

# Substance Abuse, Stress, Mental Health and the Legal Profession



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## **SUBSTANCE ABUSE, STRESS, MENTAL HEALTH AND THE LEGAL PROFESSION<sup>1</sup>**

Lawyers work high stress jobs in a high stress world. The rewards of the profession can be great, but so are the pressures. The incidence of lawyer drug abuse—all drugs, but most particularly alcohol, is high: higher than for other professions. And when a lawyer loses control to addiction, be it to alcohol, drugs, or something else, the lawyer's colleagues—and clients—often suffer as well.

### *A Lawyer in Trouble and His Friends on the Spot*

Bill “Rabbit” Worthington is a partner at the firm of Dill, Straight & Smith, one of the oldest and most prestigious law firms in town. Worthington has been with the firm for over 30 years. His colleagues call him “Rabbit” because of his creativity in facing and solving new legal problems. They used to say at Dill, Straight that he could take an impossible case and pull a rabbit out of his hat to win it, hence his nickname.

I. Recently, things have changed for Worthington. At first he seemed simply less efficient and energetic. Everyone thought he was just going through a “lazy spell.” But there began to be other telltale signs. He seemed to get little done after lunch, and those who ate with him noted that his lunchtime “glass” of wine had become three or four. “Rabbit” had long had an “open door” policy, encouraging late afternoon “schmoozing” with young associates who wanted the benefit of his counsel; his office had been dubbed “the Rabbit warren” because of all the traffic and activity centered there. In the past several months, though, Rabbit’s door has stayed closed most afternoons, and he often doesn’t emerge at all until he heads for home.

Chuck Chenier is the firm’s managing partner and a friend of Rabbit’s since law school. He has begun noticing a strong smell of alcohol on Rabbit’s breath in the afternoons. He has also observed that Worthington just doesn’t seem like “the old Rabbit.” What, if anything, should he do about this?

II. Another year has gone by. Chuck Chenier talked to Rabbit, who promised to “get myself under control,” but otherwise Chuck has taken no action. In the past several months, the associates who work with Rabbit have noticed problems with his work. He lost one client’s original documents, only to find them months later in another client’s file. One late afternoon, as the deadline for filing neared, his draft memo of a key motion was nowhere to be found, and no one knew where Rabbit was either. His secretary rummaged through his briefcase until she found a tape and retranscribed it. He now loses paperwork so often that his secretary has begun to open his mail and keep a copy of everything in a cabinet known as “Rabbit’s file.”

Jane Diaz is a second year associate at the firm. She was originally thrilled that one of the partners she was assigned to work with was Worthington. Jane had heard of him, and at first found him to be just like she imagined, but she increasingly became aware of Rabbit’s work sloppiness and found herself having to “cover” for him more and more. Last week, she and Worthington were with a major client who was being deposed by opposing counsel. It was Jane’s first “big” case, and she was excited. Rabbit “defended” the deposition, but to Jane he just didn’t seem to be paying attention. He failed to object several times to questions which Jane thought were obviously irrelevant and prejudicial. His breath smelled like alcohol, though Jane wasn’t sure anyone else could detect it.

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<sup>1</sup> The following is adapted from Richard A. Zitrin & Carol M. Langford, *Legal Ethics in the Practice Law* 2d ed., Chapter 11, Mental Health, Substance Abuse and the Realities of Modern Practice 719-42 (Lexis-Nexis 2002). Reprinted by permission. Copyright © 2002 Matthew Bender & Company, Inc., a member of the LexisNexis Group. Under the auspices of the New York State Lawyer Assistance Trust, and with the gracious permission of the authors and their publisher, Professor Marjorie A. Silver, Touro College of Law, has augmented the readings and questions posed specifically for law students at law schools in New York State. Professor Silver gratefully acknowledges the assistance of her excellent research assistants: Rachel Maida, Mili Makhijani, Stacy Meisner and Patricia Pastor. She also wishes to thank Ken Rosenblum, Barbara Smith and Eileen Travis for their expert advice and assistance, and Professors Lawrence Krieger and Andrew Benjamin for their wise counsel and feedback on an earlier draft.

### QUESTIONS

1. What should Jane do? Should she discuss the matter with Chuck Chenier? Should she talk directly to Worthington? Or is the matter simply not something she should tackle herself?
2. What, if anything, should Chenier do?
3. What, if anything, should be done about Rabbit's clients? Should they be told anything, and if so, what should they be told?

**III.** Think about what you would do if you discovered that a good friend and colleague, your fellow law student or associate, had developed a substance abuse problem. Is there anything that you feel you *must* do?

### READINGS

**1. Alcoholism: What's the Cause?** There are several theories about the cause of alcoholism. Historically, it was seen as an indication of personal weakness, a moral failing. Read the following essay by a psychologist who is also a lawyer which discusses the symptoms, as well as current scientific thought about the causes of alcoholism.

## ALCOHOLISM: SYMPTOMS, CAUSES & TREATMENTS

**Douglas B. Marlowe, Ph.D., J.D.<sup>2</sup>**

Alcoholism exacts an exorbitant toll on lawyers, the legal system, and consumers of legal services. In a 1990 study conducted by the North Carolina Bar Association, a staggering 17% of the 2,600 attorneys surveyed admitted to drinking 3-5 alcoholic beverages per day. In the state of Washington, another study found that 18% of the 801 lawyers surveyed were problem drinkers. It is estimated that the number of lawyers in the United States actively abusing alcohol and drugs is twice that of the general population. Approximately 40% to 70% of attorney discipline proceedings and malpractice actions are linked to alcohol abuse or a mental illness.

Yet, despite this high incidence, lawyers suffering from alcoholism often feel painfully alone. Fearing discovery or retribution, they are reticent to ask questions or to attempt to learn more about their problem. Very often, they fail to seek help before the problem has escalated to serious proportions. The purpose of this chapter is to introduce the impaired lawyer to the symptoms and causes of alcohol dependence and to the large menu of treatment options that now exist. . . .

### THE SYMPTOMS

"Denial" is a common feature of alcoholism. There are widely differing opinions about whether denial is an unconscious psychological defense mechanism, a misguided effort to conceal the shame of addiction, or simply a reaction to accusations or punitive actions by other people. Regardless, it is clear that those who are addicted to alcohol are often the last ones to recognize or acknowledge the existence of a problem. As a result, they unfortunately may not seek help until they are faced with serious medical, legal, financial, or social repercussions.

