
DEALING WITH PARTNERS AND ASSOCIATES
IMPAIRED BY
ALCOHOL, SUBSTANCE ABUSE
& MENTAL HEALTH PROBLEMS

Lawyer & Law Firm
Ethics, Liability & Responsibilities

David M. Wooldridge

LIMESTONE COUNTY BAR ASSOCIATION

Athens, Alabama
April 30, 2013

//Lawyer Responsibilities – Outline – 4.30.2013

Copyright © 2013 by David M. Wooldridge, all rights reserved

Dealing with Partners and Associates Impaired by Alcohol, Substance Abuse & Mental Health Problems

Lawyer & Law Firm Ethics, Liability & Responsibilities

David M. Wooldridge

1. INTRODUCTION

(a) **Mental Health Issues and the Legal Profession.** The legal profession suffers from mental health impairment to a higher degree than does the general public or even the other professions. The predominant forms of impairment are alcoholism, addiction, and depression. Impairment also results from physical disease (e.g., Alzheimer's, Parkinson's, stroke), bipolar disease, anxiety disorders and other mental health conditions, and other causes (e.g., trauma). Whether the prevalence of mental health problems is due to the nature of the profession itself, the culture surrounding the profession, or the characteristics of the individuals drawn to the profession of law is a matter of conjecture. It is likely a combination of all three.

Factors unique to the legal profession include:

- Lawyers as a group are perfectionists. They are rarely satisfied either with their performance, performance of others, or the results they achieve.
- They often procrastinate. Perhaps they don't like their clients, opposing counsel or their cases. Often they cannot see a clear "solution"; they are unable to "save" the client or his interests, and they avoid finalizing their work. They sweep problems under the rug.
- Lawyers are often isolated. As solo practitioners or even within firms, they operate autonomously. They are usually in conflict with others, professionally and often within law firm structures.
- Stress in law practice abound, and the stresses are unique. Deadlines are rarely under their control. "Failure" is a regular outcome of their work. Financial insecurity accompanies the drive to obtain clients, law firm compensation structures, and law firm departures, mergers or split-ups. Financial pressures lead to manipulation and deceit, followed by guilt and shame. Dissatisfaction with law practice is common; expected levels of recognition, income, achievement and praise do not materialize.
- Stress and other factors often contribute to and exacerbate depression, the handmaiden of addiction.

(b) **Chemical Dependency, Depression and Related Issues.**

(i) **Medically Defined Disease.** Chemical dependency (addiction) is a progressive, chronic, and fatal disease – it never gets better if left untreated. Depression disorders and other mental health issues may be chronic or situational, but in either case usually require professional intervention to effect improvement. These illnesses know no social or economic boundaries. They affect the young and the old, the affluent and the poor. Members of the legal profession are by no means immune and are, in fact, more likely than the general population to develop these illnesses.

(ii) **Denial.** Characteristically, the lawyer who suffers from chemical dependency or mental health disorders denies that he or she has a problem. Denial is a classic symptom in these illnesses. Therefore, the lawyer is less likely to seek help. In fact, he may resist it.

(iii) **Intervention.** More often, it's family members, partners, and other lawyers who become aware of the problem, and it's their involvement, and support which enable lawyers to get help. It has been clearly demonstrated that the earlier the intervention, the better the chance is for rehabilitation and recovery.

(iv) **Responsibility.** It is the responsibility of all members of the profession to help others that may not recognize the need for assistance, and we must take every step necessary to provide for that help. Only by recognizing this responsibility can we prevent the impaired lawyer from causing further harm to himself and others.

(c) **Universal Problem.** The problem is universal. All 50 states have created programs within their bar associations to deal with problems of addicted and impaired lawyers. The Alabama State Bar has the Alabama Lawyer Assistance Program. The American Bar Association sponsors the Commission on Lawyer Assistance Programs (CoLAP), which fosters these state organizations and their programs. Similar programs exist in each province of Canada and in many foreign countries.

(d) **Early Manifestation of the Problem Among Law Students.** Elevated rates of substance abuse (above those of the general public) is observed among law students, even before they enter the profession. The American Association of Law Schools has studied the problem, releasing a report in 1993, and its constituent law schools have developed programs over the past decade to better address it. However, a recent survey by AALS found no significant improvement overall in the problem among law students.

(e) **Impact.** The problem is serious. Various studies show that lawyers suffer from alcoholism, addiction and depression at a rate approximately **TWICE** that of the

general public.¹ An overwhelming percentage of lawyer discipline proceedings involve alcoholism, addiction and mental health problems as major contributing factors. Numerous incidents of malpractice are reported to involve impairment of the lawyer. One insurance company reports many “seven-figure” settlements involving impaired lawyer claims.

(f) **Topics.** This presentation addresses the issues that lawyers face as, or because of, impaired lawyers. It includes discussion of legal and ethical rules governing the lawyers and their firms, identification and dealing with impaired lawyer problems, as well as assisting impaired lawyers and protection of clients.

2. ALABAMA PROFESSIONAL CONDUCT RULES, OTHER RULES AND PUBLISHED GUIDANCE

(a) **Alabama Model Rules of Professional Conduct** (similar to most states and to the ABA Model Rules). Alabama’s Rules are located on the Bar’s website at www.alabar.org/ogc/ropc/.

