

LEGAL MALPRACTICE, LEGAL ETHICS AND ALCOHOLISM

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A. Introduction

An attorney who suffers physical injuries in an automobile accident will find most law firms very supportive during their recovery. Unless the problem persists for an inordinate amount of time, the attorney's draw or salary usually is not reduced, other attorneys help with the workload, and there is generally no problem regarding relations with others in the firm.

A different response, however, typically occurs if attorneys and/or non-attorneys in the firm become aware that an attorney is impaired because of alcoholism (or other chemical dependency), pathological gambling, similar addictions, or related emotional problems. A variety of reasons account for this response. First, these problems are not as easy to recognize. Second, by the time they are recognized, the problems typically are serious. Third, determining whether the impairment jeopardizes performance is difficult. Fourth, these problems have a psychological aura, making it more difficult for many non-impaired attorneys to deal with the impaired attorney. Fifth, although attitudes are changing, firms are not as supportive of rehabilitation efforts as they should be. Finally, some conduct may violate criminal laws.

Fortunately, bar associations and law firms started to normalize the situation in the early 1970's, and extend help to impaired attorneys. In 1971, Minnesota became the first state to address these topics specifically through the Board of Professional Responsibility.¹ Thereafter, relatively rapid progress occurred. By 1980, an ABA survey found that almost 50 percent of state bar associations and 20 percent of local bar associations had established some type of committee to deal with impaired attorneys.² By 1994, there were over 100 such bar association-related committees or programs.³

Oregon is one of the leaders, with a series of programs initiated by its captive insurance company, the Oregon State Bar Professional Liability Fund. One important feature of the Oregon approach is that services are provided at a location separate from where other bar association activities occur. Another state with a significant program is Minnesota. The Minnesota Lawyers Trust Accountability Board provides most of the funding for the Minnesota's Lawyers Assistance Program, which is administered by a non-profit entity called the Minnesota Lawyers Concerned for Lawyers.⁴

¹ See *New Help for Alcoholic Lawyers*, ABA Bar Leader, Jul., 1976, at 23-26.

² The ABA Division of Bar Services conducted the survey. See *Impaired Lawyer Programs on the Rise*, Litigation News, Summer, 1985, at 3-4. It appears that, in 1973, California was the second state to form a bar association committee to deal with this problem.

³ ABA Service Center, 1994 Directory of State and Local Lawyer Assistance Programs (ABA 1994).

⁴ This program can be reviewed at the website for Minnesota Lawyers Concerned for Lawyers, which is mnlcl.org.

When these bar association programs deal directly with impaired individuals, they usually are described as "intervention programs." Law firms also have become active, primarily through employee assistance programs⁵, or by using outside professionals.

B. Statistics

Statistics demonstrate that these addictive behaviors and associated mental illness deserve substantial attention from law firms and bar associations. Alcoholism has been estimated to affect, at a minimum, between 5 and 10 percent of the general population.⁶

There is no evidence that attorneys or judges are under-represented in these statistics.⁷ In fact, certain data suggest that alcoholism may adversely affect more than 10 percent of the general population and more than 15 percent of the lawyer population.⁸ The highest estimate is that approximately 20 percent of lawyers are likely to suffer from some type of alcohol-related problem.⁹ Moreover, lawyers reportedly suffer mental impairment from alcoholism and substance abuse at a rate exceeding twice the general population.¹⁰ The chemical dependency problem grew so drastically from 1980 to 1985, that there was an increase from 3 to 30 percent in the number of Fortune 500 companies screening employees for this problem.¹¹ Some law firms have started testing for drugs.¹²

Alcoholism and other chemical dependency are estimated to be a factor in at least 30 to 40 percent of disciplinary cases in California¹³, and are a factor in 50 to 75 percent of all cases coming before other state bar disciplinary boards.¹⁴ Although addiction and related emotional illness may be mitigating factors, violation of an ethics rule usually warrants some type of disciplinary sanction in an original disciplinary action, even if caused by those factors.¹⁵ After original disciplinary actions, some lawyers file motions to reduce the sanction,

⁵ See *Troubled Lawyers*, 72 ABA J. 17 (1986).

⁶ E.g., *Chase, Beneficial Drinking*, The Wall St.J., Mon., Jul. 3, 1995, at B1 (estimating that 7.4% of all Americans are alcoholics).

⁷ Sanborn, *Help for Impaired Lawyers*, ABA J., May 1996, at 107 (estimating that between 10% and 15% of attorneys are impaired by alcohol, drugs or other problems).

⁸ Conley, *Alcoholism Bigger Threat to Lawyers, Studies Indicate*, Daily Report, Fri., Oct. 13, 2000, at 1 and 3.

⁹ Beck, et al., *Lawyer Distress: Alcohol Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & Health 1, 3 (1995-96).

¹⁰ Bailly, *Impairment, The Profession and Your Law Partner*, 11 No. 1 Prof. Law. 2 (1999).

