1) The reporting lawyer may know of the impaired lawyer’s misconduct through first hand observation or through a third party. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-431 at n. 12 (2003); *but see* Ill. Ethics Op. 90-28 (1991) (information that a lawyer receives about another lawyer’s ethical violation that is hearsay is not sufficient to trigger a duty to report).
  - (2) In determining whether they “know” of an impairment that has caused a violation, lawyers are not expected to be able to identify an impairment with the precision of a medical professional. ABA

Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-431 2003).

(a) It making this determination, it may be helpful to seek guidance from a mental health professional or a representative of a lawyers' assistance program, if one is available. *Id.*

(3) Lawyers, however, may not ignore generally known symptoms of mental impairment. *Id.*

(a) For example, a lawyer with a mental impairment may:

(i) frequently miss court deadlines,

(ii) fail to make requisite filings,

(iii) fail to perform tasks agreed to be performed, or

(iv) fail to address issues which would be raised by competent counsel. *Id.*

c. As noted above, only conduct raising a substantial question about a lawyer's fitness to represent a client is reportable.

(1) For example, knowing that a lawyer drinks heavily in social situations does not necessarily reflect knowledge that the lawyer is impaired in his ability to represent clients. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-431.

2. Before deciding whether a report to the disciplinary authority is required, a lawyer may consider raising the issue with the impaired lawyer or the impaired lawyer's firm, and may consider reporting the affected lawyer's impairment to an approved lawyer's assistance program.

a. If the lawyer speaks with the impaired lawyer, the seemingly impaired lawyer may be able to explain what happened and why. However, the impaired lawyer's denial or explanation may not remove the need to report if a substantial question remains regarding the lawyer's fitness to represent clients. ABA Standing Comm. on Ethics & Prof'l Resp., Formal Op. 03-431 (2003).

- b. The reporting lawyer may also consider contacting the firm of the impaired lawyer.
    - (1) If the firm has removed the impaired lawyer from representation of clients, then the violation has ceased and there is no duty to report to the disciplinary authority. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-431 (2003) (“[T]here is no obligation to report the affected lawyer’s past failure to withdraw from representing clients [if] the violation of Rule 1.6(a)(2) [has] ceased.”).
    - (2) If the firm has not taken such steps, however, speaking to the firm does not remove the duty to report the violation to the disciplinary authority. *Id.*
  - c. The reporting lawyer may also report the affected lawyer’s impairment to an approved lawyers’ assistance program.
    - (1) A report to a lawyer’s assistance program, however, does not satisfy the reporting duty under Rule 8.3. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-431 (2003); *see also, e.g.*, Utah Ethics Op. 98-12 (1998) (duty to report known violations waived only for those who learn of the violation through participation in a lawyers’ assistance program, not those who simply report information to an assistance program); *see also* W. Va. Ethics Op. 92-04 (1992) (lawyer’s duty to report another lawyer’s known use of controlled circumstances not satisfied by reporting use to a lawyers’ assistance program).
3. The reporting lawyer should consider the ethical issues surrounding client confidentiality.
- a. If information relating to the representation will be disclosed, the reporting lawyer should consider whether there is a need to get permission from the client to disclose this information. *See Model Rules of Prof'l Conduct* R. 1.6 (2003); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 and 03-431(2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 62 (2001); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.7 (3d. ed. 2003).

4. This duty does not apply where a lawyer has been retained to represent the lawyer whose conduct is in question. *Model Rules of Prof'l Conduct* R. 8.3 cmt. 4 (2003).

#### IV. **Conclusion**

Dealing with the impaired lawyer raises many difficult issues. Sensitivity and judgment must be carefully exercised as the human, legal, and ethical issues are addressed. From the perspective of the Model Rules of Professional Conduct, the primary concern is that the interests of the clients of the impaired lawyer are properly protected. In cases where the impaired lawyer's conduct persists and raises "substantial questions" about the lawyer's fitness to practice, the appropriate disciplinary authority may have to be advised of the failure of the impaired lawyer to withdraw from representation. Note that the rules may differ by state and lawyers should be sure to consult their local ethical rules so that they may satisfy their duties to the bar and to their clients.





# IMPAIRED ATTORNEYS: THE FIRM AS EMPLOYER

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## **INTRODUCTION**

Dealing with the disease is hard enough, but law firms confronting professional impairment have additional problems. Practice within a firm is carried out in the context of loosely structured professional relationships with ill-defined hierarchies, and except in their early years of practice, lawyers work with little or no supervision. There are few objective measures of work product; “good” is subjective. Firms are structured with a lot of thought to the professional and economic parts of life – defining what kind of practice (full service boutique, something else), size (small, medium, supersized), and how to pay the partners. But little thought is given to establishing disciplinary procedures. There may not even be someone in charge with authority to discipline.

Toss in the idea of collegiality, which is one of those important rules of the road that help organizations endure. But collegiality, so important when you’re having a fight about money, is a barrier to the kind of confrontation that impairment may require. It isn’t my job, my role, or even my right to challenge my colleague about the problem. Professional lives are stressful enough. It is not difficult to find excuses for inappropriate conduct or lawyer negligence. There but for fortune... And if I do, am I possibly pushing the firm into the murky area of professional liability for malpractice. It isn’t surprising that lawyers circle their wagons.

All of these behaviors can be downright enabling.

The consequences of ignoring impairment include malpractice, loss of client confidence, and even the departures of qualified staff and colleagues. These can be dire. But there are equally dire consequences to blundering into a problem, ignoring laws and violating confidences and privacy. There are some rules.

## **DEFINING THE RELATIONSHIP**

You cannot make proper decisions about how to confront and manage impairment until you understand the nature of the relationship between the lawyer and the organization (which, for want of a better term, is probably "the firm"). If the relationship is employer-employee, there will be extensive regulation to worry about. If the relationship is that of independent contractor, there will be little regulation. If the relationship is that of partner to the firm, or partner to other partners, the principal concerns will be fiduciary duty and the partnership agreement. All that means a necessary first task is to define the relationship, because the nature of the relationship sets the rules.

Defining the relationship used to be easy. There were employees, and there were partners. In an unusual case there might be a sole proprietor or an independent contractor. Today there are new organizational forms, and lawyers generally make their selection of firm structure for tax advantages. Whether or not the form might require partners to become employees is rarely an important consideration, except where mandatory retirement rules are big issues (and then, employer-employee form is a real problem). Whether the organizational form requires something more than pro forma shareholder meetings is also rarely a consideration. A law firm now can be a general partnership, a limited partnership, a limited liability partnership, a limited liability corporation, and the people who work in the firm can be general partners, limited

partners, shareholders, employees, employers, and can have a bewildering combination of attributes that defies pigeonholing.