(i) **Rule 1.1: Competence.** “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Alabama’s commentary seems to focus on technical competence, rather than mental capacity or impairment. See <http://www.alabar.org/ogc/ropc/rule1-1.htm>.

(ii) **Rule 1.16(a): Impairment.** “[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules Of Professional Conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.”

1) Violations of the Rules Of Professional Conduct would include Rule 8.4(d): criminal conduct or other conduct that adversely reflects on his fitness to practice law. Discussed below.

2) Upon termination of representation, a lawyer must take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client.

¹ According to one study, while 10 percent of adults in the United States exhibit alcohol abuse, 18 percent of lawyers who have practiced 2 to 20 years, and 25 percent of lawyers who have practiced more than 20 years, have a drinking problem. Rick B. Allen, Alcoholism, Drug Abuse and Lawyers; Are We Ready to Address the Denial?, 31 Creighton L. Rev. 265 (1997). John Hopkins Medical School conducted a study in the early 1990’s of 105 separate professions, involving 12,000 subjects. The professionals with the highest percentage of members suffering from depression were lawyers. See Cohen, Bumps in the Road, 18 No. 5 GPSOLO 18 (July/Aug. 2001). A study done in Washington state showed that 26 percent of the lawyers surveyed had tried cocaine, while the same was true of only 12 percent of the general population. *Id.* at 266.

3) Alabama’s commentary does not discuss a lawyer’s mental capacity, although ironically it discusses briefly a client’s mental impairment (in the context of the client’s capacity to terminate the engagement).

(iii) Rule 8.4: “Professional Misconduct.” “It is professional misconduct for a lawyer to: ... (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; ... (d) engage in conduct that is prejudicial to the administration of justice; ... (g) engage in any other conduct that adversely reflects on his fitness to practice law.”

1) The commentary to this rule notes: “A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.” ABA Formal Opinion 04-433 interprets the Model Rule to the effect that “repetition of even minor violations can indicate indifference to legal obligation,” omitting the use of the word “pattern.”

2) The present Rule abandons the former reference to “illegal conduct involving moral turpitude.” But the language of section (g) remains unchanged.

3) ABA Formal Opinion 04-433 construes Rule 8.4 to apply to licensed attorneys who are not practicing law. The ABA interpretation is applies both to the individual’s misconduct and to the duty of other lawyers to report that misconduct.

(iv) Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer.

(a) “A partner in a law firm² shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) “A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct *if*:

(1) “the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

² The Alabama Comment to Rule 5.1 states: “Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm This includes members of a partnership and the shareholders in a law firm organized as a professional corporation, ... and lawyers who have intermediate managerial responsibilities in a firm.” The ABA Model Rules add: “; and a lawyer who individually or together with other lawyers possesses *comparable managerial authority* in a law firm.”

(2) “the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

The Alabama commentary makes clear that the term “partner” for this purpose includes shareholders in professional corporation, and that supervisory lawyers include those “lawyers who have intermediate managerial responsibilities in a firm.” See <http://www.alabar.org/ogc/ropc/rule5-1.htm>.

More importantly, the commentary discusses appropriate reactions of firms and their partners:

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules. *Id.* (*emphasis added*)....

Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred....

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules. *Id.* (*emphasis added*).

(v) Rule 8.3: Reporting Professional Misconduct.

(a) “A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.³

(b) “A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request.”

(c) “A lawyer who is on the Committee on Impaired Lawyers or on the ALA-Pals Committee or who is a member of any committee, or sub-committee of the Bar designed to assist lawyers with substance abuse problems shall not be under any obligation to disclose any knowledge or evidence acquired from any other person (including judges and lawyers) during communications made by that other person for the purpose of seeking help of the sort the lawyer's committee was intended to give. Any statement made by either party during such communications shall be privileged, and no claims or disciplinary action based on the lawyer's failure to disclose the knowledge or evidence acquired during such communications may be instituted.”⁴ The present committee meeting the definition of this Rule is the Lawyers Helping Lawyers Committee.

(vi) Reluctance to Report. There is a natural reluctance to report colleagues. In ABA Formal Opinion 04-433, the ABA acknowledged this: “Because the legal profession enjoys the privilege of regulating itself, it is critically important that its members fulfill their responsibility to stand guard over the profession’s integrity and high standards. . . . The Committee is mindful of the awkwardness and potential discomfort of reporting the misconduct of a colleague.”

(vii) Thresholds for Reporting. ABA Formal Opinion 04-433 also addresses the two thresholds that apply to reporting violations under Rule 8.4: (a) the lawyer must “know” of the violation, and (b) the misconduct must raise a “substantial question” as the lawyer’s fitness (etc.).

³ “Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. . . . A lawyer is obliged to report every violation of the Rules. The failure to report a violation would itself be a professional offense. A report should be made to the Alabama State Bar.” Commentary to Rule 8.3, <http://www.alabar.org/ogc/ropc/rule8-3.htm>

⁴ “In order to encourage a lawyer or judge who has or believes he or she may have a substance abuse problem to seek help with the problem, that person can be assured that disclosure to any lawyer who is on the Committee on Impaired Lawyers or on a ALA-Pals Committee or who is a member of any committee or sub-committee of the Bar designed to assist lawyers with substance abuse problems, will be treated with confidentiality as though a client-lawyer relationship exists.” Commentary to Rule 8.3.

