

Lawyer Impairment and Related Ethical Considerations

by *Lenes N. Omuro*

It is often said that lawyers suffer from impairment issues more than the general public. In February 2016, the ABA and the Hazelden Betty Ford Foundation published the results of a collaborative research project (the ABA Hazelden study) that confirmed that lawyers do indeed suffer from substantial rates of behavioral problems including alcohol dependent drinking, depression, anxiety and stress.¹ The ABA Hazelden study involved surveys of 12,825 licensed employed attorneys from all regions of the country and is likely the most comprehensive study to date of its kind.

In particular, between 20.6 percent to 36.4 percent of the lawyers in the ABA Hazelden study screened positive for problematic drinking: hazardous, harmful and potentially alcohol dependent drinking.² In comparison, only 11.8% of a broad highly educated workforce screened positive in another study.³ These results are comparable to earlier studies.⁴ However, in contrast to earlier studies which found a positive association between increased problematic drinking and increased years in the profession, the ABA Hazelden study found a direct reversal of that trend with attorneys in their first ten years of practice now experiencing the highest rates of problematic alcohol use. Junior associates were found to have the highest rates of problematic use followed by senior associates, junior partners, and finally, senior partners.

The ABA Hazelden study also found that levels of depression, anxiety, and stress among lawyers were significant with 28%, 19%, and 23% of the lawyers experiencing mild or higher levels of depression, anxiety, and stress, respectively. Similar to the trend of alcohol use, these mental health issues were most prevalent for younger, newer attor-

neys and generally decreased as both age and years in the profession increased.

In addition to problematic alcohol use and the mental health issues addressed in the ABA Hazelden study, lawyers also suffer from drug usage and other mental health issues including those associated with aging.⁵ Lawyer impairment is a significant issue in the profession and raises a number of ethical considerations. What should you do if you think you are impaired? What should you do if you suspect a lawyer in your firm is impaired? What should you do if you suspect another lawyer who is not in your firm is impaired?

The Impaired Lawyer's Ethical Obligations

Impaired lawyers have the same ethical obligations under the Hawaii Rules of Professional Conduct ("HRPC" or sometimes the "Rules") as any other lawyer. Mental impairment does not affect the lawyer's duty to provide competent representation to clients. Lawyer impairment is also specifically addressed under HRPC Rule 1.16(a)(2), which states that a lawyer shall withdraw from representation of a client "if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."

Unfortunately, impaired lawyers may not be aware of their impairment or they may be in denial of the fact that their impairment is affecting their ability to represent clients. Moreover, even lawyers who recognize that they may be impaired often do not seek treatment or bring their impairment to the attention of appropriate persons in their firm. At least one study has concluded that the primary obstacle that prevented lawyers from accessing care was the belief that they could handle the problem on their own.⁶ As also suggested in the ABA Hazelden study, pervasive fears surrounding an attorney's reputation is also a barrier to treatment. Therefore, although lawyers theoretically have substantial access to resources for therapy, treatment, and other support through

health plans, lawyer assistance programs or individual financial resources, it is not clear that lawyers avail themselves to these resources particularly when working in a high stakes or highly competitive environment. Accordingly, it often falls on other attorneys in or even outside the impaired lawyer's firm to recognize and address matters related to a lawyer's impairment.

Obligations Arising Out of an Impaired Attorney in the Firm.

The HRPC does not specifically address a lawyer's duty to prevent another impaired lawyer from violating the Rules. HRPC Rule 5.1 does, however, address the responsibilities of partners, managers, and supervisory lawyers. Under Rule 5.1(a), a partner or a lawyer having managerial authority in the firm "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." Comment 3 to this Rule, indicates that the measures that may be required to fulfill this obligation can depend on the firm's structure and the nature of its practice. Further, under Rule 5.1(b), a lawyer with direct supervisory authority over another lawyer "shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Next, Rule 5.1(c) makes it clear that a lawyer shall be responsible for another lawyer's violation of the Rules if the lawyer orders or knowingly ratifies the conduct or if a partner, lawyer with comparable management authority, or a supervising lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable action. Finally, all lawyers have an obligation to report professional misconduct to the "appropriate professional authority" under HRPC Rule 8.3. Accordingly, lawyers, especially those with managerial and supervisory authority, cannot simply ignore a suspected or known impaired lawyer in the firm.

Signs of lawyer impairment usually

involve a distinct change from usual behavior and can include but are not limited to matters such as frequent unexplained absences or sick days, being late for depositions or meetings, failing to return calls or emails, social disengagement or isolation in their office, missing court dates and hearings, deteriorating personal hygiene, inappropriate moods or fears, or unusual focus on death or suicide.⁷ Impaired lawyers may also ask secretaries or other staff to “cover for them” and often secretaries or other staff members may be in a position to easily and quickly recognize signs of lawyer impairment. Firms should therefore encourage staff members and not just attorneys to be aware of and to report signs of possible impairment to appropriate administrators or partners in the firm.