On April 22, 2003, the U.S. Supreme Court issued its decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 123 S.Ct. 1673 (2003). The opinion outlines the mode of analyzing a lawyer's relationship to the firm to decide an important question or two. Employer or employee? Owner or worker? Partner? Knowing the status of the lawyer is critical for application of a host of federal and state labor and employment laws, so *Clackamas Gastroenterology* provides important advice. At issue in the case was whether the medical clinic, which was set up as a professional corporation, was covered by the federal Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* That law is inapplicable to very small businesses; it does not cover an employer unless the employer's work force includes 15 or more employees over certain defined times.

The question arose because this clinic had four employee physicians who were actively engaged in the medical practice as shareholders and directors. Because the clinic was set up as a professional corporation, the physicians were formally shareholders who had employment contracts with the clinic and so were nominally employees. That very status made an easy and attractive argument for the terminated employee who wished to sue under federal law. She contended that the physicians could not have it both ways, that they could not establish a corporate status to reap tax advantages and limit civil liability, and yet at the same time claim the physician shareholders were partners for purposes of employment law. If the court counted the shareholders as employees, the clinic met the threshold for application of federal law.

The Supreme Court recognized that "we are dealing with a new type of business entity that has no exact precedent in the common law" with state statutes permitting incorporation for the purpose of practicing a profession. In the past the learned professions were not permitted to organize as corporate entities. Since professional corporations are "relatively young participants in the market" with features that vary from state to state, there had been little, if any, true guidance on just how to define and evaluate the relationship of professionals to the organization. That is what the court set out to do in *Clackamas Gastroenterology*, noting that the resolution of any legal issue depends upon understanding whether the professional is an employee or an owner. That analysis, in turn, requires a thorough understanding of the details of how the professional interacts with the organization. Here are the necessary questions:

- Can the organization hire or fire the individual or set rules and regulations for the individual's work?
- Does the organization supervise the individual's work, and to what extent?
- Does the individual report to someone higher in the organization?
- To what extent is the individual able to influence the activities of the organization? Act like a boss? An owner?
- What is the nature of the parties' agreement as to status?
- Does the individual share in the profits, losses and liabilities of the organization?

An employer is the person or group of persons who owns and manages the enterprise, can hire and fire, can assign tasks and supervise performance and decide how the profits and losses of the business are to be distributed. The fact that such a person has a title (even shareholder or employee) does not determine whether that person is an employee or a proprietor. The Court

emphasized that no one factor is controlling, that even the existence of a document called “employment agreement” does not lead inexorably to the conclusion that a party is an employee, and that the answer to the question of status “depends on all of the incidents of the relationship with no one factor being decisive.” The test is all about the substance of the relationship, not what it looks like on its surface.

That means that if the lawyer in a professional corporation has a status functionally equivalent to partnership, the form of the organization does not control. In such a case, partnership law applies. If the lawyer has a status within the firm that permits him or her to influence decision-making and keep a share in profits, losses and liabilities, those factors point to something akin to a partner and partnership law applies. If, in contrast, the lawyer can be terminated or disciplined, works under set rules and regulations, reports to and is supervised by the firm, employment law probably applies because those factors point to employee status.

### **PARTNERSHIP**

If the relationship is not employer-employee but a partnership relationship, the statutory protections do not apply but activities will be governed by the murkier provisions of the common law, including the fiduciary duties extended within partnerships, as well as common law privacy protections.

Theories arising out of the breach of fiduciary duty can be asserted if a partner is disciplined or expelled. Because most of the reported case law turns on the laws of individual states and the provisions of the partnership agreement, they are somewhat limited in precedential value. See, for example, *Cadwalader, Wickersham & Taft v. Beasley*, 728 So.2d 253 (1998) (applying New York partnership law that partners have no common law or statutory right to expel or dismiss another partner, but may provide in the partnership agreement for expulsion under prescribed conditions “which must be strictly applied”); *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (1998) (applying Texas law, holding that the relationship between partners is fiduciary in character and imposes an obligation of loyalty and utmost good faith, fairness and honesty, but concluding “a partnership exists solely because the partners choose to place personal confidence and trust in one another”); and see, *Heller v. Pillsbury, Madison & Sutro*, 50 Cal.App.4th 1367 (1996) (finding no breach of fiduciary duty in expulsion by executive committee of partner who behaved inappropriately where partnership agreement authorized executive committee to do so).

### **PRINCIPAL EMPLOYMENT LAWS**

Assuming the impaired lawyer holds employee status (as compared to partnership status or something else), two sets of statutes are most important in that they regulate and define the manner in which the organization can confront and address the impaired lawyer.

The federal Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, prohibits discrimination on the basis of disability, which is broadly defined to include a mental or physical condition, which substantially limits a major life activity, the existence of a record of a disability, or the perception of a disability. The law also sets certain confidentiality standards and requires accommodation of protected disabilities, but also provides some level of freedom in addressing

drug-related dependency. Alcohol-related dependencies fall into a different category altogether, something that firms must always remember in addressing issues under this law.

In addition to the federal law, virtually every state has a separate state statute providing similar, although not necessarily identical, protections. The potential for supplemental state regulation was recognized under federal law. 42 U.S.C. § 12201 provides: “Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.” In other words, federal and state laws both apply and an employee is entitled to the benefit of the law, which offers the greatest protection.

The second group of statutes that are important in addressing impairment of employees are those laws providing protected leave for serious health conditions. The federal law is the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.* This statute requires employers (those who employ 50 or more employees) to grant 12 weeks leave during any 12-month period for a variety of conditions, including the employee’s own “serious health condition.” This is another of those federal laws that establishes a level of protection as a floor, but permits greater protection in individual states. 29 U.S.C. § 2651 provides: “Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.”

As is the case with disability protections, a number of states have passed their own laws establishing various periods of protected leave for a variety of conditions, and often applying the requirements to smaller employers. Once again, the leave laws must be evaluated on both a federal and state basis to determine what protection, if any, the employee is entitled to. The leave laws can be important for two reasons. First, they guarantee a protected leave from work for a set period of time. Second, they provide for some level of reinstatement or reemployment. The most protective of the laws require an employee to be returned after leave to the same position of employment with the same benefits, the same responsibilities, the same duties, and perhaps even the same client base.

### **DISABILITY PROTECTIONS**

Title I of the ADA governs employment, regulates the conduct of employers, and places some limits on what employers can do in the employment, management, and terms and conditions of employment for employees who have disabilities. Because the definition of disability is so broad (any physical or mental condition which substantially limits a major life activity), substance abuse impairments meet, at least, the statutory definition. The potential protection of drug-related misconduct was a controversial issue during the debates over ADA; as a consequence, the statute provides only limited protections for drug-related activity.