1) The Opinion 04-433 notes that the “Terminology” section of the Rules states that “knowledge may be inferred from the circumstances,”⁵ and that the standard of knowledge is an “objective” belief that the conduct had “more likely than not” occurred. Criminal conduct will “often” raise a “substantial question.” “Substantial” refers to the seriousness of the violation, not the quantity of evidence known.

2) The Alabama Comment to Rule 8.3 notes: “An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”

(b) Alabama Canons of Judicial Ethics. Canon 3(B)(3): “A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for **unprofessional conduct** of which the judge has personal knowledge.” See Alabama Rule 8.4 (a) (violation of the Rules of Professional Conduct; e.g., 1.16(a)); and Rule 8.4(g) (engage in conduct that adversely reflects on his fitness to practice law).

(c) ABA Formal Opinion 03-431: Duty to Report.

“A lawyer who believes that another lawyer’s known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer who believes that another lawyer’s mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer’s consequent violation of Rule 1.16(a)(2), which requires that she withdraw from the representation of clients.”

(i) A lawyer (and firm of lawyers) must report known Rules violations that raise substantial questions about fitness to practice. Unlike Opinion 03-429, there is no exception that absolves a firm from responsibility if the firm ensures that the risk of future violations is eliminated (see below).

(ii) Importantly, the Opinion recognizes that continuation of representation of clients while impaired is necessarily (“consequent”) a violation of Rule 1.16(a)(2), which must be reported.

(d) ABA Formal Opinion 03-429: Law Firm Duties. Responsibilities of a law firm confronting an impaired lawyer. Focuses on three areas: (i) prevention of Rules violations, (ii) response to Rules violations, and (iii) obligations relating to departing impaired lawyers.

(i) Prevention of Rules Violations. If a lawyer’s mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give reasonable

⁵ Consistent with the Alabama Rules of Professional Conduct.

assurance that such impairment will not result in breaches of the Model Rules. “Reasonable efforts” may include:

- 1) confronting the impaired lawyer,
- 2) adopting procedures to protect clients,
- 3) requiring the lawyer to accept help,
- 4) restricting the lawyer’s representation of clients.

(ii) Response to Rules Violations. If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation to the appropriate professional authority.

1) Reporting to Bar Authorities. Rule 8.3 requires reporting of violations of Rules if the violation raises issues concerning the fitness of the lawyer to represent clients appropriately.

2) The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer.

3) Reporting Not Required? Opinion 03-429 states that reporting is not required if the impairment no longer exists, or if the firm is monitoring the lawyer so closely that there is no risk of future violations. This conclusion would appear to contradict the absolute requirement of Rule 8.3, regardless of future risk. Opinion 03-431 appears to reverse Opinion 03-429, by providing mandatory reporting requirements in certain situations.

4) Remediation. Rule 5.1(c)(2) may require partners and supervisory lawyers to remedy any adverse consequences of the Rule violation. This obligation would of course pertain to both open and closed matters handled by the impaired lawyer.

(iii) Communications with Clients. If the firm removes the impaired lawyer in a matter, it may have an obligation to discuss with the client the circumstances surrounding the change of responsibility.

1) Model Rule 1.4(b) obligates a firm to inform a client about a change in representation “with candor” while avoiding “material omission.” At the same time, the firm must “be conscious of” the impaired lawyer’s privacy “to the extent possible.”

2) The Opinion provides no further guidance in reconciling these conflicting objectives.

(iv) Departing Lawyers.

1) Reporting. The firm's obligation to report a Rule violation to authorities under Rule 8.3(a) is the same for a lawyer who leaves a firm as for a lawyer who remains with the firm. If no Rule has been breached, the firm does not have a reporting obligation. Nevertheless, subject to the confidentiality requirements of Rule 1.6, the firm may voluntarily report its concerns about the impaired lawyer to the appropriate authority.

2) If the impaired lawyer resigns or is removed from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to statements for which there is a factual foundation.

- The firm may need to explain the facts regarding an impaired lawyer's departure to clients to the extent necessary to enable the clients to make an informed decision whether to remain with the firm or go with the departing lawyer. See ABA Model Rule 1.4.
- Opinion implies that in some instances it may be necessary to explain the nature of the lawyer's impairment problem to clients, provided the discussion is strictly limited to the facts.
- As a practical matter, firms should avoid endorsing the competence of departing impaired lawyers, e.g., by sending joint letters to clients.

(v) Not Binding or Comprehensive. ABA Formal Opinion 03-429 is helpful guidance on numerous ethics issues and rules governing impaired lawyers. However, it leaves unresolved some difficult questions relating to lawyer impairment. It is also uncertain whether states will agree with all aspects of the ABA guidance.

(vi) Example: Disclosure vs. Confidentiality. The Opinion acknowledges the conflict between a firm's disclosure duties to clients under the ethics rules and the firm's responsibility to preserve the impaired lawyer's privacy. However, it provides little help in resolving it.