Official diagnostic criteria for "alcoholism" or "alcohol dependence" focus on the compulsive use of alcohol despite the significant negative consequences of that use. Some alcoholics will exhibit symptoms of physical dependence, including a need for significantly increasing amounts of alcohol to achieve the desired effect ("tolerance"), or withdrawal symptoms (e.g., nausea, tremor, insomnia) when levels of alcohol in the blood decline.

For a substantial proportion of alcoholics, however, dependence is manifested solely by a behavioral or psychological compulsion to use alcohol, without any recurrent episodes of binge drinking; frequent intoxication under dangerous or inappropriate circumstances (e.g. while driving); multiple, unsuccessful efforts to quit or reduce the use of alcohol; excessive involvement in alcohol-related activities; reduced involvement in adaptive or productive social and occupational activities; or the continued use of alcohol despite significant physical or psychological ill-effects.

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Rather than focusing on these direct symptoms of addiction, however, it is often more instructive or productive to focus on the loss of functions or competencies that typically accompany the addiction. Efforts to confront an alcoholic with positive evidence of his or her addiction (e.g. black-outs, binges, or the smell of liquor on the breath) typically invoke excuses, manipulations, or angry counter-attacks. It is much harder, however, to deny the existence of a problem when one's accomplishments have fallen far short of one's goals and abilities.

#### THEORIES OF CAUSATION

Theories about the causes and treatment of alcoholism are generally more reflective of personal philosophies and belief systems than of scientific or clinical evidence. Historically, the "Moral Model" of addiction viewed alcoholism as a sign of characterological weakness or moral turpitude. As such, treatment, if any, was designed to confront the alcoholic with the consequences of his or her behaviors and to force or shame him or her into making improvements.

The "Disease Model" of addiction assumed prominence in the middle part of the century. This model, which views alcoholism as fundamentally a medical illness, has found some support from recent discoveries about the genetic, biochemical, and pharmacological aspects of addiction. Treatments based upon the Disease Model sometimes emphasize the individual's relative powerlessness over the illness. This philosophy has attracted a great deal of support from the "self-help" movement because of its deemphasis on issues of blame and morality.

Most recently, a "Habit Model" or "Behavioral Model" of addiction has achieved relative prominence, particularly in the fields of psychology and education. This model views addiction as essentially a learned behavior, resulting from faulty problem solving, ineffective role modeling, or a complicated system of rewards and punishments which sustains the alcohol usage. Rather than viewing the individual as powerless in the face of a disease process, the Behavioral Model seeks to increase the individual's sense of efficacy and potential control over the problem. A distinction is made between moral blameworthiness regarding the past and behavioral accountability in the future. People may not "choose" to be addicted, but it is assumed that they have ultimate control over changing their behavioral patterns.

Philosophies aside, no one really knows for certain what causes alcoholism and it is highly unlikely that any single causal agent will ever be identified. Alcoholism appears to be a result of many different processes. For any particular individual, it may stem from a genetic predisposition, from environmental stress or trauma, from learning history, or from a complex combination of any of these.

It is useful to think about alcoholism in light of the "diathesis-stress" model of illness. Some individuals have a strong genetic loading ("diathesis") for a particular disease, which may be activated with minimal environmental influence. For example, some people are genetically predisposed to develop cancer, which may manifest itself almost irrespective of diet, exercise, or other habits. Other individuals, in contrast, are genetically heartier and do not develop the disease unless they are exposed to potent environmental carcinogens. In a similar vein, individuals appear to vary in their genetic vulnerability to alcoholism. Some people can apparently drink steadily without developing dependence or becoming socially maladapted. Others are less fortunate.

Given the current state of medical science, it is difficult to know in advance who is or is not vulnerable to developing alcoholism. However, a look at your family tree may shed light on your own risk liability. Rates of alcoholism are significantly higher within some families than in the general population. It is uncertain whether this is due to an inherited familial vulnerability to alcoholism, or whether it results from role modeling or social learning. Children of alcoholics may simply be exposed to alcohol at a younger age, or they may be negatively affected by concomitant family dysfunction. Most likely, a positive family history reflects both learned and genetic factors, in which biological and environmental forces combine to increase one's risk exponentially.

Compared to the general population, alcoholics suffer from significantly higher rates of psychiatric disorders such as depression and anxiety. This has led to some speculation that alcoholics might be "self-medicating" some uncomfortable emotional state. In fact, part of the chemical effect of alcohol is to dull the emotions. It is difficult, however, to disentangle cause and effect because of the alcohol's depressant influence on the central nervous system. Chronic alcohol use may bring about long-term brain changes, leading to the development of depressive or anxiety states. It is also possible that some individuals have a generalized vulnerability to stress which, depending on the specific circumstances, may manifest itself as alcoholism, depression, anxiety, or some other emotional disturbance.

. . . [N]ot all treatments are appropriate for all people. It is essential to find a good match between your own personal needs and the functional components of a particular program. Importantly, most programs share common core ingredients that appear to be essential for recovery. These include an opportunity to share feelings with others, to be heard, to be reinforced for abstinence, to reduce resistance in an atmosphere of trust, and to realize that you are not alone with the problem of alcoholism. Regardless of the specific program you choose, you are highly likely to receive some symptom relief simply by taking a measurable first step.

**2. A Case History of a Lawyer in Trouble.** What happens when a lawyer uses drugs or alcohol to excess? When no one intervenes to prevent such behavior, the consequences can be a swift slide down a slope towards legal oblivion. At first, the consequences may be personal to the attorney, but over time, the clients of that lawyer and the lawyer's firm will likely begin to feel the effects. Read what happened to one fallen lawyer and how his misfortune affected his life, both negatively and positively.

### **BARBARA MAHAN, DISBARRED**

*California Lawyer (July 1992)*<sup>3</sup>

Most lawyers expect a lot from their careers. They endure three rough years of law school, a grueling bar exam and the long hours necessary to establish a practice. In return they hope for such benefits as a high salary, respected status and the satisfaction of helping clients.

Sometimes it works out that way; sometimes it doesn't. . . . Lawyers become disenchanted with what they do, or how they do it, or what it brings them. They make mistakes—little ones at first, then bigger and bigger ones. The system they swore to uphold doesn't seem worth the effort anymore. They violate the standards of the profession or the law itself. Stories about these lawyers we hear only in whispers, or read in the stilted prose of a State Bar disciplinary report.

The accounts below come from . . . former lawyers who were either disbarred or resigned because they were certain they would be disbarred. Banished from the profession, they testify here from the legal underground. They agreed to be interviewed . . . [because] they believed either that telling their stories would help others or that it would help them face and accept their pasts. . . . Two of the former lawyers who speak here . . . abused alcohol or drugs. That is not a coincidence. The State Bar estimates that 30 to 50 percent of discipline cases are related to substance abuse.