The ABA has also issued Formal Opinion 03-429 which specifically concerns “Obligations with Respect to Mentally Impaired Lawyer in the Firm. This opinion provides as follows:

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 assurance that such impairment will not result in breaches of the Model Rules. 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. 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. 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 statement made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the

impaired lawyer.

ABA Formal Opinion 03-429 further states that the firm’s “paramount obligation is to take steps to protect its clients.” The first step is therefore to confront the impaired lawyer and take steps to assure that the clients are adequately represented. The firm should determine whether the impairment of the lawyer is so severe that the lawyer should no longer work on client matters. Evaluation of a lawyer’s impairment may require a detailed review of the lawyer’s work to determine if the impairment has affected the lawyer’s ability to represent clients. A firm might also consider obtaining the advice of an appropriate mental or other health professional to determine the severity of a lawyer’s mental impairment or substance abuse. ABA Formal Opinion 03-429 also suggests that, in some situations, it may be possible to accommodate some impairment. For example, if a lawyer’s ability to function under stress has been impaired, the lawyer might not be able to participate in a trial but could be assigned tasks such as legal research or drafting documents pending the results of any effort to treat the impaired lawyer.

Next, the law firm should also determine if the lawyer’s impairment has contributed to some misconduct and, if so, whether there has been any resulting damage. A detailed review of the lawyer’s work as mentioned above should be made to determine if there has been any harm to the client which might be corrected or mitigated. Moreover, under HRPC Rule 1.4(b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation. Accordingly, as suggested by ABA Formal Opinion 03-429, if a firm determines that an impaired lawyer should be replaced with another lawyer in the firm, the firm may have to explain to the client why the impaired lawyer is no longer working on the matter but, “to the extent

possible” should be conscious of the privacy rights of the impaired lawyer. Further, the firm should also consider whether there has been a violation of the HRPC of the type that would require reporting the ethical violation to the “appropriate professional authority” under HRPC Rule 8.3 which is also discussed in more detail below.⁸

Finally, ABA Formal Opinion 03-429 states that the responsibility of the firm to the client does not end with the resignation or termination of the impaired lawyer. For example, clients of the firm may be faced with a decision on whether to continue with the firm or to shift their work to the departing lawyer. Under Rule 1.4, firms may be required to advise existing clients of the facts surrounding the withdrawal to the extent reasonably necessary for the clients to make an informed decision about selection of counsel and, in doing so, the firm “must be careful to limit any statements made to ones for which there is a reasonable factual foundation.”

Obligation to Report Rule Violations by Another Lawyer Who may be Impaired

Lawyers may also have ethical obligations to report violations of the HRPC by another lawyer who may be impaired. This reporting obligation would apply not only with respect to impaired lawyers in a lawyer’s firm but also to impaired lawyers outside the firm. In particular, HRPC Rule 8.3(a), provides as follows:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

In addition, the ABA has issued Formal Opinion 03-431 concerning “Lawyer’s Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment.” This opinion provides as follows:

A lawyer who believes that another lawyer's known violation 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.

Accordingly, if a lawyer believes that the conduct of an attorney outside of the lawyer's own firm raises a substantial question about the attorney's honesty, trustworthiness or "fitness as a lawyer in other respects," then the lawyer may have a Rule 8.3(a) reporting obligation to disciplinary authorities. Although not all violations of the Rules are necessarily reportable events under Rule 8.3(a) because they may not raise a substantial question about the lawyer's

fitness to practice law, ABA Formal Opinion 03-431 does go on to state that "a lawyer's failure to withdraw from representation while suffering from a condition materially impairing her ability to practice, as required by Rule 1.16(a)(2), ordinarily would raise a substantial question requiring reporting under Rule 8.3."

On the other hand, the ABA opinion also suggests that "a lawyer need not act on rumors or conflicting reports about a lawyer" and that the "lawyer must know that the condition is materially impairing the affected lawyer's representation of clients." Each situation must, therefore, "be addressed on the particular facts presented." The opinion further explains as follows:

A lawyer may be impaired by senility or dementia due to age or illness or because of alcoholism, drug addiction, substance abuse, chemical dependency, or mental illness. Because lawyers are not health care professionals, they cannot be

expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist. Nonetheless, a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment (e.g., patterns of memory lapse or inexplicable behavior not typical of the subject lawyers, such as repeated missed deadlines).

