



Legal Ethics and the Impaired Lawyer

A recent article in the *Journal of Addiction Medicine* concerns a study of substance abuse and other mental health issues among lawyers.¹ The study was funded by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyers Assistance Programs² and was based on the premise that rates of substance use and other mental health concerns among attorneys were relatively unknown in spite of the real and potential problems they create for clients and society as a whole. The results are not very flattering and, stated simply, indicate that roughly 20 percent of the lawyers responding scored at a level consistent with “problematic drinking,” twice the rate of the general population in the United States.³ Levels of depression (28 percent), anxiety (19 percent) and stress (23 percent) were also found to be significant. The study focused mainly on alcohol and substance abuse, which is where most of us get in trouble, at least as demonstrated in the reported cases. One of the more significant findings was that 36 percent of the lawyers responding qualified as “problem drinkers” based on how much they said they drank. As pointed out in another article on alcoholism among lawyers,⁴ this means that 16 percent of us may have a substance abuse problem—and don’t know it.

Whether the practice of law tends to attract potential alcoholics, creates them after they get there, or has nothing to do with the problem, is far beyond the scope of this column. Besides the medical and societal problems attendant to substance abuse, there are ethical problems as well, arising mainly because of missed court dates and deadlines, poor preparation and representation, and improper handling (including outright theft) of client funds. These shortcomings bring into focus several specific ethical rules⁵:

- ER 1.1 (Competence) requires thoroughness and preparation reasonably necessary for the representation.
- ER 1.3 (Diligence) requires reasonable promptness in representing a client.
- ER 1.15 (Safekeeping Property) requires a lawyer to hold the property of clients and third parties that is in the lawyer’s possession in connection with a representation separate from the lawyer’s.
- ER 8.4 (Misconduct) covers and prohibits criminal, dishonest or fraudulent acts, often part of claims against lawyers who misappropriate clients’ property. Trust account violations are a common complaint in substance abuse cases.

These four ethics rules seem to predominate in the reported decisions where impaired lawyers get in trouble, but impairment can affect every aspect of a lawyer’s practice, including relations with the courts and third parties, which are covered by other ethics rules as well.

The problems concerning substance abuse and lawyer impairment not only affect impaired lawyers and their clients

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but also may affect the lawyers with whom they practice. ER 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) makes a lawyer who is “a partner or has comparable managerial authority in a law firm⁶ in which the other lawyer practices, or has direct supervisory authority over the other lawyer” responsible for that other lawyer’s violation of the ethics rules if the partner/manager/supervisor has knowledge of the other lawyer’s unethical conduct and fails to take action to avoid or mitigate its consequences. Thus, if you have managerial or supervisory responsibilities in your firm and you know that one of the lawyers in your firm may have a substance abuse problem, you could be responsible for the consequences unless you do something about the situation.

The ABA has weighed in on this problem,⁷ and an excellent Virginia State Bar draft opinion on the subject⁸ is currently working its way through Virginia’s ethics opinion approval process.⁹ Any lawyer with ER 5.1 responsibilities who thinks he or she may have an impaired lawyer issue needs to read these opinions.

So what do you do as either a lawyer who thinks he or she needs help or knows of a lawyer who may be impaired and who, for

**Ethics Opinions
and the Rules
of Professional
Conduct are
available at
[www.azbar.org
/Ethics](http://www.azbar.org/Ethics)**




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whatever reason, you want to help get help? The State Bar of Arizona no longer provides therapeutic services for lawyers in this area, and treatment for substance abuse and other personal problems is now left up to a lawyer's own resources including, if available, medical insurance. There is, however, a group of lawyers who voluntarily make themselves available and provide what is known as peer support through the State Bar's Member Assistance Program to answer questions members may have about personal problems, including substance abuse, depression and stress that they or a lawyer they know may be having. These volunteers—more than 70 in number and all Arizona lawyers—are listed online (www.azbar.org/professionaldevelopment/map/support/). These volunteers are not medical or counseling professionals but can relate their own experiences with the particular problems involved and offer support where needed. All communications with these lawyers are confidential,¹⁰ and there is no charge for

the volunteers' time.

The Member Assistance Program has been and continues to be a valuable resource for lawyers and

other members of the legal community concerning issues dealing with substance abuse and mental health problems. 

endnotes

1. Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys*, 10 J. OF ADDICTION MED. 46 (Feb. 2016).
2. www.americanbar.org/groups/lawyer_assistance.html
3. Even the Arizona Supreme Court has weighed in here: *see In re Arrick*, 882 P. 2d 943, 949 (Ariz. 1994) (18 percent of lawyers alcoholic).
4. Ronald D. Rotunda, *Alcoholics and the Profession of Law*, VERDICT (April 12, 2016) at <https://verdict.justia.com/2016/04/12/alcoholics-and-the-profession-of-law>
5. *See* Ariz. Rules of Professional Conduct, Rule 42, ARIZ.R.S.CT.
6. This is a defined term: *see* ER 1.0(c).
7. ABA Formal Op 03-429, *Obligations With Respect to Mentally Impaired Lawyer in the Firm* (June 11, 2003).
8. *See* Draft Legal Ethics Opinion 1886, *Duty of Partners and Supervisory Lawyers in a Law Firm When Another Lawyer in the Firm Suffers From Significant Impairment* (July 21, 2016), at www.vsb.org/docs/draft-1886-072116.pdf
9. Telephone call with Virginia State Bar's Office of Ethics Counsel, Sept. 26, 2016.
10. *See* Comment to 2002 Amendment to ER 8.3(c), ER 8.3 (Reporting Professional Misconduct).