From their vantage outside the profession, these men touch on several common themes. One is the economic and social cost of being forced from their work. Disbarred lawyers not only lose their ticket to practice law; they lose their financial security. Many go bankrupt. Their marriages or relationships fail, their friends drift away, their colleagues don't call, their health begins to falter.

Another theme is the depth of their personal loss. Cast from legal society, they question their identities and self-worth. They agonize at failing their fathers and their own children. Some wonder if there is any point in going on; they contemplate escape or suicide.

A third is the difficulty of starting over. Educated for the law, former practitioners can't or don't want to find a new career. Many become paralegals, doing much of the same work they performed as lawyers at substantially less pay. Those who attempt new kinds of work usually struggle for a period after making the switch.

A final, unexpected theme is a growing sense of social responsibility. Two lawyers who once were consumed by addictions now help others stop abusing drugs and alcohol. . . .

After they resigned or were disbarred, some of these men became better fathers, sons, husbands and friends. They saw clearly some things that had been clouded or hidden. Their failures, in varying degrees, appear to have led

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to redemption. Deprived of their profession, they gave more of themselves to other people than they ever had before.

In reviewing their stories, one cannot help wondering whether these former lawyers would have achieved the same advances in self-awareness and social commitment had they not suffered the loss of their profession. Perhaps what brought about their disbarment was more than simply an urge toward self-destruction. Perhaps on a level we can barely see they were waging a fight to establish and protect something in themselves more important than the right to practice law.

*David K. Demergian*

*By his second year out of law school, David Demergian had reached a level of success that many young lawyers dream of. He had established his own practice in San Diego, landed some top real estate clients and was making well into six figures a year. He had an expensive home, a pretty wife, a Mercedes and a baby daughter. But for Demergian, it wasn't enough.*

*In 1983 he started pulling this dream life apart. He fell in love with his secretary and left his wife and child. Single for the first time in years, he threw himself into a fast lane of parties and women. He began representing topless and bottomless clubs, dancers and drug defendants. It made him feel good to walk into exotic bars and be treated like a big shot.*

*In late 1984 his secretary introduced him to freebase cocaine, and within a short time he was hooked. His addiction, which lasted only seven months, cost him his profession, his financial solvency and his self-respect. He believes it also cost him his father's life.*

*Demergian, 39, has turned his life around since his disbarment. Once concerned chiefly with the power, prestige and trappings of the law, he now works as a law clerk, drafting documents to which he cannot sign his name. He has married again, has another daughter and spends a lot of time with his girls. . . .*

*In his spare time Demergian works with lawyers and judges who are alcoholics and addicts. A consultant for The Other Bar [a rehabilitation program sponsored by the California State Bar], Demergian gets up to 40 calls a month for help, from people in trouble and from their families, colleagues, and friends. He tells them his story of catastrophe and hope, and attempts to offer others what he wishes he could have found: a way off the path toward self-destruction before everything was lost.*

Until I got hooked on freebase cocaine around December 1984, my law practice had been exemplary. But by January or February 1985, I no longer went into the office. I stayed home every day, calling in for trials, saying I was sick. All day long I smoked cocaine. The high ends quickly, and the crash is lower than anything you can imagine. So every 10 or 15 minutes I would take another hit. Then I would clean my place. I had all this energy. I arranged my shirts in my closet alphabetically by color. I recorded oldies from the radio, 20 cassettes of them, and cross-indexed the songs. I only went to the office late at night to use the computer for my oldies index and to pick up any money that came in.

In seven months I went through \$80,000. Unfortunately, only \$60,000 of it was mine. In April or May 1985 I took \$20,000 from a client trust fund, the proceeds of the sale of a client's house in a divorce settlement. I had run out of money. . . . I told myself I would pay it back. The denial involved in my addiction was frightening and extreme. . . .

On Father's Day 1985 around 3 a.m. my doorbell rang. I had been up all night having a party, and there were half-naked girls and drugs all around. I opened the door and there on the doorstep was my father, who was a doctor. He had flown out from Wisconsin because Stephanie, the woman who is now my wife, called him and said, "Your son is killing himself with drugs." My father and I had always been close. But I wouldn't let him in. The tears were streaming down his face when I slammed the door.

My father and Stephanie began conspiring to get me into treatment. I went into a drug treatment center, but I was not committed to it and I left. Over the next three days I went through a lot of cocaine. At the end I was as

pitiful and incomprehensibly demoralized as a human can be. . . . An old friend showed up at my place and stayed with me until he found a hospital that would take me. I went back into treatment June 28, 1985, and I have been clean ever since.

In the program I learned rigorous honesty. After I was in the hospital three days, I borrowed the money from my parents and paid back my client. When I got out, I called all my clients and told them everything. They all stayed with me except the drug dealers.

Ironically, after I got well . . . I got a notice of my interim suspension from the State Bar effective January 1987.

The stress of helping me get into treatment killed my father. He had a stroke a year and a half after I recovered and passed away about the time I was sending out the . . . notices to close out my practice. He was only 57. He got me through as much as he could and then he died.

After my suspension, I got a job as a law clerk for a small firm starting out at \$800 a month. Then the State Bar hearings began. No one except me thought it would result in disbarment, because I had no prior discipline [record] and I had more than 70 letters of support from lawyers and judges. But deep in my heart I knew I should be disbarred.

About a year after my sobriety I got involved with The Other Bar. At first I thought it would look good for my discipline case. Then it became something I really believed in. As it started to get inside me, I thought maybe I could help other people avoid what happened to me. In the last three years I have helped maybe 100 people. It's one of the things that lets me sleep at night. I lie there and see dozens of faces of lawyers who are still practicing and alive because of me.

I make \$4,600 a month as a law clerk doing general civil litigation research and writing. . . . I was eligible to apply for reinstatement in January 1992, but I was not sure I would do it right away. It's real important to me to get my license back because they took it away. But being a lawyer isn't so important anymore. I used to care about the power, the prestige, the money. Now I want to preserve the happiness I have . . . .

**3. Identifying the Problem and Doing Something About It.** The effect on the clients of a lawyer who abuses drugs or alcohol is not always as graphic as in the case history described above. But the abilities of lawyers to perform their fiduciary duties to their clients—to put the causes and needs of their clients first—often become seriously impaired when lawyers are more concerned with their substance addictions. Deadlines are missed, responses are not filed, and more subtle lapses—some of which the client may not be able to discover—occur with increasing regularity.