¹¹ Daily Labor Report (BNA) No. 234, at D-1, December 5, 1985, quoting Elaine M. Johnson, Acting Deputy Director, National Institute on Drug Abuse. Drug testing has continued to expand. One study found that almost 90% of the businesses sampled used drug testing to some degree. *Business Week, The Big Picture--Testing*, May 2, 1994, at 6.

¹² Major Manhattan law firms may start testing for drugs. See *Troubled Lawyers*, 72 ABA J. 17-18 (1986).

¹³ Gronke, *The State Assembly OKs Bar-Funded Rehab for Lawyers*, L.A. Times, June 22, 2001, at B8.

¹⁴ See Thompson, *Minet Quality Assurance Review, Effective Management of Risk in the Legal Profession* (Spring 1994); *Cocaine Blues*, 72 ABA J. 25 (1986).

¹⁵ E.g., *In re Mooers*, 910 A.2d 1046 (D.C.App.2006) (because of the mitigating circumstance of depression, the order of disbarment was stayed and three years of probation was ordered).

including reinstatement after disbarment. Depending on circumstances, rehabilitation from alcoholism, drug addiction, mental illness or pathological gambling can be important factors.¹⁶

Oregon, through its Attorney Assistance Program, conducted a study in 2001 of the relationship between disciplinary complaints, legal malpractice claims and alcoholism.¹⁷ The Attorney Assistance Program looked at malpractice claims and disciplinary complaints for five years before sobriety and five years after. The annual rate of malpractice claims before sobriety, for those participating in the Attorney Assistance Program, was 30 percent and after sobriety was 8 percent. In Oregon, the average annual malpractice claim rate for all lawyers in private practice was 13.5 percent. The percentages were similar regarding the annual disciplinary complaint rate for those in the Program, which before sobriety was 28 percent and after sobriety was 7 percent. This compared to an average annual disciplinary complaint rate for all attorneys in Oregon of 9 percent. Mathematically, malpractice claims and disciplinary complaints for those impaired lawyers were almost four times higher before sobriety, strongly suggesting a correlation that many intuitively believe.

Finally, the statistics on the frequency of legal malpractice claims caused by administrative errors should be considered. Most of the administrative errors are time-related in nature. The data collected and analyzed by the ABA Standing Committee on Lawyers' Professional Liability¹⁸ show that over 25 percent of the claims have a time-related component.¹⁹ Approximately 12 percent of all claims are due to administrative errors, most of which are time-related, by personal injury plaintiffs' attorneys.²⁰ Some of this data may be explained by high caseloads, a lack of support staff and poor work-control systems. Although not documented in the statistics, some of these claims involve alcoholism, other chemical dependency or emotional problems. The percentage may be significant, as shown by data from Oregon.²¹

¹⁶ *E.g.*, Florida Board of Bar Examiners re Barnett, 959 So.2d 234 (Fla.2007) (several years after an attorney resigned from the bar association in connection with disciplinary proceedings, the court approved the attorney's admission to practice, on a probationary basis); *In re Lord*, 589 Pa. 543, 910 A.2d 1 (2006) (because of the mitigating factor of alcoholism, and the treatment received for it, the attorney was reinstated).

¹⁷ Statistics presented at ABA Standing Committee on Lawyers' Professional Liability, Spring 2002 Conference.

¹⁸ ABA Standing Committee on Lawyers' Professional Liability, Profile Of Legal Malpractice (May 1986). Many insurance carriers contributed to this publication by responding to questionnaires prepared by the Standing Committee.

¹⁹ ABA Standing Committee on Lawyers' Professional Liability, Profile Of Legal Malpractice (May 1986) at Table 2, p. 10.

²⁰ ABA Standing Committee on Lawyers' Professional Liability, Profile Of Legal Malpractice (May 1986) at Figure 2, p. 8 and Table 5, p. 11.

²¹ The Oregon State Bar Professional Liability Fund found that 30% of a sample of attorneys recovering from alcoholism or drug addiction had legal malpractice claims filed against them before receiving treatment, but only 8% had claims during the year following initial treatment. Statistics presented at ABA Standing Committee on Lawyers' Professional Liability, Spring 2002.

In addition to bar-sponsored and law firm-sponsored programs for alcoholism, there are other nationally recognized organizations that focus on preventing addictive behavior patterns.²²

C. The Most Important Statistic

Assume the existence of a hypothetical firm of 60 lawyers. The statistics set forth above, demonstrating that between 5 to 20 percent of all lawyers have a serious alcoholism problem, strongly suggest there are at least 3 lawyers with a serious alcoholism problem in this hypothetical law firm. Based on the upper end of these statistics, there may be as many as 12 such lawyers.

Even if a survey was completely anonymous, in most firms of 60 lawyers, no one, or at most, one lawyer would be identified as having a serious alcoholism problem.

Given the statistics, that obviously means that the next hypothetical law firm of 60 lawyers must have a minimum of 5 lawyers with a serious alcoholism problem. If, once again, only one such lawyer can be identified in that firm, the next law firm of 60 lawyers must of course have a minimum of seven lawyers with a serious alcoholism problem.