The statute prohibits employers from making certain disability-related inquiries until there has been a conditional offer of employment. If you ask an applicant how much he or she drinks, you

may be asking a medical question because the answer may be diagnostic. Ask whether the applicant has ever been treated for drug addiction and you may end up in ADA-land.<sup>1</sup>

Once a conditional offer of employment has been made, you are free to make those inquiries, and to make them as broadly as you like (provided they are made for every employee being considered for the same class of jobs). Once the employee is hired, however, the window of opportunity slams shut.

After employment has started, only limited disability-related inquiries may be made and they must be "consistent with business necessity." The restriction on disability-related inquiries during employment (where they are limited to inquiries consistent with business necessity) also limits the ability of employers to inquire into potential substance abuse problems. Before asking, you will always need to test yourself: is this an inquiry that is "consistent with business necessity." Is it an inquiry that can be justified because the answer matters to the firm?

Because drug abuse (as compared to alcohol abuse) typically implicates illegal activity, the statute draws a marked distinction between abuse of drugs and abuse of alcohol.

"Drugs" are defined as controlled substances, with reference to the Federal Controlled Substances Act. The "illegal use of drugs" is unprotected; if use of drugs would be illegal under the Controlled Substances Act, it remains unprotected under the Americans with Disabilities Act. An exception exists under the law for drugs which are used under the supervision of a healthcare professional or as otherwise authorized by federal law.

There is an uneasy treatment of marijuana, which is authorized under the laws of some states for certain medical conditions, but remains illegal under federal law. Employers are generally free to follow the mandates of federal law, most state laws relating to the medical use of marijuana are limited in what they permit and generally excuse users from state criminal laws. Some employers want to ban it entirely. Other employers want to permit marijuana for recognized therapeutic purposes. Those are permissible legal choices up to a point; most firms don't particularly want to be seen as flaunting federal law, so an uncomfortable "don't ask don't tell" attitude might be the result.

An employee who is "currently engaging in the illegal use of drugs" has no protection under federal law, as long as the employer acts on the basis of the illegal drug use. At issue, however, is whether the employee's drug use is "current." There is some circularity in the legal definition of "current" drug use. Current drug use is drug use that is current. It is a fact-based inquiry. An individual's drug use is "current" if the facts suggest that ongoing drug use may continue to be a problem, even though the employee is not actively using, and even though the employee may not have drugs in his/her system at the time of the employer's disciplinary decision.

The structure of the statute is intended to encourage rehabilitation. Employees who have used or are using illegal drugs can regain the protection of the statute through rehabilitation. The successful completion of a supervised rehabilitation program, together with ceasing the illegal use of drugs restores the protection of the law. Employees can achieve rehabilitation in other

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<sup>1</sup> The EEOC has a helpful guidance on permissible pre-employment inquiries at [www.eeoc.gov](http://www.eeoc.gov).

ways, including participating in a supervised rehabilitation program (as compared to completing the program) so long as the illegal use of drugs stops. The law also recognizes “being otherwise” rehabilitated. That can include, for example, participation in a 12-step program or voluntary activities, so long as the illegal use of drugs ceases and so long as there have been sufficient rehabilitative activities to make it reasonable to conclude that the illegal drug use has stopped.

Under the ADA, employers have a statutory right to control employee drug use including prohibiting the illegal use of drugs in the workplace, requiring employees to remain in compliance with other statutes such as the Drug Free Workplace Act, holding employees to the same qualification standards as non-users, complying with administrative requirements which may mandate drug testing in certain occupations, and requiring employees to submit to drug tests.

Some state statutes place limits on employer rights to conduct drug testing. Federal law is generally silent (except for those situations in which testing is mandatory -- drivers, pipeline workers, train operators, coast guard, defense contractors).

Employers also have the right to prohibit alcohol use at the workplace, to require employees not to be under the influence of alcohol in connection with their work, to require employees to meet job and behavior standards regardless of alcoholism or alcohol-related conditions and to require compliance with federal standards such as Department of Transportation testing regulations.

The disparity in treatment between alcohol and illegal drugs creates employment-related issues. Although an employer can, in most circumstances, prohibit the illegal use of drugs even if off work (as long as there is some job-related connection), the same is not true with the use of alcohol.

Employers may require employees to submit to drug testing. It is not a medical examination according to federal law, and therefore can be administered without “cause” or suspicion of drug-related impairment. Alcohol tests are different and employers do not have the same right to test for alcohol. Any alcohol-related testing must be preceded by cause or suspicion of alcohol-related impairment. In the language of drug and alcohol testing, drug tests can be administered on a random basis under federal law; alcohol tests cannot be administered on a random basis.

### **SIGNS OF SUBSTANCE RELATED IMPAIRMENT**

Substance abuse leads to behavior problems, performance problems, or both. However, all employers need to proceed cautiously because a performance problem or a behavioral problem is not necessarily linked to a drug-related dependency or alcohol problem. Other concerns, some of them protected disabilities, could also be the cause. For example, a performance problem could be caused by personal problems at home, concerns about serious health conditions of family members, mental impairments, clinical depression, stress, fatigue, burnout, or overwork, and a host of conditions or circumstances. Many of these are protected by various state and federal laws and it is far too easy for an employer to blunder in a situation and mishandle it by making assumptions about the cause of the problem.

A cautious approach would include some, perhaps all, of the following steps:

- Establish and maintain institutional standards so that behavioral and performance problems are identified at an early opportunity.
- Identify specific performance or behavioral problems such as erratic work hours, substandard performance, observations of intoxication or impairment, unacceptable or unprofessional behavior.
- Confront the lawyer with factual information and observations, and provide an opportunity for explanation or a request for assistance.
- If appropriate, request an evaluation by a healthcare professional to determine whether there is a medical problem and, if so, what course of treatment is recommended.
- Impose appropriate requirements, including a “last chance” or “return to work” agreement.

### **OBTAINING AND PROTECTING MEDICAL INFORMATION**

Any time a firm requires a lawyer, employee or otherwise, to participate in a medical evaluation, any communication between the firm and the healthcare professional should be preceded by a specific written authorization. The law on the content of such an authorization varies from state to state, but typically an authorization should include the description of information which is to be used or disclosed, authorization to the healthcare professional, identification of the person to whom disclosure may be made, a description of the purpose for which disclosure is authorized, some expiration date, and obviously the lawyer/patient’s signature and date of authorization. It bears emphasis that any communication with a healthcare provider should remain strictly within the boundaries of the authorization. Repeat after me: I will not talk to doctors without a written authorization.