1) *See* Opinion 2000-12, Philadelphia Bar Association (below)(no duty to disclose); Informal Opinion Number 98-124, Pennsylvania Bar Association (below)(no duty to disclose, but suggesting manner of response if asked by clients)

2) However, at least one insurer has paid a substantial sum to settle a claim that a firm failed to disclose a departing lawyer's mental impairment to clients who left with the lawyer.

(e) Opinion 2000-12, Philadelphia Bar: Operation of Rules. (Phila. Bar Professional Guidance Committee, December 2000). Partner with knowledge of another's impairment may have duty to disclose facts to bar authorities, and may counsel with impaired lawyer. However, Opinion dissuades lawyer from making disclosure to clients, unless he "observes that [impaired lawyer's] violation of the Rules persist."

"Inquirer is presently a 50% shareholder in a firm practicing in New York and Pennsylvania. W is the other 50% shareholder. The firm does complex medical malpractice work for plaintiffs and has approximately 50 active matters in Pennsylvania. The firm is dissolving. W has a permanent reading disability and some memory impairment as a result of several strokes. Once the firm is dissolved both inquirer and W intend to solicit the present clients of the firm. Inquirer knows that W will be suggesting as part of the solicitation to the clients that he (W) will be handling their cases. However, inquirer also knows that W does not intend to inform the clients of his disability, his strokes, or the fact that he has not been involved in handling cases since his strokes. In view of these facts, inquirer asks whether he has an obligation to disclose to the clients W's disability.

[T]he inquirer may have a Rule 8.3(a) *duty to inform the Disciplinary Board* of the Pennsylvania Supreme Court of W's proposed conduct. The inquirer should also consider a *direct approach to W* urging that W not go forward with a solicitation of the firm's clients which includes an indication that W would handle their cases in any substantive way. In view of the Committee, there *does not, however, appear to be an obligation under the Rules to inform the clients* to be solicited of W's disability and his consequent inability to personally handle their matters.

Rule 1.1 may permit such disclosure to the clients, as may Rules 1.3 and 1.4(a) and (b), but none of the just-cited Rules appear to contemplate the situation posited by inquirer, and inquirer would be *risking action against him by W* on various legal theories if inquirer engaged in the proposed disclosure to the firm's clients. The Committee recognizes that under Rule 5.1(c)(2), inquirer may have some responsibility for violation by W of the Rules, but under the facts as stated, that responsibility could be discharged by urging that W desist from misrepresenting his ability to serve the firm's clients, and informing the Disciplinary Board if W fails to comply with Inquirer's request. If, in the process of remonstrating with W, and proceeding with the Disciplinary Board, inquirer *observes that W's violation of the Rules persist, a direct approach to clients*, carefully worded to reflect demonstrable facts and to avoid discouraging the clients from selecting a firm capable of handling their matters which might employ or have a relationship with W, may be permitted under the Rules." (*emphasis added*)

(f) Informal Opinion Number 98-124, Pennsylvania Bar Association (Committee on Legal, Ethics and Professional Responsibility; December 7, 1998). Analysis of firm's responsibilities when an elderly resigning partner plans to begin an individual practice despite the remaining partners' advice to him that health conditions (*short-term memory loss*) limit his ability to provide competent representation.

“Despite the condition, the partner has continued to handle client matters with the firm supplying extensive support and supervision, including a full-time secretary, a full-time associate and a paralegal. In addition, one of the name partners monitors his work. The firm has not disclosed his limitation to clients or disclosed the special measures which the firm maintains have been necessary.

He intends to resign on December 31, 1998, and to invite some of the firm's clients to utilize his private practice. When his partners questioned his ability to function without the ongoing support and supervision, he disputed their appraisal. Under the circumstances, you and your partners fear that as a sole practitioner he will be a danger to clients and others, including such firm clients as may elect to engage him....

First, you foresee a short letter to clients, announcing his upcoming departure; affording the client the choice of continuing with the firm or changing to the private practice; and recognizing the client's right to control disposition of the file. In addition, because of the remaining partners' apprehensions, the letter would disclose: (a) that the firm originally understood he planned to retire to Florida and (b) that in the considered opinion of the remaining partners it is not in his best interest or the best interest of his prospective clients that he continue to practice. He objects strenuously to these qualitative remarks....

The Rules of Professional Conduct

You have asked me to address the draft letter to clients Various authorities state that a letter to clients, whether sent by a departing lawyer or by the firm, is to be neutral. However, the brief draft letter contains these comments unquestionably designed to influence clients' decisions: he changed his mind after first deciding to retire; his partners think it is “in his best interest” and that of the clients that he not continue practicing. American Bar Association Informal Opinion 1466 (February 12, 1981) approved a letter sent by a departing lawyer because, *inter alia*, it did not urge the client to sever the relationship with the lawyer's former firm, it did not recommend the lawyer's employment, it made clear the client's right to decide and it was brief, dignified and not disparaging. Further guidance is found in Opinion 98-5 of the Ohio Supreme Court Board of Commissioners on Grievances and Discipline, April, 1998, which instructs that the notice to clients should not disparage the lawyer or the law firm. Because the letter acts as an invitation to choose a lawyer, the strictures of R.P.C. 7.1 on soliciting

clients are also applicable. Under R.P.C. 7.1 (c), the communication must not compare "the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated," and under R.P.C. 7.1(d) "it must not contain subjective claims as to the quality of legal services."