Since lawyers are not under-represented, it is more likely that the number of lawyers with a serious alcoholism problem at a 60 lawyer firm is greater than three. This makes the statistical progression set forth above even more dramatic.

D. Warning Signals of Alcoholism

Overview. Alcoholism usually progresses through stages. Avoiding serious problems requires early detection and treatment. An analytical approach is to divide the process into five stages:

1. development of an increasing tolerance to alcohol;
2. onset of withdrawal symptoms when abstinence is attempted, such as anxiety or depression, as opposed to hangovers, from using alcohol;
3. addictive compulsion to alcohol, even while knowing the severe adverse consequences, such as job loss or criminal penalties;
4. serious deterioration of judgment accompanied by denial of the problem; and
5. amnesia or blackouts induced by using alcohol.

Alcoholism Warning Signals. There are warning signals that can help identify a problem early on. Any of these warning signals may be no more than an aberration in an otherwise normal situation. When two or more coincide, however, the situation deserves closer scrutiny. The following warning signals are listed in their probable order of increasing severity:

1. friends or family complain about the amount of alcohol consumed;
2. a consistent failure to keep appointments;

²² E.g., these organizations include Alcoholics Anonymous (212-870-3400), with a Website at Alcoholics-Anonymous.org; Narcotics Anonymous (818-773-9999), with a Website at NA.org; The National Council on Alcoholism & Drug Dependence (800-622-2255), with a Website at NCADD.org; The National Clearing House for Alcohol & Drug Information (800-729-6686), with a Website at ncadi.samhsa.gov; and The United States Center for Substance Abuse Treatment (800-662-4357), with a Website at csat.samhsa.gov.

3. a frequent failure to respond to telephone calls or letters;
4. feeling guilty about the amount of alcohol being consumed;
5. drinking during the day, whether at the office, or at lunch;
6. drinking in the morning;
7. frequent problems that usually are blamed on others;
8. inability to complete projects on time;
9. an unusual number of jokes by others about the degree of drinking;
10. deterioration in business and personal relationships;
11. irritation at suggestions there should be less drinking;
12. serious failures of memory, amnesia or blackouts from using alcohol;
13. "borrowing" client funds;
14. driving under the influence of alcohol, whether or not arrested; and
15. being arrested for crimes other than driving under the influence, but related to the use of alcohol (e.g., domestic violence).²³

Another useful approach involves a three-stage spectrum²⁴, with the following symptoms:

A. Early Stage

1. increased tolerance;
2. desire to continue use when others stop;
3. uncomfortable in situations where a substance is not present;
4. others express concern about the person's use;
5. preoccupation with use;
6. urgency of use after a period without;
7. avoid references about use or related problems/irritation when use is discussed; and
8. onset of memory blackouts;

B. Middle Stage

1. lying about use;
2. hidden use;
3. increase in memory blackouts;
4. alcohol taken in larger amounts, or over a longer time, than intended;
5. increasing dependence on alcohol;
6. grandiose, extravagant, aggressive, violent behavior;
7. persistent remorse or regret;
8. unsuccessful efforts to control or abstain from use;
9. changing types of alcohol, or manner of use, in an attempt to control;

²³ See Jones, *The Troubled Attorney: A Sobering Thought*, Ga.B.J., Vol. 3, No. 1 (Sept. 1997), at 56-59; *Even Attorneys May Need Help*, Or.St.B. Professional Liability Fund (1985).

²⁴ Donald Muccigrosso, ABA National Institute on Competence in the Law Firm, May 17-18, 1991, San Francisco, California. Mr. Muccigrosso was a leader in the area of alcoholism among lawyers before he retired from the Professional Liability Fund of the Oregon State Bar Association.

10. frequent intoxication or hangover symptoms that interfere with expected performance in major role obligations;
11. excuses about use;
12. isolated pattern of use;
13. legal problems related to use;
14. work/school problems related to use;
15. family or significant other problems related to use;
16. financial problems related to use;
17. physical problems related to use (including accidents/injuries);
18. continued use despite knowledge of problems it causes, or exacerbates;
19. loss of, or change in, friends;
20. attempts at geographical cure;
21. family changes habits;
22. protection of supply of alcohol;
23. important social, occupational, or recreational activities given up or reduced because of use;
24. failed promises and resolutions; and
25. complete dishonesty.

C. Late Stage

1. overdose;
2. onset of lengthy periods/binge patterns of use;
3. ethical deterioration;
4. tremors/use to relieve withdrawal symptoms;
5. increase in severity of effect on job, family, finances, legal status;
6. neglect food, hygiene, health care;
7. undefined fears, paranoia;
8. decrease in tolerance preceded by little or no change in level of use;
9. physical deterioration;
10. unable to initiate action;
11. obsession with use;
12. alibis exhausted; and
13. admits defeat.