Regardless of whether the individual lawyer is an employee covered by the ADA or has a different status, any medical information should be retained in strictest confidence. The ADA requires medical records to be stored in separate locked cabinets, separated from personnel records and limits the persons who may have access to those records. Even if that law does not apply, however, most states recognize a right of privacy to confidential medical information. That means, at a minimum, that the persons within the firm who are aware of the medical information or medical records must restrict dissemination absent the consent of the lawyer.

### **COVERING THE WORK**

Client needs don't stop when a lawyer's practice is interrupted for treatment, and somebody needs to take care of those needs if there are to be any clients to come back to. Managing re-entry to the practice starts with planning to cover client needs during treatment. You may be doing this in crisis mode, but some time to plan will pay dividends.

- **What's pending?** Have somebody go through all pending matters and sort out the work so that you can identify immediate needs, near-term problems, and those matters that can wait. How you accomplish this will depend on what sort of system the lawyer uses. Check calendars, look through files, check documents on computers, and talk to clerical staff. Maybe the lawyer can prepare a list to start with, and if you're really lucky you may be able to get a briefing memo on major matters. And don't forget the invaluable assistance of the secretary or assistant who has been keeping the practice running. While you're at it, you might have some great ideas about reorganizing your own calendaring system; that can probably wait a few days, but don't lose track of the thought.
- **Who's going to do it?** Once you have a list, get matters reassigned as quickly as possible. Obvious deadline work is the place to start, but don't forget that large complicated matters need some advance warning too. It might be practical to get everything passed out in one awful meeting. Then everybody in the firm can feel terrible for an afternoon before they get down to work. While you're pondering reassignments, consider whether you may be able to reassign work in a way that will protect the practice for the lawyer. That maybe particularly important in organizations with a high degree of internal competition.
- **Should I get extensions?** Getting extensions sounds like it might solve some of the interim problems, but delaying the work may be a bad move. A month's worth of mail stacked up, clients clamoring for attention, and major messes to clean up aren't good for anybody. See if you can get the most critical work covered in the lawyer's absence.
- **What do I tell the clients?** In general, clients do not belong to that class of people who have a need or a right to know the nature of the problem. They do, however, have a right to know that their lawyer is not going to be around for a while and not going to be handling a particular matter, and they might have strong feelings about reassignment. Before you say anything to clients, see what the lawyer wants you to say. You might be able to agree on wording that communicates the need for the absence, without damaging the lawyer's client relationships in the bargain. If you can't reach some agreement, you still have to tell the clients something. Consider explaining that the lawyer is on leave or on medical leave. It is very good form to ask a client whether a particular reassignment is acceptable.

### CONFIDENTIALITY

The staff may know a lot more than you want, but you still need to think about what you are going to announce internally. There isn't an easy answer for all categories, but there are some guidelines that can help work through the gray area between confidentiality and notice.

Philosophically, honesty is great. But substance abuse treatment is a confidential matter. Information about treatment should be shared only with consent or on a need to know basis. If there is an employment relationship, it may be the type of medical information protected by the law.

Outside of an employment relationship, there may be civil privacy protections prohibiting the disclosure of private facts.

The first place to look for a resolution is the lawyer. Ask for input. You may be able to work out an acceptable internal statement, and you'll never know unless you ask. It may be, however, that the lawyer does not want to start treatment with a fanfare. If you can't agree on a statement, you may still need to notify personnel. If that happens to you, separate people into categories. You will have some who have a clear right to know (partners, for example). You will have others who have little or no right to know. And you will have others somewhere in between (the receptionist, the librarian, the mail room). Tailor your announcements accordingly, but remember to caution them not to gossip or contribute to the rumor mill. That is particularly important with the group that may be getting some detailed information. You don't want them spreading it around after you took such pains to tailor your own announcements. You might want to avoid notifying people in writing, unless you are using a prepared statement. Memos have a way of missing the shredder and finding the light of day someplace you didn't want them to be.

A caution is probably in order here. Lawyers entering treatment often do so having skated the surface of malpractice. As you assign out work, you may want to suggest the file be reviewed for errors or problems. That suggestion might require a bit of explanation. That category of person probably falls neatly into the "need to know" category, so don't worry too much about explaining what the problem is, as long as you follow up with the threat that they will get warts all over their bodies if they breach confidentiality. It usually works (the threats, not the warts). The final caution, to the extent that any notification is made, consider whether you want to make it orally rather than in writing. Confidential memoranda often are not, and may find their way into the hands of people who will spread the news.

### **WHO PAYS FOR ALL THIS?**

The cost of treatment is normally the lawyer's responsibility, regardless of status. That does not mean that you are prohibited from contributing, paying the bill, or loaning money for treatment. Keep a few guidelines in mind as you consider expense issues, however.

- If you are going to pay this time, consider whether you are setting a precedent that you might feel compelled to follow with others. Would you have to? Perhaps, particularly if you are dealing with employees. If you pay a male's treatment costs, you should think twice before deciding not to pay a female's treatment costs. If you pay this year, how will you explain next year's decision not to pay?
- It is permissible to contribute to the cost of treatment in different ways depending on status. For example, you could choose to have the firm pay for a partner but not an employee.
- It is probably more common to loan money for treatment, and set up some repayment plan. If you elect to do so, you should consider having the lawyer sign a repayment agreement and a promissory note. Most states have laws about payroll deductions, so check your state before you draft an unenforceable payroll deduction agreement.

## **CAN WE VISIT OR SEND CARDS AND LETTERS?**

Sure, unless the lawyer does not want to hear from you. Or unless you don't have authorization to share any information. Don't assume that well-intentioned contacts will be appreciated.

## **IS OUTPLACEMENT BETTER THAN REENTRY?**

Don't automatically assume that reentry to the same practice is the best thing to do. It may not be. There may be situations in which the relationship is so fractured that treatment should be followed by outplacement into another job or career. That may be particularly appropriate if there is no work to return to.

Keep this in mind, however, when you are dealing with the lawyer who is an employee. If the organization is large enough to fall under the federal Family and Medical Leave Act, substance abuse treatment is medical care for a serious health condition, and employers are required to hold the job open. Your state may have equivalent state laws.

Partnership and shareholder agreements may also determine whether outplacement is a choice that can be imposed on the lawyer. If outplacement seems like a better idea, you might do well to involve the treatment counselors. You may unwittingly interfere with the treatment program by making a sudden unexpected change like telling the lawyer there may be no job to return to.