Psychologists, management consultants, and other experts in the field offer a great deal of advice about how to deal with the problem attorney. Some of that advice includes the following:

Watch for early warning signs, such as declining hours, little work accomplished after lunch, or sharply reduced revenue production; have a managing partner or management committee sufficiently strong and autonomous to deal with the problem without putting it to a vote of the whole firm; consult the services of a psychologist, psychiatrist, or other trained professional.

But most experts would tell us that the most important advice they can give is the following: Don't ignore the problem, or even worse, participate in the cover-up. Take action, because inaction will be viewed as tacit acceptance of the situation. The more difficult it is to take action, because of friendship or close long-term business relationships with your colleague, the more important taking action becomes.

The following article expands on these ideas. . . . and [discusses] the extent to which such addictions should be considered "mitigating" factors.



**MICHAEL A. BLOOM & CAROL LYNN WALLINGER,  
LAWYERS AND ALCOHOLISM: IS IT TIME FOR A NEW APPROACH?**

*61 Temple Law Review 1409 (1988)<sup>4</sup>*

Lawyers generally are terrible resources for each other. Perhaps it is a function of a lawyer's training and the independent nature of the profession. While viewed as a virtue, independence frequently can wear another face. The intense pressures of competition, the meeting of continuous deadlines, and the anxieties associated with earning a decent living lead many lawyers to feel isolated and without resources. . . .

The most difficult problem for the troubled lawyer is to identify that a problem exists, and to recognize that help is needed. The troubled lawyer is plagued by fear and impaled by denial; in combination, the two can be deadly.

. . . .

About ninety-five million Americans drink alcohol in one form or another. About ten to thirteen percent of the general population is alcoholic, but estimates for professionals, including lawyers, range from three to thirty times the average for lay people.

Even more striking is the percentage of lawyer disciplinary cases that involve alcoholism. Oregon's Professional Liability Fund has determined that more than one-half the attorneys admitted to its alcoholism treatment program already have been sued for malpractice. Surveys taken in New York and in California reveal that as many as fifty to seventy percent of all disciplinary cases involve alcoholism. . . .

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The process of healing oneself begins when the person admits to being an addict. This is the most crucial part in recovery of an addict because denial is the cornerstone of addiction. Breaking through this denial is the most important step in the recovery process and often is the most difficult task if treatment is to be successful.

An excellent example of denial is the reluctance of most lawyers to report incompetent or impaired work. Although technically obligated to do so under the Model Code and the Model Rules, this "conspiracy of silence" has been cited as the "greatest obstacle to better regulation of the legal profession."

Most reports from attorneys concern violation of the advertising or solicitation rules rather than real crimes. Reported cases in which discipline has been imposed for a lawyer's failure to report another lawyer's misconduct are extremely rare.

This is a classic example of the psychological concept of "enabling," whereby we consciously or "unconsciously help alcoholics block their perception of their illness." There often are signals, other than obvious drunkenness, that point to a potential drinking problem. Some of these signals include long weekends and/or frequent late arrivals and early departures from work; failure to file court papers; forgetting to show up for scheduled court appearances and appointments; neglecting correspondence and phone messages; "borrowing" from client trust funds; and often missing deadlines. As the disease progresses, the alcoholic increasingly requires the help of others to cover his or her decreasingly effective performance of life's daily responsibilities. Colleagues in the legal community (secretaries, associates, partners, even judges) often are recruited, to participate in the "cover-up." When colleagues allow this behavior to continue unchecked, the alcoholic lawyer is enabled to progress deeper and deeper into alcoholism. The resulting harm to clients is not something from which these colleagues should hold themselves (or be permitted to hold themselves) entirely blameless. Nor should they be permitted to escape liability to clients for a risk they knew existed, but took no steps to prevent.

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*Effect of Alcoholism on Disciplinary Proceedings*

The model of alcoholism as a disease views the alcoholic as a person with an illness which is outside his or her control, or involuntary. Although the behavior of drinking is involuntary, it is often difficult to determine what other behaviors of the alcoholic also are involuntary. The issue of voluntariness must be addressed when designing any policy concerning alcoholism. The complexity of defining what is “voluntary” action by an alcoholic lawyer involved in disciplinary proceedings is demonstrated by the following cases, where the courts of New Jersey and Washington, D.C. struggled with terms such as “intent” and “but for,” while attempting to balance protection of the public interest with appropriate disciplinary sanctions for attorney misconduct.

A. *Non-Mitigating Factor Approach*

New Jersey has steadfastly resisted consideration of alcoholism as a mitigating factor in determining attorney discipline. Disbarment always is the result when the lawyer’s conduct involves misappropriation of client funds. Maintenance of public confidence in the bar is viewed as controlling in these cases; rarely will mitigating factors be considered. Two recent cases illustrate the view of the New Jersey Supreme Court on this issue.

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*In re Crowley* [105 N.J. 89, 519 A.2d 361 (1987)] concerned an attorney who was admitted to the bar in 1957 and maintained a solo practice concentrating in real estate, matrimonial, and estate matters. In 1978, his alcohol consumption and dependence began to increase and his practice began to decline.

Crowley began taking extended lunches and not returning phone calls. In 1981, he undertook a real estate closing on behalf of a client, but failed to satisfy an outstanding mortgage of \$11,500 from the closing proceedings. A complaint was filed and eventually it was conceded that Crowley had diverted, for payment of his own office expenses, a total of \$17,684 from five different clients.

In this case, the DRB [Disciplinary Review Board] had the benefit of a report from the Alcohol Advisory Committee, which determined that alcoholism was a contributing factor in Crowley’s behavior, and that he was now a recovering alcoholic. The DRB recommended indefinite suspension until recovery was demonstrated, and also required restitution of losses.

The New Jersey Supreme Court rejected the recommendations of the DRB and voted 7-0 for disbarment. The court noted . . . the probable direct relationship between Crowley’s unethical behavior and his alcoholism. The court, however, was not impressed with this connection, and observed that the same causal relationship could occur from severe financial reversals or other family hardships. Declining to use this case to create a new exception, the court instead elected to continue its ironclad policy of disbarring attorneys who misappropriate client funds.

B. *Mitigating Factor Approach*

In *In re Kersey*, [520 A.2d 321 (D.C. 1987)] the District of Columbia Board of Professional Responsibility found Kersey guilty of twenty-four Code violations and concluded that Kersey’s “pattern of dishonesty and deceit was so pervasive that disbarment was the only appropriate sanction.”