An individual need not experience all symptoms in a stage. Even three symptoms in any one of these stages suggest that there is a problem. Usually, the more symptoms, the worse the problem.

E. Providing Solutions

1. Overview

Trained professionals can interpret symptoms that may reflect the presence of alcoholism, other chemical dependency or emotional problems. Since such professionals are not usually on the premises of a law firm, bar association committees and law firms primarily must rely on lawyers and staff for early detection. Unfortunately, these problems surface at work relatively late, because lawyers' presentation skills and typical work schedules prevent early detection.

Detection and help can come from a variety of sources. First, in the ideal situation, the impaired lawyer realizes that help is needed and voluntarily seeks assistance. This, however,

is contrary to the primary characteristic of the disease, which is denial. Second, detection may be made by other family, lawyers, staff or perhaps friends, who may urge the impaired lawyer to seek assistance. Third, a bar committee or the firm may be informed by someone other than the impaired lawyer, perhaps anonymously, that a particular lawyer needs help. Finally, judges or disciplinary agencies may make participation in a rehabilitation program a condition of a reduced sanction, if a particular ethical or civil violation is believed to relate to the individual's problem.²⁵

2. Reporting Ethics and Malpractice Violation

It is clear that detection of alcoholism and other addictions occur earlier and more frequently if information can be exchanged confidentially. To the extent that the only goal was detection and treatment, there would be little room to debate the need for confidentiality. But, there are other considerations.

A potential problem involves Disciplinary Rules 1-102 and 1-103 of the ABA Code of Professional Responsibility, which is still in force in a few jurisdictions. Disciplinary Rule 1-102 prohibits an attorney from, among other things, engaging in conduct that involves moral turpitude or conduct prejudicial to the administration of justice.²⁶ This is enforced by Disciplinary Rule, 1-103(A), which requires an attorney who possesses "unprivileged knowledge of a violation of DR 1-102" to report to a tribunal or other authority that can investigate or act.²⁷ For example, if an attorney goes to court on behalf of a client, under the influence of alcohol, that conduct would fall within these two Disciplinary Rules.

The ABA Model Rules of Professional Conduct also have similar provisions. Model Rule 8.3(a) requires that an attorney report the conduct of another attorney which is both a violation of the Rules and "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness. . . ." ²⁸ ABA Model Rule 8.3(c) provides two exceptions to that duty to disclose. First, if the information comes from a privileged communication, it need not be reported. Most information on this topic will not come from a privileged source.²⁹ Second, if the information is obtained in the course of participating in an approved lawyer assistance program, it need not be disclosed.³⁰

²⁵ *E.g.*, In re Germundson, 301 Or. 656, 724 P.2d 793 (1986).

²⁶ DR 1-102 is entitled "Misconduct" and states in Subparagraphs (A)(3) and (5) that "a lawyer shall not ... (3) engage in illegal conduct involving moral turpitude" or "(5) engage in conduct that is prejudicial to the administration of justice." "Moral turpitude" has been the focus of various cases. *E.g.*, In re Wilson, 391 S.W.2d 914, 917-18 (Mo.1965); Committee on Legal Ethics of West Virginia State Bar v. Scherr, 149 W.Va. 721, 726-27, 143 S.E.2d 141, 145 (1965).

²⁷ DR 1-103(B) requires that an attorney also answer questions regarding another attorney or a judge if requested by a tribunal or other authority empowered to investigate or act upon the conduct of attorneys and judges. This duty does not apply if the information is privileged.

²⁸ Model Rule 8.3(b), like Disciplinary Rule 1-103(B), requires an attorney to answer questions posed by an appropriate tribunal or authority involving the conduct of lawyers.

²⁹ Clients are sometimes the source of such information. However, that does not automatically mean the information is privileged.

³⁰ *E.g.*, Utah State Bar Ethics Advisory Opinion 98-12 (1998).

The ABA has focused on these issues in Formal Opinions. For example, Formal Opinion 03-429 discussed extensively the obligations of lawyers in that situation.³¹ That opinion focused on action, which was necessary when:

1. an impaired lawyer is still practicing with the law firm;
2. the impaired lawyer has violated ethics rules; and
3. the impaired lawyer is no longer with the law firm.³²

Formal Opinion 03-429 noted that mental impairment can come from a variety of sources, including Alzheimer's disease, other age-related problems, alcoholism and substance abuse. The committee commented that lawyers probably suffer from alcoholism and substance abuse at a rate at least double that of the general population.³³

Formal Opinion 03-429 also identified three primary sets of obligations when a lawyer in a firm develops a mental impairment, summarized as follows:

1. once the law firm's principals realize that a problem exists, they should take reasonable steps to prevent violations of ethics rules and other law occurring;
2. if violations of ethics rules or other law do occur, the firm may have a duty to report the lawyer's condition to the appropriate professional authority, unless the lawyer's mental impairment has ended or, through supervision by the firm and other means, the threat of any future violations has been eliminated; and
3. if the impaired lawyer leaves the firm, the firm may still have disclosure obligations to clients, who are considering whether to continue utilizing the services of the departed lawyer or to remain clients of the law firm.