## **LAST CHANCE AGREEMENTS**

In business, employers generally require employees returning from treatment to execute a "last chance agreement" or "return to work agreement." These agreements can be a constructive part of recovery. They provide job-related motivation and outline job-related responsibilities, which relate to treatment and recovery. Although they vary from workplace to workplace, most include the following elements:

- Verification that the employee is participating in a treatment program (be careful not to require too much information);
- A commitment to remain drug and alcohol<sup>2</sup> free;
- An acknowledgement that the lawyer is committed to adhere to requisite standards of behavior;
- Drug or alcohol testing if appropriate (be careful to avoid random alcohol testing for

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<sup>2</sup> Before requiring a commitment to remain alcohol free, check with developing interpretations of the Americans with Disabilities Act. While current use of illegal drugs is not protected under the law, alcoholism is as long as it does not have a negative effect on the business operations. That may lead to a tension between the need to abstain from alcohol for purposes of treatment and recovery, and the employer's insufficient interest in monitoring off-the-job drinking habits. We don't yet know where the line lies.

employees);

- A commitment to participate fully in recommended aftercare, 12-step meetings, or other therapy recommended by treatment counselors;
- An acknowledgement that a violation of the agreement, or its incorporated standards, will result in immediate termination; and
- Authorization to talk to treatment counselors to obtain information about compliance with treatment requirements, aftercare conditions, and to get advice about the return to work, all limited to a need to know basis and carefully drafted to protect medical privacy.

"Last chance" or "return to work" agreements are appropriate for the lawyer too; however the type of agreement might vary with the lawyer's status. Partners and shareholders who have ownership interests may work under agreements that spell out rights and responsibilities that leave little room for a mandatory extra agreement such as a last chance agreement. That may leave the firm with little leverage beyond a motion to expel the lawyer or break up the firm. But don't overlook the value of negotiation too. You may be able to work out a perfectly satisfactory return to work agreement, which protects organizational interests and, in exchange, offers practice-related assistance upon return.

### **THE WELCOME HOME**

It is a good idea to designate a single person or a small group to be the lawyer's designated contacts during treatment. That will ensure a more consistent flow of information about progress, prognosis, return dates and similar details. It will also help avoid a minor catastrophe upon return: the lawyer walks in, wholly unexpected, to find someone working at his/her desk, secretary reassigned, no clients, no work, and no friends. That doesn't have to happen; the contact person can be responsible to see it doesn't.

Organizations must give some thought to the lawyer's return to the office:

- Check out the physical space and make sure you return it to pre-treatment condition (but ditch the bottles!)<sup>3</sup>
- Some kind of welcoming activity is appropriate, but take personalities and desires into account. Maybe a brief acknowledgement at a breakfast meeting is in order, maybe a card, or some other recognition. Treatment counselors are often very good sources to tap if you're concerned about what's appropriate.
- At least a week before the lawyer's scheduled return, two work related things should be happening. First, the lawyers who were assigned the pending matters should

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<sup>3</sup> Actually, if the organization's culture respects the privacy of desks and offices, don't go searching for bottles or drug paraphernalia. Let the lawyer or a sponsor take that project on.

prepare brief status reports on what was done in the lawyer's absence. Second, the appropriate person (practice chair, managing partner, and supervisor) must give some thought to the work the lawyer will be doing upon return. Employees need assignments; partners or shareholders may need guidance. A visit with treatment counselors may help out here provided you have consent.

- Don't neglect the other lawyers in the practice. Some of them will have a right and a need to have some information about the return. You will also need to manage their expectations about the return. Maybe the lawyer will return gung-ho, ready to dive into an intense three-month project. More likely he/she will return to a wounded practice and some resentful colleagues.

### **BASIC LAWYER SKILLS**

There may be a lot of surprises upon the lawyer's return. Alcohol or drug use can mask many other problems, and may have contributed to a false impression of the lawyer's skills. The lawyer may have forgotten -- or never learned -- good skills. That may include work skills -- effective research, analysis, advocacy, effective oral and written presentation skills -- and it may include "office" skills -- billing practices, client relationships, office relationships. Be on the lookout for this problem. It can be corrected, but not if you don't know about it.

### **WHAT HAPPENED TO THE PRACTICE?**

You can bet the rent on this: you are welcoming back a lawyer with a sick practice. If you want reentry to work, you have to work on the practice. Every sick practice is sick in its own way, and there are no universal solutions.

- The returning lawyer is probably not able to do much alone. More likely he/she will be at a loss to know what happened to the practice, let alone how to fix it.
- Controlled assignments or responsibilities for six to twelve months may be needed, first to provide some work, then later to fill in gaps as the practice rebuilds.
- Most lawyers returning from treatment will benefit from practice building advice and some wise counsel -- from a department head, knowledgeable peer, or even an outside consultant.
- Don't underestimate the value of jump starting. Early successes are very important motivators.
- Have a short-term and near-term practice development plan; give some thought to it before the lawyer returns, and make it a key point of discussion the first few days back on the job.
- Monitor progress against the plan, particularly during the first six months.

All this takes commitment, which raises another concern. Sick practices don't get that way overnight. More likely, others have carried their impaired colleague just a little too long.

### **RESENTMENT, MISTRUST AND THE OTHER UNHOLY EMOTIONS**

Most lawyers do not analyze their own practices; but they often can't stop themselves from analyzing the practice of their colleague who has just returned from treatment. It isn't difficult to understand why the dominant emotion is resentment. One of their own has failed them. They may be cleaning up, mending shattered client relationships, worrying about staff complaints and rebuilding a tarnished firm reputation. They may be the ones giving up vacations and weekends to get the work done in the lawyer's absence. They may even be paying for treatment, in one way or another. They may be struggling with their own practices, but not getting the same care and attention the returning Prodigal Son is getting. They may be looking for a reason to believe the lawyer should go someplace else to make a fresh start.

Reentry to the same firm is not always the best choice, although it may sometimes be required because of a controlling statute. If you are looking for the greatest good for the greatest number of people, an honorable goal, you will understand that the interests of the group are at least as important as those of the returning lawyer (and there are usually more of them). Give this some time. The tension may fade, but it is unlikely you'll be able to predict whether it will. But don't count on time alone to make this work. The lawyer in an average organization knows very little about the complexities of drug and alcohol abuse. If you sense tension, it might be helpful to provide some education to the lawyers in the organization so they can understand more about addiction, and maybe learn something about repairing relationships themselves.

Regaining credibility is a critical task for the impaired lawyer. Remember that a part of credibility is what others see. If the senior or "important" lawyers in the firm wash their hands of the returning lawyer, everybody else will too. On the other hand, a little public attention from the right people can make the difference.