Making Known The Remaining Partners' Apprehensions

Because you report the firm has well substantiated concerns about the departing partner's ability to practice, it can be said you anticipate that as a sole practitioner he would engage in professional misconduct by failing to provide the competent representation required by R.P.C. 1.1. Under R.P.C. 8.3, a lawyer is to inform the appropriate professional authority when he knows another lawyer has committed a violation. Because the departing partner disputes your view of his competency and because the *letter to clients is not the medium for resolving this disagreement*, it follows that a complaint to the Office of Disciplinary Counsel may be the only recourse. . . . Since the departing partner's competency is disputed, resolution should be by the office created to investigate and adjudicate lawyer behavior.

If the firm's ultimate decision is to send a neutral letter, the letter can invite clients to confer with one of the remaining partners or with the departing partner before making a decision. If the client should approach a remaining partner and should, in the context of the existing lawyer-client relationship, seek guidance on choice of counsel, it will then be the firm's obligation under R.P.C. 1.4(a) to "promptly comply with reasonable requests for information" and under R.P.C. 1.4(b) to explain the matter "to the extent necessary to permit the client to make informed decisions regarding the representation." It would then be appropriate to describe the special measures.

I recognize that divulging the supports which have been necessary to sustain your partner for some period, either in client conferences or in a complaint to the Office of Disciplinary Counsel, might lead to embarrassment. In justification, however, it may be reasonable to rely on R.P.C. 5.1, which requires supervisory lawyers to assure compliance by practitioners within the firm. Up until now the departing partner has been under the supervision and guidance of his colleagues.

3. LAW FIRM & PARTNER RESPONSES TO IMPAIRED LAWYERS

(a) **Threshold Hurdle: Reluctance to Act.** Lawyers are reluctant to report colleagues whom they suspect suffer from alcoholism, drug abuse, or other impairments. This is equally true for subordinates and staff. However, disregarding these issues can result in consequences for the impaired lawyer and the firm, from malpractice claims, to

loss of clients, to disciplinary actions. Early identification is often key to addressing the impairment and preventing serious consequences.

(i) Are you willing? Are you committed?

(ii) The acid test is your long-term friend and partner, a rain-maker whose book of business keeps the firm afloat and whose reputation is key to your own financial success. Just for fun, add that he is a difficult personality and probably willing to pull up stakes if pressed. And why not add that he has suffered numerous personal tragedies recently, not of his own making.

(iii) Are you still willing?

(b) **Firm Policies & Procedures**. A firm should have procedures and policies in place to facilitate the identification of impaired lawyer and prevention of problems.

(c) **ABA CoLap Recommendations**. The ABA Commission on Lawyer Assistance Programs (CoLAP) recommends that law firms have a specific policy dealing with impaired lawyers. Their recommendations for the components of a policy include:

- Recognition that
 - alcoholism, addiction and other mental health issues are health, and not moral, issues;
 - treatment and rehabilitation, not punishment, are the appropriate responses to such issues;
 - shielding or enabling the impaired lawyer, and denial of the problem, are inappropriate actions; and
 - no one is above the rules.
- Self-referral by the impaired lawyer himself should be the goal of the policy and most used method of initiating evaluation.
- A committee to serve as a resource and contact point for addressing concerns and suspicions about impaired lawyers.
- A definition of acceptable and unacceptable behavior relating to alcohol and drug use, and relating to behaviors related to mental health.
- Processes and encouragement for identification of, and intervention upon, impairment problems.
- Consequences for noncompliance with the policy. Continued improper behavior will not be tolerated.

- Education:
 - of all employees about the policy,
 - means of reporting concerns, and
 - symptoms and warning signs of impairment problems.

(d) **Reporting Process.** The most basic safeguard for any firm is a policy that encourages all firm employees – partners, associates and staff – to report any suspected lawyer impairment.

(i) Overcoming the reluctance requires that the reasons for the reluctance be addressed. Subordinates and staff must be assured that there will be no retaliation. Partners must be educated about the prevalence of these health issues, the symptoms and the warning signs. They must overcome their reluctance to offend the impaired lawyer or to "rock the boat." They must also understand that the adverse impact on careers can be minimized, and addressing the problems causes fewer problems than letting them go unattended.

(ii) Confidentiality of reports should be maintained, if at all possible.

(iii) Everyone must know that there are designated individuals available to receive reports. It is important that more than one person be designated, to ensure that the reporter is comfortable making the report and that there will be someone to report to who is not seen as allied with the impaired lawyer. Candidates include managing partners, office managers, executive committee members, risk management partners, and practice group chairs.

(e) **Education and publication.** Education of lawyers and staff about the warning signs of impairment should be conducted regularly. Similarly, the policies themselves and the identity of persons who can be contacted should be published repeatedly. Reinforcement of the commitment of the firm to these policies should be made at the highest levels of firm management. **Warning signs of impairment** may include:

- Absenteeism, tardiness, erratic work habits, inefficiency, isolation
- Missed deadlines
- Grossly inappropriate conduct, rage, hostility, mood swings
- Poor concentration, forgetfulness, confusion
- Poor hygiene or appearance
- Low morale of co-workers or subordinates

- Accidents and DUI's

(f) **Peer Review.** Various means of oversight, monitoring and simple due diligence are available to supplement reporting policies and to identify potential problems.