The ABA opinion further indicates that a lawyer may or may not make a report to an approved lawyers assistance program but, even if a report is made, such a report is not a substitute for reporting to the disciplinary authority responsible for assessing the fitness of a lawyer to practice in the jurisdiction. There is also no affirmative duty to speak to the affected lawyer or the affected lawyer's law firm about the condition before reporting to the disciplinary authority. An affected lawyer's denials

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HSBA HAPPENINGS

December Board Action Summary

The HSBA Board took the following actions at its meeting in December 2016:

- Voted to approve the HSBA Nominating Committee's recommendation on the following appointments:
- HSBF Board - Caryn Okinaga, Rosemarie Sam, and Jeffrey Sia to three-year terms beginning January 1, 2017.
- Hawaii Access to Justice Commission - Derek Kobayashi and Judge Trudy Senda (ret.) to three-year terms beginning January 1, 2017.
- Ratified the appointment by President Jodi Yi of the following individuals (in addition to the automatic appointments of the immediate Past President of the HSBA and the incoming President) to the joint committee of the Hawaii State Trial Judges Association-Hawaii State Bar Association for a one-year term beginning January 1, 2017: Russ Awakuni, Robert Frija, Daniel Kim, Scott Leong, Laurel Loo, Jonathan Ortiz, and Andrew Park.

Lawyer Referral & Information Service ("LRIS")

Looking to increase your client base or attract clients in other areas of law? The LRIS is the only bar-sponsored referral service in the state. The annual registration cycle is July 1 to June 30 although the service accepts attorney applications year-round. Areas of law include family law, business law, real property, trusts and estates, torts, criminal law, and many more. The LRIS staff screens over 1,500 calls each month within the state. The LRIS joins a network of nationwide services approved by the ABA. To enroll as an LRIS member or to learn more about the program please visit <http://hawaii.lawyerreferral.com>, call 808-537-9140, or email lr@sbsa.org.

Member Benefits Spotlight

Island Air

From January to March 2017, Island Air is offering a 15% discount for interisland flights. Utilize promo code "hauoli" when booking your flight. Island Air is rolling out brand new turboprop aircraft that are 30% faster than

conventional turboprops and burn 30% less fuel, producing lower emissions compared to similar capacity jet aircraft.

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What's inside your 401(k) may surprise you. Find out why thousands of law firms of all sizes - even solos - use the ABA Retirement Funds Program ("the Program") as their 401(k) provider. Call us at 866-812-3580 for a free consultation or visit www.abaretirement.com for more information.

PSH Insurance

Are you taking advantage of The Hartford's new 34-cent temporary disability insurance rate exclusively for HSBA member firms? The Hartford reduced the exclusive HSBA member firm Temporary Disability Insurance ("TDI") rate to 34 cents effective October 1, 2013. Participating firms have already seen the reduction in their January 1 billing. Contact Arnold Hirotsu at PSH Insurance Inc. at (808) 531-6211 or email a.hirotsu@pshinsurance.com to start saving on your TDI insurance.

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alone do not necessarily negate the reporting obligations under Rule 8.3 because it is the lawyer's knowledge of the affected lawyer's actual impaired conduct that typically triggers this reporting obligation.

This article is not intended to cover all ethical issues that may arise when faced with an impaired lawyer nor does it address all matters covered by the ABA opinions referenced herein. Lawyers should conduct their own research or consult with appropriate members of their firms or other authorities as needed to address these issues.

Mental Health Concerns Among American Attorneys, Journal of Addiction Medicine (Jan./Feb. 2016), http://journal.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental_8.aspx.

² The range of 20.6% to 36.4% apparently exists because not all lawyers answered all questions on the survey. There was an Alcohol Use Disorder Identification Test (AUDIT) score of 20.6% based on 11,278 participants who answered all 10 questions on the AUDIT and an AUDIT C (shortened form) score of 36.4% based on the 11,489 participants who answered at least the first 3 AUDIT questions.

³ ABA Hazelden study, J. Addict. Med. Vol. 10, Number 1, Jan./Feb. 2016 at p. 51.

⁴ See Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 Creighton L. Rev. 265, 266 (1997) (in a 1997 study, 18%-25% of lawyers had a drinking problem compared to 10% of adults overall in the United States).

⁵ The ABA Hazelden study did consider drug use but a lower percentage of the lawyers completed the drug abuse screening test (DAST) so the data compiled did not meet the assumptions for more advanced statistical procedures and no

inferences were made. Other studies, however, suggest that drug use is more prevalent among lawyers than the general population. See Allan, *supra* at 266; see also Ellen Murphy, *Coping with Challenges*, 17 Bus. L. Today Jan./Feb. 2008 at 35.

⁶ Melody Crawford Chadwick, *Hiding in Plain Sight: Recognizing signs of impairment and what to do about it*, Oregon State Bar Bulletin, August/September 2006, <https://www.osbar.org//publications/bulletin/06augsept/addictionhiding.html> (referring to a 2003 research study by the Cottonwood de Tucson treatment center).

⁷ See Chadwick, *supra*.

⁸ There is generally no obligation to report under Rule 8.3(a) if the impairment has not resulted in a violation of the Rules. ABA Formal Op. 03-429 at p. 7.

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¹ Patrick R. Krill, Ryan Johnson and Linda Albert, *The Prevalence of Substance Use and Other*