Facing disbarment, Kersey, whose drinking problems had begun in high school, reluctantly entered and completed an alcohol detoxification program. Together with the D.C. Bar Special Committee on Alcohol Abuse, Kersey then petitioned the District of Columbia Court of Appeals to stay his disbarment, and asked for reconsideration of his discipline in light of his alcoholism and his prognosis for recovery.

The court acknowledged that alcoholism is treated as a mitigating factor by many jurisdictions in determining lawyer discipline and held that the “but for” standard “must be met in order to prove causation in disciplinary cases involving alcoholism.” The court stated its belief that but for Kersey’s alcoholism, his misconduct would not have occurred.

In discussing the appropriate discipline to be imposed, the court considered the likely result that due to the “pre-treatment alcoholic’s persistent and virtually unshakable denial of his alcoholism,” other alcoholic attorneys would

fail to make any connection between Kersey's case and their own situations. Reasoning that suspending Kersey would not alter the behavior of other alcoholic attorneys, the court ordered that Kersey be placed on probation for five years, under supervision of a sobriety monitor, a practice monitor, and a financial monitor.

These two jurisdictions could not be more inconsistent. . . . [O]bvious from these cases is that neither of these approaches protects the public from impaired lawyers before harm to clients occurs. Given a choice between the two approaches, it is not hard to imagine which result the general public endorses. The public has no choice but to see the results in Kersey's case as a "protection of one's own" and to view the New Jersey approach as "rough justice" at work. Viewed in context, is this the message that the legal profession wishes to send?

### C. *Rehabilitation and Recovery*

Among those jurisdictions that have accepted the mitigating factor approach, it is evident that efforts by the alcoholic attorney to rehabilitate himself figure prominently in decisions to impose less severe discipline. [South Dakota, Illinois and Oregon cases cited.]

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It should be noted that in jurisdictions that have accepted the mitigating factor approach, "rehabilitation" and "abstinence" neither have been defined nor quantified. Failure to have done so in these jurisdictions gives rise to criticism that such factors are highly subjective and result in imposition of greatly varying sanctions for lawyers who have committed similar offenses.

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### *Conclusion*

At first glance, it may appear to be time for a new Model Rule that specifically deals with impaired lawyers. It could include, for example, providing ethical penalties for failure to report an impaired colleague to a LAP [Lawyer Assistance Program]. The fact is, however, that most of the provisions necessary to achieve these goals already are in place. What is lacking is a major commitment on the part of the entire bar to effectively self-regulate. A new approach is needed that is directed at changing the way that lawyers view their duty to report misconduct. At this point, it is unclear how long the public will tolerate such an unprofessional and potentially dangerous state of affairs. Not to act exposes lawyers to the risk that they may one day find themselves without a voice in regulation of their own profession.

In writing about *In re Kersey* for the ABA publication *Litigation*, associate editor Howard Gutman commented:

The court also ignored the major villain: a local bar committed more to a skewered notion of friendship than to its oath and profession. How could lawyers and judges pretend for seven years not to notice the bloodshot eyes, peppermint breath, lost paperwork blackouts, and missed court dates?

Once Kersey could not control himself, others should have stopped him. The Board of Professional Responsibility should have sanctioned Kersey's so-called friends at the bar for choosing not to do so.

Why did not Kersey's so-called friends help? It is easy to place the blame on them. It is too easy, perhaps because experience demonstrates that people generally are willing to help a friend with a problem. That is how friends and colleagues become trapped in the dilemma of "enabling" to begin with. Gutman's "skewered notion of friendship" demonstrates the insidious nature of alcoholism. . . .

The current informal system of underfunded state and local bar organization programs is inadequate to confront a disease that affects more than ten percent of the bar (and perhaps as high as one in every five lawyers or more). The cost of identifying and offering help to lawyers afflicted with alcoholism cannot be viewed as a luxury. At the very least, lawyers are paying for their lack of concern with increased malpractice insurance premiums. An additional cost is the continual erosion of public confidence in the integrity of the bar. Even more important is the human cost, the damage to clients, the needless destruction of lawyers, their careers, and their families.

The conspiracy of silence surrounding lawyers and alcoholism must be broken. The time has come for a national policy which goes beyond acknowledging that alcoholism is a disease. The policy must advocate that the duty to report impaired lawyers is a critical element in self-regulation of the profession. Furthermore, it must advocate the use of sanctions against lawyers who knowingly fail to meet this obligation of self-regulation.

....

Availability of alcoholism as a mitigating factor in lawyer disciplinary proceedings does not protect the public from impaired lawyers. . . . As each state develops effective Lawyers' Assistance Programs, they contemporaneously should prohibit the availability of alcoholism as a mitigating factor in lawyer disciplinary proceedings. Friends and colleagues of impaired lawyers then could direct their energies towards encouraging treatment before harm has occurred.

In purely human terms, we owe it to ourselves, as individuals and as a profession to take care of our own.

\*\*\* *In New York:*

The preceding article raises the question of whether substance dependency or abuse should be treated as a mitigating factor in disciplinary proceedings. As the Bloom and Wallinger article makes clear, jurisdictions differ on their positions with respect to mitigation, with New Jersey among the most stringent and the state of Washington among the least.

In 1992, the ABA promulgated *Standards for Imposing Lawyer Sanctions*, which provided as follows with respect to mitigation:

9.32 Factors which may be considered in mitigation.

\* \* \*

(i) mental disability or chemical dependency including alcoholism or drug abuse

when:

- (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
- (2) the chemical dependency or mental disability caused the misconduct;
- (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
- (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

New York courts, along with those of many other jurisdictions, incline towards considering chemical dependency a mitigating factor, depending on the circumstances. First, the court must find a causal connection between the chemical dependency and the transgression. Second, the court is less likely to be lenient in cases where (1) the attorney has previously been sanctioned or (2) where the transgression is grave. Third, mitigation is most likely in instances in which the attorney has become involved in helping others, for example serving as a peer counselor. Frequently, the court will condition a lenient sanction on continuing sobriety and participation in a treatment program.