(i) Physical examinations regularly required of lawyers, preferably with some reporting to the firm of indicia of impairment (with consent of the lawyer, of course)

(ii) Significant changes in billable hours and work hours can be monitored.

(iii) Attention to client complaints and solicitation of client comments.

(iv) Staff and colleagues can stay attuned to significant life style changes, unusual or secretive handling of matters.

(v) Employee assistance programs (EAP) and extended psychiatric services can be provided.

(vi) The firm should have procedures to oversee new client and matter screening, partner entrepreneurial activities (especially business relationships with clients), insider trading, conflicts of interest, ethics inquiries and grievances, opinion letters, default judgments and motions for sanctions.

(vii) Client complaints, including fee disputes, should be monitored, as they sometimes disclose dissatisfaction with the legal work or lawyer's handling of matters. Many law firms make regular visitations to clients to solicit their feedback on the firm's services and to identify service and other problems.

(viii) A few law firms are known to monitor mail, incoming, outgoing or both, for problems.

(ix) A few law firms undertake formal "peer review" of client matters and/or lawyer services on a regular and systemitized basis.

(g) **Procedures for Working with Impaired Lawyers.** Once the firm has identified an impaired lawyer, it must decide what to do about it. There are generally two goals: (1) help the impaired lawyer, and (2) ensure that no client is adversely affected.

(i) **Removal of Lawyer from Client Matters.** The first decision may be whether the impairment is so severe that the lawyer should no longer work on client matters. A lawyer may not represent a client if the lawyer's "physical or mental condition materially impairs the lawyer's ability to represent the client." Alabama ROPC 1.16(a)(2); ABA Model Rule 1.16(a)(2). *See also In re Taylor*, 959 P.2d 901 (Kan. 1998) (lawyer whose representation of client was impaired

because of alcoholism violated ethics rules by not withdrawing from representation); *Carter v. Mississippi Bar*, 654 So.2d 505 (Miss. 1995) (lawyer who suffered from depression that affected his representation should have withdrawn).

(ii) Review of Lawyer's Activity. A review may be needed of all matters the lawyer recently handled to discover if the lawyer's impairment has interfered with his representation. The review might include a review of client files, the lawyer's time, billing and telephone records, and interviews with others in the firm with whom the lawyer worked.

(iii) Remedial Action. The firm should take any remedial action on client matters immediately. Disclosure of problems on a clients file may be required.

(iv) Reporting to Bar Authorities. If there is a substantial concern about the lawyer's fitness to practice law, the firm must consider reporting the problem to appropriate professional authorities. Alabama ROPC 8.3. *See also* ABA Model Rule 8.3; ABA Formal Opinion 03-431; ABA Formal Opinion 03-429.

(v) Conditional Employment. The firm may consider requiring the lawyer to take a leave of absence while seeking evaluation and/or treatment.⁶ A typical condition is short-term evaluation by health care professionals and commitment to a program of treatment, if recommended by them. Return to work may be conditioned upon periodic alcohol or drug testing, periodic evaluation by a counselor or addiction expert, and participation in appropriate recovery programs. Participation in a lawyer assistance program can be considered. The affected lawyer should agree to disclose the results of evaluation and participation to an appropriate law firm monitor.

(vi) Treatment Concerns. *"The very skills that make us good lawyers make us terrible, terrible patients."*⁷ Rationalization is a key feature of denial, and lawyers are the only addiction rehabilitation patients actually trained to argue and rationalize. They are trained to deny liability and responsibility. They intellectualize, shift blame and focus, and isolate. They are taught to detach from feelings. They are taught to be self-sufficient. Treatment of lawyers presents unique problems that not all treatment providers fully understand or adequately

⁶ At this point, the law firm is well advised to seek professional assistance in structuring and bringing about any intervention, monitoring or treatment program. All states have established lawyers' assistance programs (LAPs) or committees. Virtually all of them provide counseling for lawyers with drug and alcohol problems. Some have extended their programs to deal with depression and other mental health problems. These programs typically have available lawyers and health care professionals who assist with planning, interventions, and referrals to other treatment sources, such as rehabilitation centers or counseling facilities. Services are confidential and not reported to any disciplinary committee. A directory of state and local LAPs, as well as a wealth of reference material, can be found at www.abanet.org/legalservices/colap/home.html.

⁷ Michael Cohen, Director of Florida's Lawyer Assistance Program.

address. Aftercare (care, 12-Step participation, and monitoring after formal treatment) is key to recovery and long-term sobriety.⁸

(vii) Supervision/Oversight of Affected Lawyer. Assuming the lawyer recovers and remains able to represent clients, the firm may consider various prophylactic measures, for at least a period of time. For example:

- 1) assignment of two lawyers to all of the lawyer's files and matters.
- 2) appoint a "practice monitor" who would meet with the affected lawyer periodically and receive a report on the status of each pending matter.

(viii) Termination. Any applicable contractual or statutory implications involving the lawyer and his continued employment with the firm should be considered. In addition to the ethics and malpractice concerns discussed above, issues such as the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12101 *et seq.*; the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.*; state counterparts of those statutes; and federal and state confidentiality statutes. ADA and FMLA regulations generally prohibit disclosure of confidential medical information except on a need to know basis. See 29 C.F.R. § 1630.14 and 29 C.F.R. § 825.500(g).