ABA Model Rule of Professional Conduct 1.16(a)(2) was cited in Formal Opinion 03-429. It specifically prohibits a lawyer from undertaking or continuing the representation of a client, if the lawyer's mental condition materially impairs his or her ability to provide competent legal services. Model Rule 5.1(a) was also cited as authority. It requires partners as well as lawyers with comparable managerial authority to create appropriate preventive policies and procedures regarding mental impairment and compliance with ethics rules and other law. Model Rule 5.1(a) requires that partners or the equivalent must take steps to provide reasonable assurance that the mentally impaired lawyer's conduct will not result in the violation of ethics rules or other law.

A potential complication arises if a duty to report the mentally impaired lawyers exists. Specifically, Model Rule 1.6 regarding confidentiality must be considered. It is possible that the information, which should be disclosed to the appropriate regulatory authority, cannot be disclosed under Model Rule 1.6 without the client's consent.

Complicating the matter further, the Formal Opinion did not address the obligations of the law firm to the mentally impaired lawyer under the Americans With Disabilities Act of 1990. In different factual situations, there may be complicated, conflicting duties to the appropriate regulatory authorities, the client and the mentally impaired lawyer. The resolution

³¹ ABA Formal Opinion 03-429 (June 11, 2003).

³² The opinion discusses the need for informing the client about the lawyer's impairment and whether the representation should remain with the firm or continue with the lawyer.

³³ ABA Formal Opinion 03-429 (June 11, 2003), at note 2, citing Beilly, *Impairment, the Professional and Your Law Partner*, 11 No. 1 Prof.Law 2 (1999).

of those issues is beyond the scope of this treatise, but it is strongly recommended that lawyers specialized in dealing with the Americans With Disabilities Act of 1990 be consulted.³⁴

A few months later, the ABA issued Formal Opinion 03-431. It concerns a duty to report violations of ethics rules by a lawyer, who may suffer from a disability or from mental impairment.³⁵ The ethics rules require that a lawyer cease representing a client if the representation has already commenced and the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.³⁶

ABA Formal Opinion 03-429 also discusses Model Rule 8.3(a).³⁷ It requires that a lawyer, who knows that another lawyer has engaged in unethical conduct that raises a substantial question about the lawyer's fitness to practice law, inform the appropriate professional authority. Jurisdictions vary regarding the adoption of that Model Rule or similar rules. In situations involving the analysis of whether a duty arises to report conduct of another lawyer, it is important to carefully review the applicable jurisdiction's rule regarding such reporting obligations.

Members of intervention committees and law firms with employee assistance programs have a potential difficulty based on the Model Code. The first corrective step was taken in Tennessee by the Board of Directors for the Nashville Bar Association. The Tennessee Board of Professional Responsibility addressed the issue. Its Opinion³⁸ is an example for other states. It improved the process by relieving intervention committee members from any duty to report a violation of Disciplinary Rule 1-102 despite Disciplinary Rule 1-103. The New York State Bar Association issued a similar opinion.³⁹ Hopefully, such reasoning also will be applied to law firms with employee assistance programs.

The Los Angeles County Bar Association in California went further. It opined that there was no duty to report unethical conduct, despite the nature of the conduct.⁴⁰ Another approach is to provide more flexibility in the wording of these rules, either directly or through interpretation by the state or local bar association. The Washington, D.C. Bar Association did this.⁴¹

³⁴ See Bailly, *Impairment, Profession and Your Law Partner*, 11 No. 1, Prof. Law. 2 (1999).

³⁵ ABA Formal Opinion 03-431 (Aug. 8, 2003).

³⁶ *E.g.*, In re Morris, 343 S.C. 651, 541 S.E.2d 844 (2001) (lawyer disbarred for several reasons, including his failure to notify clients that he would not be available, because he was an in-house patient in a drug and alcohol rehabilitation program).

³⁷ ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 03-429 (June 11, 2003).

³⁸ Formal Ethics Opinion 83-48, Board of Professional Responsibility of the Supreme Court of Tennessee (May 23, 1983), ABA/BNA Lawyers' Manual on Professional Conduct, Ethics Opinions, 1981-1985, 801:8109.

³⁹ Opinion 531, New York State Bar Association Committee on Professional Ethics (March 28, 1981), ABA/BNA Lawyers' Manual on Professional Conduct, Ethics Opinions, 1981-1985, 801:6103.

⁴⁰ Opinion 440, Los Angeles County Bar Association Ethics Committee (May 19, 1986), ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, Vol. 3, No. 13, at 259.