- *Should disciplinary authorities ever consider addiction a mitigating factor? What if the addicted attorney has converted client funds? Neglected client matters? Committed perjury?*

- *Is monitoring or supervising an attorney's practice in lieu of suspension appropriate in circumstances where the attorney has neglected clients' cases due to alcoholism or other addiction?*
- *Should the answer depend on whether the addiction is to a legal as opposed to illegal substance? Should addiction to illegal drugs be treated the same way by the courts as alcoholism?*
- *What is the purpose of the disciplinary system? To punish the attorney, or to protect the public?*
- *Does your answer to the above question affect your position on mitigation?*

**4. Defining the Ethical Requirements.** As the [Bloom & Wallinger] article suggests, the Model Code and Model Rules do not provide much help in dealing with this situation. The "technical" requirement that incompetence or "impaired work" be reported<sup>5</sup> is more often ignored than acted on. Rules describing the responsibilities of supervising and subordinate lawyers are largely silent on the issue of what to do about an impaired colleague. Even in Illinois, where *Himmel*<sup>6</sup> gives lawyers an "absolute duty" to report, rates of reporting lawyer impairment have hardly skyrocketed.

What, then, do the rules of ethics require? Where the client is being hurt, does another law firm member have an obligation to protect that client's interests? If the lawyer's individual fiduciary duty is imputed to each member of the law firm, is "whistleblowing" to the client necessary? Must other firm members step in and act to protect client interests? Even if an ethics complaint doesn't follow for the impaired lawyer, could a law firm be liable for malpractice and breach of fiduciary duty if a client later learns that the firm failed to advise about a partner's impairment?

Finally, how else other than "whistleblowing" might the goal of client protection be accomplished?

**5. Reporting Substance Abuse Problems.** What if any obligation does an attorney or judge have to report another attorney with a substance abuse problem? And to whom would such a report be made?

The New York Code of Professional Responsibility, § 1200.4 [DR 1-103], provides:

- (a) A lawyer possessing knowledge, (1) not protected as a confidence or secret, of a violation, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of Section 1200.3 of this Part [DR 1-102] [Misconduct] that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
- *If the misconduct is related to alcohol or drug abuse, can a lawyer fulfill this obligation by reporting to the relevant Lawyers Assistance Program (LAP)? Is that "a tribunal or other authority empowered to investigate or act upon such violation"?*

Note the comparable rule in Texas:

### 8.03 Reporting Professional Misconduct

(a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable 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 disciplinary authority.

(b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

<sup>5</sup> See MR 8.3 and DR 1-103(A).

<sup>6</sup> 112 Ill. 2d 531, 533 N.E.2d 790 (1988).

(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyers report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

(d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information:

(1) by Rule 1.05 or

(2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

In 2003, the ABA's Ethics Committee issued a formal opinion interpreting Model Rule 8.3 that concluded that an attorney who knows that another attorney has a mental condition that materially impairs that attorney's ability to practice law, must report that to the appropriate disciplinary authority. The impairment may be the result of "senility or dementia due to age or illness or because of alcoholism, drug addiction, substance abuse, chemical dependency, or mental illness."<sup>7</sup> The Committee suggested that the reporting attorney may want to notify the relevant LAP, but that notifying the LAP was "not a substitute for reporting to a disciplinary authority with responsibility for assessing the fitness of lawyers licensed to practice in the jurisdiction."<sup>8</sup>

- *Do you agree with the ABA Committee's opinion?*
- *Should New York's rule be amended similarly to that of Texas?*
- *Take a look at the Bloom & Wallinger article again. The authors suggest that perhaps the Model Rules should be amended to impose penalties on a lawyer who fails to report an impaired colleague to a LAP. They argue that the public will be adequately protected only if there is an intervention before the impaired attorney breaches the rules of professional conduct. In May 2004, the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, along with other proposals, published the following for comment:*

**2.19 Disability and Impairment.** A judge having knowledge that the performance of a lawyer or another judge is impaired by drugs or alcohol or other mental, emotional or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.<sup>9</sup>

- *What do you think of these approaches? Would you recommend that New York adopt similar rules?*

**6. Intervention.** Intervention programs such as Chicago's Lawyer Assistance Program have become an increasingly common way to deal with addiction issues. Such intervention programs often have the same message conveyed by psychologists—the need to be tough, especially with those with whom we are close. But some discipline counsel feel that treating alcoholism as a disease may be letting lawyers off the disciplinary hook. How would you balance these considerations in the case of "Rabbit" Worthington?

<sup>7</sup> ABA Formal Op. 03-431 (Aug 8, 2003).

<sup>8</sup> *Id.*

<sup>9</sup> ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Posting of First (Partial) Draft Proposals for Public Consideration and Comment, May 11, 2004 ([www.abanet.org/judicialethics](http://www.abanet.org/judicialethics)).

## TRIPP BALTZ, PRESENTING THE HARD FACTS OF A LIQUID HABIT TO IMPAIRED LAWYERS

*Chicago Lawyer (December 1991)*<sup>10</sup>

She glares across the circle of people at her sister, the alcoholic lawyer, and begins.

“For as long as I remember, you’ve been tearing up every family gathering and ruining every holiday,” she says, her voice quaking.

“At my house you get drunk and pass out,” she continues. “We could go to your house; you get drunk and pass out. At a restaurant, you get drunk and embarrass everybody. You throw up in the bathroom, and you fall down. . . .”

Cook County Circuit Judge Warren D. Wolfson breaks in. “Lemme stop it at this point,” he says. “This would not happen.”

Lawyer’s Assistance Program interventions are no place for emotional outbursts, Wolfson explains. Participants must stick to retelling specific events of what they have seen and heard and how they felt about it. Things like always tearing up family gatherings “are throw-aways. You can’t have it,” he says.

Wolfson and other LAP intervention veterans were conducting a training session for about 40 lawyers and judges who volunteered to be intervenors—people who confront attorneys with substance abuse problems in hopes of creating change. Intervenors also inform people about alcoholism and act as resources within firms.

. . . .

Through LAP, intervenors confront lawyers or judges addicted to alcohol or other drugs with their problem to try to breach the impaired attorney’s denial and encourage him or her to seek treatment. Intervenors work in teams of three, including a judge and at least one recovering alcoholic.

Intervenors surround alcoholics with reality, [Former LAP President Michael J.] Howlett explained prior to the training session. They encourage family, friends and co-workers—the witnesses and victims of the chaos of alcoholism—to present hard facts of drinking to the impaired attorney.

LAP intervenors must attend at least one training session; be licensed attorneys and, if they are recovering alcoholics, have one year’s sobriety behind them. . . .

They come from all parts of the legal community: a large firm associate, a name partner in a three-lawyer shop, assistant state’s attorneys from two counties, an attorney from a law school legal clinic and two lawyers who are also clinical psychologists.