- 1) A United States Supreme Court opinion was rendered in *Raytheon v. Hernandez* in December 2003 which clarified some, but by no means all, aspects of the ADA's application to persons suffering from addictive disease.
- 2) Discrimination Prohibited. The ADA broadly prohibits discrimination on account of disability in 42 USC § 12112:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

- 3) Individuals Protected. "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 USC § 12111(8). The ADA defines the term "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life

⁸ See Friedman, *Addressing the Needs of Lawyers in Addiction Treatment*, Addiction Professional (January 2004).

activities of such individual; “(B) a record of such an impairment; or “(C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2).

4) Alcoholism is not necessarily considered a disability. The individual’s status must be evaluated based upon actual limitations of essential functions. *Goldsmith v. Jackson Memorial Hospital Public Health Trust*, 33 F. Supp. 2d 1336 (SD Fla 1998), *aff’d* 198 F.3d 263 (11th Cir. 1999).

5) Employees Protected. The ADA protects employees of employers having at least 15 employees. In *Wells v. Clackamas Gastroenterology Associates P.C.*, The U.S. Supreme Court considered whether physician-shareholders of a professional corporation were employees within the meaning of the statute (partners are typically not employees). The Supreme Court avoided an outright ruling, but sent the case back to the Court of Appeals with instructions to decide the case upon common-law principles of control: “whether shareholder-directors operate independently and manage the business or instead are subject to the firm’s control.” This result leaves considerable uncertainty in the application of the rule.

6) Current Illegal Drug User Exception. There is an exception for *current* users of *illegal* drugs – denying protection from an employer’s action (e.g., termination) based upon that use. 42 USC § 12114(a). Alcohol, which is legal, is treated separately.

7) Current User Defined. An individual is not a “current user” if he or she has successfully completed a supervised rehabilitation program (or otherwise been rehabilitated) and stopped the illegal use of drugs, or is participating in a supervised program and no longer engaging in the illegal use of drugs, or is erroneously regarded as engaging in the illegal use of drugs but is not “currently” using them. Federal regulations promulgated under the ADA define the term “currently engaging” as intended to apply to the illegal use of drugs “that has occurred recently enough to indicate that the individual is actively engaged in such conduct.” 29 CFR § 1630.3, App. *See also, McDaniel v. Mississippi Baptist Med. Ctr.*, 877 F Supp 321, 327 (SD Miss 1995), *aff’d*, 74 F3d 1238 (5th Cir 1995) (Congress intended that drug-free period must be of a considerable length and holding that six weeks between drug use and notification of termination was insufficient to entitle employee to safe harbor protections of ADA); *Baustain v. State of Louisiana*, 910 F Supp 274, 276 (ED La 1996) (abstinence for seven-week period prior to termination date was not long enough to avoid classification as a “current user”);

8) Direct Threat Exception. ADA includes an exception from the protection of the law for those employees whose employment would

pose a direct threat, either to themselves or to others. The term “direct threat” means “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 USC § 12111. A physician was denied reinstatement as Chief of Medicine of a hospital 3 months after a relapse of alcoholism. The denial was affirmed under the “direct threat” exception in *Altman v. New York City Health and Hospitals Corporation*, 903 F. Supp. 503 (SDNY 1995), *aff’d* 100 F.3d 1054 (2d Cir. 1996). Only three months had passed since he sought treatment, and the hospital knew that plaintiff was a relapsed alcoholic. The recency of the recovery effort and the fact that he had relapsed in the past were relevant considerations, both of which indicated that the risk of relapse was “still unacceptably high.”

9) The Supreme Court recently issued a significant decision relating to refusal of employment resulting from drug use in *Raytheon v. Hernandez*, 540 U.S. 44 (2003). Hernandez’s employment was terminated by Raytheon because he tested positive for illegal drugs. After 2 years and having completed drug rehabilitation, Hernandez applied to be rehired. Raytheon contended he was rejected because of a Raytheon policy against rehiring employees terminated because of workplace misconduct. Hernandez claimed he was denied employment because he was “disabled,” i.e., an addict.⁹ The Court found the Raytheon policy to be a quintessential legitimate, nondiscriminatory reason for denial of employment and not to be discriminatory on its face. The Court remanded the case to allow findings on whether the determination was not in fact based upon the policy but upon Hernandez’ disability.

4. MALPRACTICE PRINCIPLES

(a) Elements of Malpractice Claim.