## **SAMPLE: TREATMENT AND RETURN TO WORK AGREEMENT**

By signing this agreement I accept and agree to the following terms and conditions which will govern my continued employment with and my return to work with [firm].

### **I. TREATMENT**

1. I acknowledge that my work performance and/or behavior have resulted in the need for intervention and have provided a basis for the termination of my employment (or: define nature of relationship) with the firm. As a consequence, and in order to avoid the termination of my employment (expulsion from the firm), I voluntarily accept the terms of this agreement.

2. I agree to submit to an immediate evaluation by a health care professional of the firm's selection.

3. I will follow all treatment recommendations of that professional including without limitation entry into a residential treatment program.

4. I understand that I am responsible for all costs associated with the treatment program to the extent they are not covered by insurance.

5. I will authorize regular progress reports to be made to the firm during treatment (tailor to specific consent).

### **II. RETURN TO WORK**

1. Upon completion of the recommended treatment program I understand that the firm will return me to employment.

2. Upon my return, I will review all aftercare requirements and recommendations with my supervisor (on a need to know basis).

3. I understand and acknowledge that my return to work will be conditioned upon my strict compliance with the following:

(a) Strict compliance with the treatment recommendations made by the treatment professionals with whom I have been working. Upon completion of my treatment program, a summary of those recommendations will be prepared and attached as Exhibit A to this agreement, and I will re-execute it at that time (tailor consistent with medical authorization);

(b) Complete abstention from all mood-altering substances except in strict accordance with the written authorization of a licensed physician who has been advised in advance of my treatment for substance abuse and who has reviewed any such prescription in advance with my substance abuse counselors (tailor to address off-duty alcohol use);

(c) Regular attendance at required or recommended 12-step programs.

4. For a period of two years from the date of my return to work, I agree to submit to testing to detect the presence or use of drugs (or alcohol if appropriate), on any basis including random or unannounced, and at the times and on the terms that are communicated to me by [insert authorized person or entity]. I understand that at the conclusion of the two-year period the company, in its sole discretion, may extend the period during which I will submit to drug testing for an additional year. (use caution in defining alcohol testing to avoid ADA problems)

5. I understand and acknowledge that I continue to be bound by and must adhere to all standards of professionalism, behavior and performance that are required of attorneys with the firm as they may exist from time to time, including but not limited to those set out in the firm's policy and procedure manual.

6. This agreement does not guarantee my employment or compensation for any period of time, nor does it in any way alter my status [as an at will employee]. I understand and acknowledge that strict adherence to these terms and conditions are a requirement of my continued employment with the firm and that any violation of the terms of this agreement (including its incorporated standards) will result in my immediate termination.

By my signature below I confirm that I have reviewed and considered these terms and accept them voluntarily as a constructive part of my recovery. I also acknowledge that these terms are being provided to me as an alternate to the termination of my employment. I understand that I may withdraw my consent at any time during the term of this agreement, but acknowledge that withdrawing my consent is a voluntary termination of my employment (consent to my expulsion from the firm).

Signature # 1 (at the time of intervention):

Signature # 2 (upon return to work, and incorporating aftercare recommendations)



## Lawyer Assistance Programs

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## A. An Introduction to the Issues

Alcoholism, drug addiction, and mental health problems are issues that affect a great number of lawyers, judges and law students. Reports now estimate that while ten percent of the general population has problems with alcohol abuse or chemical dependency, anywhere from fifteen to eighteen percent of the lawyer population battles the same problems. Because many lawyers and judges are overachievers who carry an enormous workload, the tendency to "escape" from daily problems through the use of drugs and alcohol is prevalent in the legal community. Also, the daily pressures placed on these men and women can lead to an inordinate amount of stress and an associated increase in the incidence of depression and other mental disorders. Recent reports have also shown that a majority of disciplinary problems are the result, at least in part, of chemical dependency or substance abuse, depression, emotional stress and other mental disorders. Some of the research in this area can be summarized as follows:

~ Up to 18% of lawyers suffer from alcoholism (Washington Research).

~ Approximately 33% of lawyers suffer from significant mental health issues (Washington Research).

~ Approximately 19 - 37% of lawyers suffer from depression. (Washington and North Carolina Studies).

~ Of 28 occupations surveyed, lawyers are most likely to suffer depression and 3.6 times more likely to suffer depression than are members of other professions (1990 Johns Hopkins Medical School study).

~ 40 - 75% of discipline cases involve a chemically dependent or mentally ill practitioner (Illinois Survey).

~ 80% of Client Protection Fund cases involve chemical dependency or a gambling component (Louisiana & Oregon Studies).

~ A 2001 research project studied the incidence of malpractice and disciplinary claims against Oregon lawyers who suffer from alcoholism or chemical dependency. The study examined their claim rates during the five years before sobriety and the five years after sobriety. It was found that malpractice and discipline complaint rates for lawyers before recovery are nearly four (4) times higher than they are after recovery and that malpractice and discipline complaint rates for lawyers in recovery are lower than that of the general lawyer population.

## B. The American Bar Association Response

To provide a model for assisting these lawyers whose practices had been impaired by addictions, the American Bar Association created the Commission on Impaired Attorneys in 1988. In August 1996, the Commission changed its name to the Commission on Lawyer

Assistance Programs (CoLAP or the Commission). This name more aptly describes the work performed by both the Commission and the various state Lawyer Assistance Programs (LAPs) which then and now include a variety of services including outreach, education and other services relating to lawyer stress, depression, and mental health issues. The name change also served to help reduce and avoid any stigmatization associated with the former name.

In 1988, the American Bar Association Board of Governor's also established certain priorities for CoLAP:

1. Education concerning lawyer addiction, depression, and mental health problems, and means of treatment.
2. Development and maintenance of a national clearinghouse on lawyer assistance programs and the case law about addiction, depression, and mental health problems.
3. Collection of state rules and opinions on confidentiality and immunity.
4. Development of a national network of lawyer assistance programs.
5. Models and guidelines for state and local lawyer assistance programs.

CoLAP has been successful in aiding the introduction and support of programs in both state and local bars. Whereas only twenty-six state bar programs existed in 1980, today all fifty states have either a fully developed and funded lawyer assistance program or a committee or other program focused and dedicated to LAP issues. The Commission continues to support the state programs by offering evaluations and reviews of state and local lawyer assistance programs (LAP's) already in operation. Upon request, the Commission will assemble a team of Commission and Advisory Commission Members to review the structure and operation of the LAP program including but not limited to, a review of the job responsibilities of the staff, the financial operation of the program, the services provided, volunteer involvement, and cooperative measures between the LAP and bar association. Following each evaluation, the Commission provides a written report with its recommendations. Programs in Alabama, Arizona, Connecticut, Delaware, Florida, Georgia, Illinois, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, Tennessee, Texas, Utah, Washington, and British Columbia have all participated in this review process.