There are also three sitting judges, one retired judge and a smattering of solo practitioners, corporate counsel and government agency attorneys. The group is a mix of women and men, jackets and suits, tight-knotted ties and open collars, thin gray hairs and long curly locks.

. . . .

Based on intervention services, LAP is not a disciplinary organization, a temperance society or a recovery program.

“We don’t shake tambourines and beat drums,” Wolfson says. “We treat alcoholism as a treatable disease. We share the common conviction that we care about chemical abuse victims and their families, friends, co-workers, partners and associates. We try to get all parts of the person’s life.”

The relationship between trained intervenors and the judges and attorneys who receive assistance through LAP is privileged under Rule 1.6 of the Illinois Supreme Court’s Code of Professional Conduct, Howlett says.

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<sup>10</sup> Reprinted by permission.

“What is said at an intervention never goes out,” he says. To retain the LAP privilege and the right to participate in an intervention, one has to stay for the entire training program, he says. During the next four hours, no one will leave.

Assisting Howlett and Wolfson are Cook County Circuit Court Associate Judge Michael Murphy, vice president of LAP; and Barbara J. Sereda, president of LAP and assistant corporation counsel in the litigation division of Allstate Insurance Co.

Providing the professional perspective on alcoholism and interventions are Carl Anderson and Betty Reddy from Parkside Medical Services, an addictions treatment facility at Lutheran General Hospital in Park Ridge. LAP works closely with Parkside, which handles most of LAP’s referrals.

Wolfson describes how a team prepares for an intervention. The team interviews the addicted lawyer’s family, friends and co-workers who are willing to participate as if they were preparing witnesses. Some of those interviewed will accompany the LAP team when it confronts the addicted person.

Intervenors plumb for solid evidence and specific events.

“We’re lawyers,” Wolfson says. “We know how to ask the question; we know how to get the information. We need information that will stand up. It can’t be hearsay. It can’t be gossip or rumor.

“It has to be specific, and you will need to lay the same kind of foundation you would need to get a conversation into evidence: who was there, when was it, what happened.”

Intervenors advise participants to write down on yellow legal pads the facts and incidents that will be useful later, Wolfson says.

....

“If the alcoholic senses a weak point, he’ll go after it like a dog after a rabbit,” he says.

So if a participant falters or loses heart, Howlett says, the intervention team is there to gently nudge him or her back to the purpose by reminding them of something they wrote down.

“If a partner talks in terms of, ‘Well, I’m not so sure that George has a problem,’ then an associate can remind him, “Well, we did find him walking down the center of the L tracks twice. And we know that he’s talked his way out of the last three DUI tickets.”

“Or the last time we entertained a client, he put his face in the salad,” Howlett says. “We engage in what I call the duck school of diagnosis. Walks like a duck, talks like a duck, hangs around with ducks, acts like a duck—it’s a drunk. . . .”

“It’s an equal opportunity disease: men and women, all races, makes no difference. We take the position that this is a disease that doesn’t recognize any barriers,” he says.

Throughout the session, the trainers used the term “alcoholic” to refer to any person impaired by substance abuse or addiction.

....

Wolfson . . . explains the importance of setting limits: Having a person deliver the message that the lawyer’s job is in peril if they fail to seek treatment.

“There is no more powerful motivator” than the prospect of losing your job, Wolfson says. “The limit-setter will often be the last person to speak at an intervention, designated as the clean-up hitter,” he says.



Murphy adds, “You gotta make sure they mean it, and you make sure they’re gonna say it.” Partners sometimes back down. “It’s like impeachment,” he groans. The trainees laugh.

Howlett gives an example: “We’ll ask, ‘What are you going to do if he doesn’t get help?’ and the supervisor will say, ‘I’m going to feel terrible.’

“We had a head of public office say they were going to fire this person if they didn’t get help,” he continues. When we got to the point where the hammer was supposed to fall, and we turned to the supervisor and said, ‘Is there anything you want to say to him now?’ he said, “Get help, or I’m going to be disappointed.’

“You have nothing further to say? ‘Get help or I’m really going to be disappointed.’ Wasn’t there something you wanted to say about his job? “Yeah, if he doesn’t get help, he’s not going to be very good at his job.”

Howlett, like an entertainer on stage, relates the ironic humor of the story. But he follows through with its seriousness: “It was sad because it takes a lot of courage to do what we ask these people to do. You have to prepare them well enough and give them the support that will carry them through it.” The alcoholic cannot argue with the participants’ feelings, Murphy says. “We’re going to hit them with facts, but we’re going to tell them how that made you feel,” he says. “And we want them to know that the feeling hurts that person.

“The alcoholic can do all kinds of bad things, and he thinks he’s only hurting himself. We want to now let him know he’s hurting these people. We want to get all these people to give them that message.”

If the intervention team and participants are not ready, Howlett says, another information-seeking session will be held. . . .

“You get your bluff called and it strengthens the denial, and it goes on, and it’s much tougher to attack. You get that shock once. The last thing you want to do is get them used to all that.”

When everyone is prepared, the judge on the team calls the subject and invites him to a meeting in the judge’s chambers, saying there are a number of people concerned about him, Howlett says. The alcoholic usually knows the reason for the call, he says.

. . . .

Howlett instructs Wolfson to start the mock intervention. Trainees playing the concerned people in the alcoholic lawyer’s life sit in a circle in Wolfson’s chambers. The judge greets Sue, who takes her seat at the center of the circle. After Sue’s sister has spoken, an associate tells her story.

“First of all, I’m glad I can work for you,” she says. “You were the prime reason I joined this firm. You have an excellent reputation, and I have learned a lot. Over the last couple of years, though things have gone downhill. . . .

Howlett interrupts. “Get to the drink,” he says.

Wolfson backs him up: “Here again, it’s much too general. . . . You can’t just say her work’s getting worse.

“You have to say, ‘Last Tuesday, there was a client waiting in the office, a Mr. Jones; and when you didn’t come back [to] work, I had to meet with him. When you came back later that day, you smelled of alcohol and I had to lie to a partner about where you were.’”

. . . .

A recovering alcoholic rises to describe the role he plays at an intervention. “You won’t find this on my resume,” he begins.

“The intervention I was most successful in was the one where I really related to the subject,” he says. “I was able to talk to him about his drinking habits and mine.

“One of the big things I always say to them is that the other people in this room talk about how hard it is and how difficult it is for them to be here and for you to be here.

“They don’t know how difficult it is. There are only two people in the room who know how difficult it is for you to be here.” Now only his voice and the low rattle of the air conditioning can be heard in the room.

