

Dealing With Impairment

ABA addresses a lawyer's duty after discovering a colleague's addictions and disorders.

BY ARTHUR D. BURGER

Ethics

Law firm managers and lawyers who supervise other lawyers, take note: Impairment is not a small or isolated problem for lawyers—nor is it limited to solo practitioners or small-firm attorneys. Lawyers are prime candidates for impairment, whether caused by alcoholism, drug abuse, depression, or some other mental disability.

A study by the Johns Hopkins Medical School has found that lawyers had the highest rate of depression of any profession. Other studies have also shown that the rate of substance abuse is significantly higher among lawyers than in the general population (an estimated 15 percent to 18 percent versus 9 percent to 10 percent). The stress, demands, and high expectations of the practice of law seem to contribute to this higher risk. Impairment plays no favorites, and the “best and the brightest” are not immune, especially when the stress is high and chronic.

When the impairment affects a lawyer’s ability to provide competent legal services, the lawyer’s partners are ethically and legally mandated to take action. If the impairment is also causing violations of ethics rules, the obligation to intervene can even extend to lawyers in other firms.

Two recent American Bar Association opinions, Opinions 03-429 and 03-431, address the obligations of lawyers who learn that other lawyers are impaired. If the impaired lawyer is one’s own partner or associate, the key element is to protect the interests of affected clients. The appropriate steps will depend on the nature and degree of the problem and the manner in which clients’ interests may be at risk.

The central ethical obligation stems from Rule 5.1, which requires that lawyers in a supervisory position take steps to ensure that lawyers in a firm comply with the Rules of Professional Conduct. One of those rules, Rule 1.1, requires that lawyers be competent—and an impaired lawyer may not be competent, or may not be competent at certain times or in doing certain kinds of work.

Impairment does not come in one size or shape. As the ABA stated in Opinion 03-429, “Certain dementias or psychoses may impair a lawyer’s performance on ‘bad days,’ but not on ‘good days’ . . . Substance abusers may be able to provide competent and diligent representation during sober interludes.”

ABA Opinion 03-431 focuses on the obligation of lawyers who know that a lawyer in another firm is impaired. In this circumstance, there is no obligation to take steps to protect the impaired lawyer’s clients.

If, however, the impairment leads to a violation of the Rules of Professional Conduct that reflects on the fitness of the lawyer to practice with competence, there may be an obligation to report the violation under Rule 8.3(a).

The ABA cautions, though, that “knowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not itself enough to trigger a duty to report under Rule 8.3. A lawyer must know that the condition is materially impairing the affected lawyer’s representation of clients.”

What are the proper steps to take when you think a lawyer in your firm is impaired? The ABA proposes that it might be helpful first to discuss the matter with a mental health professional. Options then include confronting the impaired lawyer and insisting that he or she accept treatment or restricting the lawyer from continuing to work on certain matters, or any matters, until the lawyer is rehabilitated. There may be some matters that the lawyer can continue to handle properly and others that the lawyer cannot.

Despite the unpleasantness of confronting a respected colleague and the likelihood of protestations of denial by the lawyer, the ABA concluded that the “firm’s paramount obligation is to take steps to protect the interests of its clients.” The firm’s potential exposure to tort liability similarly calls for effective measures. An employer must also be cognizant of the lawyer’s rights under the Americans With Disabilities Act, 42 U.S.C. §§12101 *et seq.*

If the firm decides it must replace an impaired lawyer in an active case, the ABA opinion states that “under Rule 1.4(b) there

may be a responsibility to discuss with the client the circumstances surrounding the change of responsibility.”

The opinion further states that even if the impaired lawyer leaves the firm and the client needs to decide whether to continue with the lawyer, the firm must make disclosures to the client “to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel.”

In the District, there are also formal procedures to address the bar status of incapacitated lawyers set forth in Section 13 of D.C.C.A. Rule XI.

The good news is that there are avenues for the impaired lawyer to receive help confidentially and get his or her career and life back on track.

The D.C. Bar, like other state bars, has a lawyer assistance program to provide help to impaired lawyers or lawyers who simply need help in preventing stress from getting the better of them. The D.C. Bar’s Lawyer Counseling Program is a free and confidential service. The program staff and trained volunteers are *not* the cops. Under D.C. Rule 1.6(h), consultations with the program’s counselors and program volunteers are generally privileged.

The program serves lawyers, judges, and law students, helping them reach their goals of treatment, rehabilitation, and ongoing recovery or, in cases of serious mental health problems, illness management. The program provides evaluation and assessment, short-term counseling, and referrals to other health care professionals where appropriate.

Lynn Phillips, the director of the program, has a master’s degree in counseling and is licensed in the District as a professional counselor. Phillips has nearly 30 years of clinical experience with substance abuse problems and mental health issues, and much of her experience is with lawyers.

Dawn Byrne, the counselor in the program, also holds a master’s degree in counseling and is certified as a relapse prevention specialist and registered in the District as an addictions counselor. Byrne has 25 years of employee assistance and clinical and educational experience.

While the long-term stress and cultural climate of the profession may make lawyers more susceptible to drinking problems than others, Phillips notes that lawyers have a better than average success rate “because they have a lot to lose personally and professionally if the problem continues and therefore are highly motivated to resolve the problem once they fully understand the need.”

Phillips adds that another important factor in lawyers’ success is the support provided by the trained lawyer volunteers, who themselves may have previously overcome substance abuse problems.

Phillips says that when a lawyer comes to the program with a problem, the first step is an assessment of the immediate need. Some lawyers can be helped merely by counseling within the program. Others may benefit from a higher level of care such as intensive outpatient care, psychiatric intervention, or residential treatment. Phillips says intensive outpatient treatment often works well for lawyers because it allows them to take part in their treatment program after work. For others, the best treatment may be found through in-patient therapy in a hospital or a specialized treatment facility. Phillips says that the program also assists firms or groups of individuals who are concerned about an attorney and want to address the issue with that colleague.

Phillips says, “The hardest part may be making that first contact. It’s hard for lawyers to ask for help when they are so used to helping others themselves.” She emphasizes that a lawyer should call even if he or she cannot clearly identify the source of his or her distress.

The D.C. Bar’s Lawyer Counseling Program can be reached at (202) 347-3131, a confidential line, and further information is accessible on the bar’s Web site at www.dcbbar.org.

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