The Commission also provides significant educational opportunities regarding lawyer addiction and mental health including, but not limited to, its Annual Workshop for Lawyer Assistance Programs, now in its 16<sup>th</sup> year, and *Highlights*, a quarterly publication designed to keep readers up-to-date about the Commission's latest activities. Both the workshop and newsletter help to educate and provide expert resources concerning the latest developments available to assist lawyers with chemical dependencies or mental health problems. Most recently, the Commission worked with the New York State Lawyer Assistance Trust in June 2003, to co-sponsor a day long symposium that brought together law school deans, academics, judges, practitioners, bar admission officials, and law students from throughout the Northeast, to discuss the role of law schools in addressing the issue of alcohol and substance abuse in legal education.

The Commission has published several compilations specific to LAP issues including *The 2002 Survey of Lawyer Assistance Programs*, a comprehensive survey and analysis of lawyer assistance programs throughout the United States and Canada, and *The 2002 Directory of Lawyer Assistance Programs*, a listing of LAP contact information, personnel and staff directors, state bar association committee members associated with LAP issues, and other pertinent resources.

The Commission on Lawyer Assistance Programs maintains a web page that includes a directory of local programs; information about CoLAP products and publications; copies of recent *Highlights* Newsletter; information and registration materials for the 16<sup>th</sup> Annual ABA CoLAP National Workshop; a calendar of upcoming events and other links of interest. See [www.abanet.org/legalservices/colap/home.html](http://www.abanet.org/legalservices/colap/home.html).

### C. The States' Response: Lawyer Assistance Programs (LAPs)

Lawyer Assistance Programs (LAPs) have been providing outreach to impaired lawyers for a considerable length of time. Some such programs have been in existence for longer than twenty years and some have recently moved from operating as volunteer committees to fully funded and permanently staffed programs. Some programs are wholly volunteer supported. Suffice it to say that currently each and every state has some form of lawyers' assistance program.

All such programs serve the lawyers licensed to practice law in that state and most programs also provide services to others, including judges and law students, and sometimes lawyers' family members and law firm employees.

LAPs provide a variety of services relating to different categories of impairment. Some LAPs focus exclusively on alcohol related impairments. Others address additional dependency issues while still others cover the broad brush of addictions and mental health issues. The services provided by each LAP are varied and may include assessment, peer and professional counseling, referrals, intervention services, support groups, and a variety of prevention and educational outreach programs. LAPs also may provide monitoring services for law firms, conditional bar admission, probation, diversion or discipline.

Most LAPs operate a toll free hotline for incoming calls and professional staff, lawyers, or mental health professionals answer most such phone lines. Lawyers and others come to the attention of the LAPs by various means: self-referral, the judiciary, discipline, admissions, family members, friends, peers, and office workers.

All LAPs use volunteers to help provide program services. Volunteers are generally trained to help perform a number of services including, but not limited to, peer counseling, hot line response, advocacy, education, monitoring, intervention, and facilitating support groups.

Most LAPs work with the state's disciplinary agency to help provide resources, support, assessment and evaluations, development of agreements, contracts or monitoring orders, education for both grievance entities and referrants, support group services and general outreach. Many LAPs work with the state's admission agency to provide many of the above listed services and a handful of LAPs also provide similar services to the professional liability carriers.

Every LAP reports that communications between it and the lawyers it serves are confidential. Confidentiality flows from varying sources, including state or federal statute or rule, court decision or state bar rule. Many states also provide immunity to those who, in good faith, make reports to the LAP. As most here know, an ethical obligation to report the misconduct of another lawyer exists in most states but many LAPs may be exempt from the reporting requirement under certain circumstances. Appendix A, B and C contain information regarding LAP confidentiality and immunity and the duty to report.

#### D. Conclusion.

The reality of practicing law today is that at sometime in your legal career, you will come across another lawyer who is dealing with some type of impairment. This impairment may be a result of alcohol, drugs, gambling, food, sex, or other addiction. This impairment may be the result or complicating factor of mental or physical illness, age, stress or burnout. No matter the cause, when you are confronted with a lawyer who is struggling with an impairment, it will help to know that your local Lawyer Assistance Program or the ABA Commission on Lawyer Assistance Programs can provide you with confidential, individualized, and valuable information, services and support. Take a look at the information available about contacting the LAP in your state, the confidentiality and immunity provided, and your ethical duty to report the misconduct of another lawyer. It may be important to establish a relationship with the Lawyers' Assistance Program in your state soon.

## SOME SIGNS and SYMPTOMS of CHEMICAL DEPENDENCY

(with thanks to Florida Lawyers Assistance, Inc.)

<b>Family</b>	<b>Physical</b>	<b>Community</b>	<b>Office</b>	<b>Professional</b>
Withdrawal from family and pleasurable activities	Multiple Complaints	Decreased participation in community affairs	Disorganized appointment schedule	Inappropriate behavior or mood
Frequent absences	Increased use of prescription medication	Change of friends, acquaintances	Hostile behavior to staff and clients	Decreasing quality of performance
Frequent arguments; child/spouse abuse	Increased hospitalization	Drunk and disorderly incidents, public intoxication, DWI arrests	Locked door syndrome (drinking or using at work)	Inappropriate pleadings, decisions
Family members display codependent behaviors	Frequent visits to doctors, dentists, medical professionals	Leaders in community lose confidence	Borrowing money from partners, associates or staff	Partners, associates, staff notice and discuss changes in behavior
Children may engage in abnormal, antisocial, or illegal activities	Personal hygiene, dress, and appearance deteriorate	Marked change in participation in weekly routines – including religious and volunteer participation	Frequently absent, sick, or missing from work	Client complaints, disciplinary issues and malpractice suits
Sexual problems (dysfunction, affairs)	Accidents, trauma, ER visits	Sexual promiscuity	Clients openly complain to partners, associates and staff	Missed appointments, hearings, depositions
Separation or divorce (often initiated by spouse)	Serious emotional crisis	Isolation from support systems, friends and family	Increasing unexplained absences	Loss of clients, practice, unemployment



## DEFINITIONS & CHARACTERISTICS OF ADDICTION

BY: CHARLES N. ROPER, PHD\*

The question comes up often: “What is the definition of addiction?” The assumption is that one *true* definition actually exists. It doesn’t. Indeed, there are many definitions of addiction, including a few good ones.