- (i) Attorney-client relationship
- (ii) Failure to exercise ordinary skill and knowledge of a reasonable lawyer in the community
- (iii) Proximate cause

(b) "Ordinary" level of skill and knowledge. As odd as it seems, this is not an "average" level of skill and knowledge, otherwise roughly one-half of all lawyers

⁹ Hernandez was considered “disabled,” because the parties agreed that there was a “record of disability.” *See Id.* n. 2 & 4.

would be committing malpractice every day. "Ordinary" has to mean some reasonable, minimum competence expected by a practicing lawyer.¹⁰

(c) **Objective vs. subjective standard.** A lawyer does not commit malpractice merely by failing to do his best, or even his average work¹¹ However, a lawyer is held to the level of expertise which he holds himself out as having. Claiming expertise means being held to the standard of an expert.¹²

(d) **Violation of Rules of Professional Conduct.** Violations may be evidence, or even create a presumption, of negligence.¹³

(e) **Cause of Client's Damages.** A client must prove that the result would have been otherwise but for the impaired lawyers inadequate representation.¹⁴

(f) **Vicarious Liability of Law Firm.** Firms are responsible for the actions of their lawyers acting within the scope of their employment or as partners of a partnership.¹⁵ Behavior unrelated to employment or partnership activity should not result in liability.¹⁶

5. DEFENSE OF MALPRACTICE CLAIMS INVOLVING IMPAIRED LAWYERS.

(a) **Harder to Defend.** Impaired lawyer claims are often harder to defend on liability. If the impairment causes the lawyer to miss a deadline, or causes sanctions to be imposed on a client, it is difficult to argue that the lawyer complied with the standard of care.

(b) **Little Leniency or Sympathy.** Judges juries typically offer no leniency to the lawyer and the firm.

(c) **Clients Unsympathetic.** Clients (or, more precisely, *former* clients) are generally not sympathetic to the situation, but rather, will capitalize on the impairment to inflate their claim.

¹⁰ See Restatement (Third) of the Law Governing Lawyers.

¹¹ See, e.g., Little v. Matthewson, 114 N.C. App. 562 (1994), *aff'd* 340 N.C. 102 (1995).

¹² E.g., Lucas v. Hamm, 56 Cal. 2d 583 (1961); FDIC v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1992)(securities laws), *rev'd on other grounds*, 512 U.S. 79 (1994); Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707 (9th Cir. 1992)("supervisory" level expertise).

¹³ E.g., Mirabito v. Liccardo, 4 Cal. App. 4th 41 (1992); *but see* Borden v. Clement, 261 B.R. 275 (N.D. Als. 2001).

¹⁴ E.g., Mika v. Danz, 199 Ill. App. 3d 296 (1990).

¹⁵ E.g., Tri-Growth Centre City Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 216 Cal. App. 3d 1139 (1989).

¹⁶ E.g., Hayes v. Far West Services, Inc., 50 Wash. App. 505 (1988)(lawyer shot plaintiff during fight in a bar to which the lawyer went to discuss a particular case with other lawyers; firm not liable).

(d) **Exacerbation of Damages.** In an effort to magnify claimed damages and settlements, plaintiffs lawyers will often allege more than mere negligence, adding claims for breach of fiduciary duty, failure to supervise, and fraud, and seek punitive damages.

(e) **Denial Makes Worse.** Efforts to delay or minimize disclosure to the client are a recipe for disaster when a claim comes.

(f) **Swift Response.** Once it is determined that there is an impaired lawyer problem, it is imperative that the firm act swiftly, decisively, and thoroughly to address the problem and limit any damage to the client that might occur.

6. **ALABAMA LAWYER ASSISTANCE PROGRAM**

(a) **Alabama Lawyer Assistance Program.** The Alabama Lawyer Assistance Program is available to help lawyers, judges and law students with alcohol/drug problems. **For more information contact:**

Robert Thornhill
Program Director

Alabama Lawyer Assistance Program
(334) 834-7576, Confidential Phone
(334) 224-6920, 24 hr Cellular
E-mail: robert.thornhill@alabar.org

OR, visit ALAP's website, at <http://www.alabar.org/members/alap.cfm>.

(b) **Lawyers Helping Lawyers.** ALAP is assisted by the Lawyers Helping Lawyers Committee of the Alabama State Bar and many lawyers and judges throughout the state who volunteer to carry the message to fellow members of their profession that recovery is possible.

(c) **Role of ALAP.** ALAP is a program of the Alabama State Bar that assists legal professionals with alcohol and chemical dependency and/or mental health problems. It provides evaluation, assessment and referral services, peer and facilitated support, aftercare programs, and monitoring services. In addition, ALAP engages in preventative services through educational outreach programs, including mailings, literature distribution, and presentations to the judiciary, law schools, law firms, bar associations, bar seminars, and other organizations. ALAP provides assistance for problems associated with drug, alcohol, gambling, food, and sexual addictions, problems resulting from depression, and other mental health problems, as well as other issues which may affect a lawyer's ability to function competently.

(d) **Role of Other Recovery Resources.** ALAP is not a twelve Step program. However, in many cases of chemical dependency it recommends participation in

programs such as Alcoholics Anonymous, Narcotics Anonymous or other recovery programs as major resources in a lawyer's recovery. ALAP is not a treatment program, counseling center, employment agency, legal referral center, or employee assistance program. However, all of these services can be accessed through ALAP's resources.

(e) **Self Tests.**

(i) For chemical dependency, see <http://www.alabar.org/alap/alcohol.cfm>.

(ii) For depression, see <http://www.alabar.org/alap/depression.cfm>.

7. ADDITIONAL INFORMATION.

Additional information and references are available from various websites, including the Alabama Lawyer Assistance Program, <http://www.alabar.org/members/alap.cfm>, and the ABA CoLAP, <http://www.abanet.org/legalservices/colap/home.html>.

Series of articles in *GP Solo*, a magazine published by the ABA General Practice, Solo and Small Firm Section, October/November 2004 and July/August 2001 issues.