⁴¹ It did not adopt verbatim the former ABA Model Code's wording in Disciplinary Rule 1-

In 2003, the ABA Standing Committee on Ethics and Professional Responsibility opined that a lawyer must report another lawyer to the appropriate professional authority, where a known violation of disciplinary rules raises a substantial question about that lawyer's fitness to practice.⁴² The opinion concerns mental impairment that causes a lack of fitness, whether consisting of a series of errors or a single incident. Impairment can be from age, senility, dementia, illness, alcoholism, chemical dependency or other causes.

The committee outlined procedures for a law firm, starting with consultation with the firm's partners or supervising lawyers, regarding reporting obligations:

If the affected lawyer is not representing clients while materially impaired, there is no obligation to report the affected lawyer's past failure to withdraw from representing clients. If, on the other hand, the affected lawyer's firm is not responsive to the concerns brought to their attention, the lawyer must make a report under Rule 8.3. We noted that there is no affirmative obligation to speak with either the affected lawyer or her firm about her conduct or condition before reporting to appropriate authority.⁴³

Reporting to a lawyer assistance program, however, does not obviate the need for reporting to a disciplinary authority under Rule 8.3. Rule 8.3 requires both a violation of the rules and a substantial question about the lawyer's fitness, which may address most concerns about mandatory reporting.

In some states, assuring lawyers that confidentiality will be preserved is simple, if the information is obtained through a lawyer assistance program. For example, in New York, DR 1-103(A) expressly prohibits the disclosure of any information a lawyer gains in his or her capacity as a member of a lawyer assistance program or similar program. This can be copied verbatim and easily distributed to lawyers in New York.

On the other hand, the law in some states is different. For example, under Arizona law, program administrators for lawyer assistance programs have the right to disclose information necessary to prevent specific future harms to clients.⁴⁴

Libel or Slander. Libel or slander charges are a risk when dealing with any of these problem areas. If the firm identifies an individual as falling within one of these four impairment categories, information about the apparent problem should be provided only to those who have a need to know. If the initial conclusions turn out to be wrong, the law firm should thereby reduce the risk of claims and damages. This follows if only a few attorneys or staff persons have discussed the matter and if the situation has been dealt with in good faith. The risk of uncontrolled "gossip" is a libel or slander claim.

103. The changes enable more flexibility in determining if an event or condition must be reported.

⁴² Formal Opinion 03-431, "Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment."

⁴³ *Id.*

⁴⁴ Arizona Rules of Professional Conduct, ER 8.3(c) (2007).

3. Bar Association Intervention Programs

The operation of bar association intervention programs differ widely. The best source of information regarding the various approaches used by state and local bar associations comes directly from the bar committees. Over 100 bar associations have committees or programs aimed at either alcoholism, other chemical dependency, emotional problems or gambling.⁴⁵ Many have used a Model Program developed by the ABA Standing Committee on Bar Activities and Services.⁴⁶

Because funding for these programs has been a continuing problem, some suggestions may be helpful. First, state and local bar associations should work together to avoid duplicating effort and expenses. In fact, in some relatively less populated states, a multi-state program could be effective.

Second, requests should be made to state, city and county bar associations to make prevention and intervention programs a line-item part of the annual budget. Any attorney or firm not directly benefited will be indirectly benefited by the decrease in legal malpractice claims and ethical violations. That will improve the legal profession's image, decrease legal malpractice claims, lower insurance rates and increase availability of insurance.

Third, grants should be sought from charitable and governmental sources. In applying for grants, emphasis should be on the benefit the public receives, instead of how much assistance attorneys may need. Impaired attorneys can damage clients, which will not always be covered by insurance⁴⁷ or client security funds.⁴⁸

Apart from the specifics of how such programs are funded, created and operated, there are a few generally applicable principles. First, the program should include a cross-section of attorneys, including former alcoholics (also known as recovering alcoholics or alcoholics who no longer drink). This will make prevention more effective, detection more likely and increase the chance that an impaired attorney will use the services of the intervention program.

Second, terms such as "drunk," "dope addict" or "crazy", can stigmatize the situation. The labeling process is detrimental, and should be avoided.

Third, the program must be highly visible to those individuals who may become impaired. Publicizing the warning signals in bar journals, at seminars and within law firms is an integral part of any program. Although seminars designed solely to prevent alcoholism or other addictions may not draw well because of the stigma that those attending are impaired,

⁴⁵ ABA Service Center, 2000 Directory of State and Local Lawyer Assistance Programs (ABA 2000).

⁴⁶ This excellent source of information is available from the ABA, through the Division of Bar Services, 750 North Lake Shore Drive, Chicago, Illinois 60611. It is designated as MAP (Program Models and Packages) Package No. 1, Alcohol and Drug Abuse Programs for Lawyers and Judges.

⁴⁷ See Mallen & Smith, *Legal Malpractice*, § 2:50, Client Security Funds.

⁴⁸ See Outcalt, Jr. & Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 Hastings L.J. 675 (1973); *Standing Committee on Clients' Security Funds, Report*, 96 ABA Rep. 595 (1971). Also, dishonesty is usually a prerequisite for recovery from a client security fund. *E.g.*, *Folly Farms I, Inc. v. Trustees of Clients' Security Trust Fund of the Bar of Maryland*, 282 Md. 659, 387 A.2d 248 (1978).

other seminars can be quite useful. For example, a seminar designed to train individuals to detect such problems and to establish employee assistance programs would not have that stigma attached to it.