Morse & Flavin’s (1992) definition of addiction is the one traditionally utilized by treatment centers and substance abuse counselors. It is very good and touches all of the bases. Published in the Journal of the American Medical Association (Vol. 68, No. 8), Morse & Flavin defined addiction thusly (paraphrased):

*Addiction is a primary, progressive, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by impaired control over use of the substance, preoccupation with the substance, use of the substance despite adverse consequences, and distortions in thinking.*

The DSM IV (1994) relies on symptoms for its definition. The DSM says that *addiction, or dependence, is present in an individual who demonstrates any combination of four or more of the following symptoms:*

- Preoccupation with use of the chemical between periods of use.
- Using more of the chemical than had been anticipated.
- The development of tolerance to the chemical in question.
- A characteristic withdrawal syndrome from the chemical.
- Use of the chemical to avoid or control withdrawal symptoms.
- Repeated efforts to cut back or stop the drug use.
- Intoxication at inappropriate times (such as at work), or when withdrawal interferes with daily functioning (such as when hangover makes person too sick to go to work).
- A reduction in social, occupational or recreational activities in favor of further substance use.
- Continued substance use in spite of the individual having suffered social, emotional, or physical problems related to drug use.

I appreciate and concur with both of these widely respected definitions. I have found, though, that the following conceptualization of addiction has proven to be understandable and meaningful to a lot of people, both professionals and lay people alike. It suggests that there are reliable, concrete differences between social users of alcohol and drugs, abusers of alcohol and drugs, and addicts, or those addicted to alcohol and drugs. The categories break down as follows:

A. *Social User: One who uses alcohol and/or drugs simply to enhance the pleasure of normally pleasurable situations. The social user experiences the following:*

- No negative consequences;
- No surprises or unpredictability;
- No loss of control;
- No complaints;
- No thoughts of or need for limit setting.

B. *Substance Abuser: One who uses to enhance pleasure and/or compensate for something negative, such as physical or emotional pain, insecurity, fear, anger, etc. The substance abuser experiences some or all of the following:*

- Occasional negative consequences that are not repeated;
- Limit setting that is adhered to;
- Promises that are made and kept;
- Complaints are heard and dealt with.

C. *Addict: One who uses to celebrate, compensate, or for any other reason, legitimate or not. The addict experiences some or all of the following:*

- Negative consequences are recycled;
- Limit setting & promises to self or others are broken;
- Complaints are denied and/or not heard;
- Reliable symptoms of addictive disease become more evident. Reliable symptoms include those listed under the DSM IV definition of addiction and others, expressed as follows:
  - Continued use despite negative consequences;
  - Loss of control, as in more use than planned (broken limits);
  - Unpredictability, as in use despite plan not to use (broken promises);
  - Compulsivity/preoccupation in thinking;
  - Denial; Use of defenses to maintain denial;
  - Build up of (or "break" in) tolerance;
  - Remorse & guilt about use or behavior when using;
  - Memory loss, mental confusion, irrational thinking;
  - Family history of addictive behavior;
  - Withdrawal discomfort (physical, mental, emotional, and/or psychological).

The following conceptualization of addiction is drawn primarily from the work of John Bradshaw. I took his basic premise and expanded it to its present form. It says that *addiction exists in the individual who demonstrates a pathological relationship with any mood altering experience that results in ongoing, recurring life damaging negative consequences.* Within the context of this definition, the following sub-definitions are offered:

- A. Pathological refers primarily to the presence of the following:
- Denial and delusion—defense mechanisms that look very crazy to the objective, outside observer; and
  - The intention to control one's use combined with unsuccessful attempts to do so.
- B. Mood altering experience refers to both of the following:
- Substances, including for example, alcohol, illegal drugs, prescription drugs, nicotine, caffeine, food, and sugar; and
  - Behaviors, including for example, gambling, work, sex, relationships, exercise, religion, emotions, shopping/spending, and TV.
- C. Life damaging negative consequences refers to both of the following:
- The Obvious, including for example specific health problems, specific legal problems, accidents, and loss of jobs or relationships; and
  - The Subtle, including for example loss of self-respect or respect of family or peers, lowered job performance or efficiency, arguments, and generally negative attitude.

Obviously, this conceptualization of addiction is broad and captures more than just alcohol- and drug-addicted people. It suggests that addiction to alcohol, heroin, nicotine, gambling, and shopping are all similar conditions as long as they meet the criteria of the definition.

Other definitions of addiction include those that are based strictly on biological, biochemical, or neuro-chemical presuppositions. They require evidence of a genetic predisposition to addiction coupled with a biochemical or neuro-chemical "error" or " malfunction" in the brain. These conceptualizations of addiction may well prove to be exactly correct. Time will tell.

In the meantime, however, defining addiction according to behavioral symptoms appears to offer the most reliable means of accurately diagnosing addiction. In layman's terms, "If it looks like a duck, acts like a duck, walks like a duck, and quacks like a duck, it's probably a duck." Very simply put, if an individual is having problems associated with his/her substance use, and tries but fails to control his/her use, then the chances are pretty good that there's an addiction lurking nearby.

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## Depression: Signs and Solutions

**Signs:** The first step in addressing a depression problem is acknowledging its existence. Someone with a major depressive disorder will present a number of symptoms nearly every day, all day, for at least two weeks. These include at least one of the following:

- losing interest in things you used to enjoy; or,
- feeling sad, blue, or down in the dumps;

plus at least three of these:

- feeling slowed down or restless and unable to sit still;
- feeling worthless or guilty;
- gaining or losing appetite or weight;
- thinking of death or suicide;
- having problems concentrating, thinking, remembering, or making decisions;
- having trouble sleeping, or sleeping too much;
- experiencing loss of energy or feeling tired all of the time.

**Solutions:** If you meet these criteria, it is important that you not ignore the problem and hope it goes away. The longer serious depression goes untreated, the more likely it is to become chronic and damaging. Left alone, depression can cut short a promising legal career, destroy a loving family, and ultimately, lead to suicide. True depression typically is not something you can “self-treat,” “shake yourself out of,” or simply “wait out.” Even between depressive episodes, most of those who go untreated continue to experience negative effects, such as inability to concentrate, disorganization, and apathy. And often, it is only a matter of time before the next depressive episode begins.

Getting treatment is often easier and less painful than you might imagine. It is important, however, that you see a professional trained in the treatment of depression. Usually, treatment will consist of medication, psychotherapy, or some combination of the two. Often, people with depression begin to see positive results within a month of beginning treatment—some earlier, some later. If you are not sure where to start, the Texas Lawyers’ Assistance Program can help. They can get you in touch with other lawyers who themselves have recovered from depression, and can refer you to a number of professionals in your area who can assess your condition and help you get treatment.