4. Bar Association Lawyer Assistance Programs

Numerous bar associations have created lawyer assistance programs, frequently referred to as “LAPs.” In Oregon, the primary lawyer assistance program was created and integrated into the Oregon State Bar Professional Liability Fund. In other states, such as New York, both state⁴⁹ and local⁵⁰ bar associations provide lawyer assistance programs.

It is one thing, however, for bar associations to make lawyer assistance programs available but quite another to encourage their use. That is particularly true in the early stages of alcoholism, because of an addicted person’s characteristic denial, particularly with people who are relatively more educated. Law firms can facilitate the use of these assistance programs by responding to addiction problems in a constructive manner. This should include periodically circulating reminders that practicing law is a relatively stressful profession and this stress can impact a percentage of people who are prone to alcohol, other chemical, or gambling addictions. By simultaneously encouraging understanding within the law firm and by encouraging lawyers to seek treatment, law firms will certainly give lawyers a better chance to receive help earlier on.

As part of a firm’s prevention and remedial program, law firms should also consider providing assistance to lawyers even after they are disciplined, as many such people are likely to be very productive in the future. If attorneys, who have been disbarred, seek assistance for addiction-related problems, successfully complete programs for those addictions, and dedicate themselves to creating a new place for themselves in the work force, they could in fact be reinstated.⁵¹

5. Law Firm Employee Assistance Programs

Law firms have an opportunity and, sometimes, a duty to act when lawyers and staff are affected by alcoholism. A significant opportunity for prevention as well as for remedial action involves creating employee assistance programs. Such programs have become even more important from a legal point of view, because of ABA Formal Opinion 03-429, which says that law firms have obligations to prevent the violation of ethics rules and other law

⁴⁹ New York State Bar Association Lawyer Assistance Program (800-255-0569), with a Website at nysba.org, followed by a click on “attorney resources” followed by scrolling down to the “lawyer assistance program.”

⁵⁰ New York City Bar Lawyer Assistance Program (212-302-5787) with a Website at nybar.org, followed by a click on “Lawyer/Law Student Services” followed by scrolling down to the “lawyer assistance program.”

⁵¹ *E.g.*, Florida Board of Bar Examiners re Barnett, 959 So.2d 234 (Fla.2007) (several years after an attorney resigned from the bar association in connection with disciplinary proceedings, the court approved the attorney’s admission to practice, on a probationary basis); *In re Lord*, 589 Pa. 543, 910 A.2d 1 (Pa.2006).

based upon mental impairment, particularly if it arises from the abuse of alcohol and other chemicals.⁵²

In that opinion, the ABA Standing Committee on Ethics and Professional Responsibility said that supervising partners in a law firm have an ethical responsibility to assure that lawyers known to be impaired can comply with their ethical responsibilities. Formal Opinion 03-429 states that the firm not only may have to remove the lawyer from the representation, but also may have to make disclosure to the client. The disclosure to the client must be balanced against the lawyer's right of privacy. If the lawyer is terminated or resigns, the law firm may have an obligation of disclosure to clients, who are considering remaining with the firm or continuing with a departed lawyer.

A law firm should establish an employee assistance program. Such programs are usually available to principals as well as employees. The American Bar Association has developed a model Employee Assistance Program, which is set forth as Appendix A to Section 2:37. In addition, law firms must comply with state and federal law, which are applicable to various types of impairment.⁵³

While there are businesses that specialize in providing employee assistance programs⁵⁴, these same services can probably be obtained by directly retaining social workers, psychologists, psychiatrists or other professionals.

The cost will vary with the law firm's goals, but, the average annual cost will be about \$100 per person. This assumes that a maximum of 15 percent of the attorneys and staff will use the program. The most practical goal is to use the program to detect problems at the earliest possible stage, help in crisis intervention and refer individuals who need assistance to sources of long-term care.

The law firm's health insurance should be analyzed. To the extent insurance coverage is available, it may reduce the cost to the firm of establishing an employee assistance program.

Because the program must be confidential to be effective, there are two problems regarding the funding. First, if the firm retains the service, how will it know which individuals have used it and how often? Obviously, the firm must establish a reporting system with the entity providing the services, but because of the need for confidentiality, a degree of trust will be required. This does not differ significantly from the trust clients place in attorneys who bill on an hourly basis. Few clients have any first-hand knowledge regarding the actual time spent on legal research or most other tasks performed by lawyers.

⁵² ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 03-429 (June 11, 2003).

⁵³ *Cf. Hull v. Rose, Schmidt, Hasley & DiSalle P.C.*, 700 A.2d 996 (Pa.Super.1997). A partner was not an employee able to claim a disability under Pa. Human Relations Act, 43 Pa.Stat. §951.

⁵⁴ A good source of information is the Employee Assistance Professionals Association. It is at 1800 North Kent Street, Suite 907, Arlington, Virginia 22209 (703-522-6272). Its Website can be accessed at eapassn.org. Another good source is the Small Business Employee Assistance & Workplace Clearinghouse, P.O. Box 21, Merrifield, Virginia 22116-0021 (703-836-1096).

Second, because of confidentiality concerns, law firms should investigate the possibility of having the provider of the services submit forms directly to the insurance carrier, without specifically identifying the names of individuals. At a minimum, if names are used, there should be no description of the services.⁵⁵ Because of the various deductibles that may apply, and the limits per person that are available, it may be difficult to involve the firm's health insurance.

The next step is to determine the range of services, which can include:

1. the evaluation of the firm's current and prospective policy concerning alcoholism, other chemical dependency and emotional illness;
2. the presentation of in-house seminars conducted by health care providers;
3. distributing written material to attorneys and staff regarding the program;
4. scheduling in-house workshops designed to train attorneys and staff to identify and deal with such problems;
5. crisis counseling; and
6. general counseling and referral services, such as Alcoholics Anonymous.

Employee assistance programs can be highly cost effective.⁵⁶ Law firms, however, may not achieve as significant a benefit as companies that are both much larger and that have a larger percentage of employees engaged in relatively routine tasks.

Although not necessarily part of an employee assistance program, firms should consider requiring all partners or shareholders to have an annual physical.⁵⁷ This could be encouraged by having insurance coverage with no deductible, or by the firm paying for whatever insurance does not cover.

F. Safety and Privacy

If the safety of others is involved, a law firm can be justified in discharging an individual, particularly for using illegal drugs. Precedent exists in other contexts,⁵⁸ and law firms are not likely to be treated differently. However, cases holding that safety considerations justified drug testing and discharge usually involve the possibility of physical danger to third parties, which lawyers usually are not in a position to cause.⁵⁹ Yet, some courts have not required that physical safety be a factor.⁶⁰

⁵⁵ Several law firms that have employee assistance programs use this approach. It probably strikes the best balance between the need for: (1) confidentiality; (2) financial support through insurance; and (3) some degree of control over the health care providers. *See* Commission on Impaired Lawyers, March 1994 Highlights, Mar. 24, 1994 (ABA).

⁵⁶ *See* Commission on Impaired Lawyers, March 1994 Highlights, Mar. 24, 1994 (ABA).

⁵⁷ Few, if any, firms require that a copy of the physical exam be provided to the law firm. However, if an attorney has been diagnosed as, for example, being addicted to an illegal drug, the results of random drug testing are required by some firms to be submitted to at least one person assigned to monitor the matter

⁵⁸ *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979).

⁵⁹ *E.g.*, *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (upholding post-accident mandatory drug testing procedures for railroad employees).

⁶⁰ *See Willner v. Thornburgh*, 928 F.2d 1185 (D.C.Cir.1991) (upholding drug testing for

Law firms should, of course, consider the affected person's privacy. Although employees have a Constitutional right to privacy, the parameters of that right within the private sector are unclear. Although private sector employers usually can impose requirements, such as urine analysis, law firms first should obtain legal advice from specialists in the area of labor relations or privacy law.

A law firm needs to consider its own negligence if it does not have an impairment policy or does not deal with impaired attorneys or staff. This could arise either because the law firm fails to respond reasonably to signs that its attorneys or staff have substantial problems or because the law firm obtained such information and did nothing. A larger firm is more representative of the general population. The presence of impaired attorneys and staff becomes a virtual certainty. If other attorneys or staff members are physically injured because someone in the law firm is an alcoholic, is otherwise chemically dependent or is emotionally ill, the law firm may be liable.

As previously noted, if a lawyer or staff member perceives that disclosure will result in "punishment," there will be no voluntary disclosure. In turn, this will make it more difficult to detect a problem exists. Frequently, a client already will have been damaged. Therefore, firms should develop a policy that protects the interests of clients and enhances the likelihood of early detection and rehabilitation. There should be a method of assigning other attorneys to the matters on which the affected attorney is working. The newly assigned attorneys also should decide what the impaired attorney can do with and without assistance.

Ultimately, the firm's goals in this situation should be to protect the client's interests above all, preserve the impaired attorney's confidentiality/privacy if possible, and to address the impairment of the attorney in a constructive and sensitive manner, whether through treatment, monitoring, or more severe means such as discipline or termination, rather than ignoring the problem and hoping it goes away on its own. The firm needs to preserve the client's interests and, when consistent, not disclose the attorney's condition. If there is disclosure without the impaired attorney's consent, the chances of early detection diminish. Rehabilitation may not take place. The result may be injury to clients and the firm. Therefore, thoughtful yet proactive intervention is key to running a successful firm while having your clients' best interests in mind.

applicants seeking positions in the Department of Justice as attorneys).