“I’ve been there,” he continues. “I sat in that chair; I walked down the same road as you. I sat in the same bars. I ruined my life. I, too, had a drinking problem.”

....

The intervention should last less than an hour, Wolfson says.

....

[B]efore the intervention, a member of the team will have arranged for a bed for the subject at a treatment facility, most likely Parkside.

Treatment usually starts with the alcoholic entering an in-patient program that lasts 28 days and exposes him to the medical and academic side of the disease, Howlett says. But it also begins his relationship with Alcoholics Anonymous, Howlett says, one he will most likely continue for the rest of his life as long as he stays in recovery.

“I welcome you to all this,” Howlett says as the session comes to an end.

“I have found that it is, next to what I do as a husband and a father, the most significant thing I do with my time.”

....

Shields: “I never have placed any restrictions on people coming to see me in my chambers. I think a judge has to be humanized. . . .”

Wolfson: “When a 6-or 7-year-old child turns to her father and says, ‘I want my daddy back, please get help,’ there isn’t a dry eye in the room.”

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#### NOTES

Note the idea of setting clear limits and sticking with them. The emphasis on not “changing the finish line” by giving second chances again and again is central to the intervention’s success. Other, pre-emptive approaches are being proposed as ways to address a lawyer’s substance abuse problem *before* it leads to severe discipline. See Rick Allan’s proposals in the following article.

After discussing the problem of alcoholism and substance abuse among lawyers and the approach adopted by *In re Kersey*, Allan, director of the Nebraska Lawyer Assistance Program, describes the travails of the unfortunate lawyer in a Nebraska case,<sup>11</sup> who was disbarred after relapsing with alcohol while on probation for earlier disciplinary violations. He then comes up with a series of recommendations, which form the bulk of the brief excerpt below.

#### **RICK B. ALLAN, ALCOHOLISM, DRUG ABUSE AND LAWYERS: ARE WE READY TO ADDRESS THE DENIAL?**

*31 Creighton L. Rev. 265 (December 1997)*<sup>12</sup>

The saga of this alcoholic lawyer in Nebraska raises two issues. First, if probation is appropriate in a disciplinary proceeding, how can the bar better serve the Nebraska Court and Counsel for discipline in an effort to

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<sup>11</sup> *Nebraska ex rel. Nebraska State Bar Assoc. v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995).

<sup>12</sup> Reprinted with permission. Copyright © 1997 by Creighton University.

promote compliance by the lawyer placed on probation? Second, whether alcoholism is accepted or not as mitigation in a lawyer disciplinary proceeding, neither approach protects the public from alcoholic lawyers. The obvious reason is that no formal action will be sanctioned against the alcoholic lawyer until the harm has occurred.

....

*Recommendations: Monitoring and Diversion*

The most important factor in successful treatment of alcoholism is early detection. Lawyer Assistance Programs are in part designed to protect the public from lawyer misconduct. Protection of the public is accomplished by assisting alcoholic lawyers in their recovery and providing education concerning recognition of the problem and the treatment options available. The Nebraska State Bar Association has acknowledged the problem of the alcoholic lawyer and has taken positive steps in the creation of the [Nebraska Lawyers Assistance Program].

In addition to starting Lawyers Assistance Programs, other states have instituted monitoring and diversion programs in response to the problems of chemical dependency in the profession. . . . Monitoring programs have been shown to be highly effective in satisfying the dual goals of protection of the public and rehabilitation of the impaired practitioner. . . .

Monitoring programs are really in their infancy and vary from state to state. Highly trained probation monitors may be assigned to disciplinary cases when disbarment is not mandated, but public protection must be insured. Disciplined lawyers are assigned highly skilled probation monitors who evaluate their law practices, finances, and sobriety, filing regular reports as may be required.

While disciplinary-probation monitoring generally follows serious misconduct, diversion programs are designed to “divert” the impaired lawyer before serious disciplinary violations have occurred. Lawyers in need of help are referred to professionals, groups or agencies for treatment and education in order to address the problems that lead to misconduct.

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**NOTES**

One of the major aspects of diversion programs is that because they are implemented before official disciplinary charges are filed against the lawyer, the information given to the regulating agency is considered to be confidential. If the lawyer successfully completes the diversionary program, no one besides the law firm, the lawyer, the program, and the lawyer’s immediate family need know about the lawyer’s participation in the program or any of the information that resulted in his participation.

Public knowledge can deter lawyers from coming forth and admitting that they have a problem; therefore, confidential diversion programs are a way to encourage lawyers to obtain early treatment before the disease leads to publicly-announced misconduct. But what of the public’s right to know of a lawyer’s addiction? Is the trade-off preemptive treatment worth keeping the public in the dark? The answer may lie in how successfully these diversion monitoring programs provide long-term success.

**\*\*\* In New York:**

Recent years have shown an increase in diversion programs for chemically dependent attorneys in lieu of formal discipline. Such programs exist in some form in each of the four appellate departments, although to date only the Third and Fourth Departments have formalized their programs. Following are the Fourth Department rules, which went into effect in January 2003:

**OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE  
STATE OF NEW YORK  
TITLE 22. JUDICIARY  
SUBTITLE B. COURTS  
CHAPTER IV. SUPREME COURT  
SUBCHAPTER D. FOURTH JUDICIAL DEPARTMENT  
ARTICLE 1. APPELLATE DIVISION  
SUBARTICLE B. SPECIAL RULES  
PART 1022. ATTORNEYS**

Text is current through December 31, 2003.

Section 1022.20 Formal disciplinary proceedings.

\* \* \*

(d) Disposition by the Appellate Division. . . .

(3) (a) When an attorney who is the subject of a disciplinary investigation or proceeding raises in defense of the charges or as a mitigating factor alcohol or substance abuse, or, upon the recommendation of chief counsel or a designated staff attorney pursuant to section 1022.19(d)(2)(iii) of this Part, the Appellate Division may stay the matter under investigation or the determination of the charges and direct that the attorney complete a monitoring program sponsored by a lawyers' assistance program approved by the Appellate Division upon a finding that:

(i) the alleged misconduct occurred during a time period when the attorney suffered from alcohol or other substance abuse or dependency;

(ii) the alleged misconduct is not such that disbarment from the practice of law would be an appropriate sanction; and

(iii) diverting the attorney to a monitoring program is in the public interest.

(b) Upon submission of written proof of successful completion of the monitoring program, the Appellate Division may dismiss the disciplinary charges. In the event of an attorney's failure to successfully complete a court ordered monitoring program, or, the commission of additional misconduct by the attorney during the pendency of the proceeding, the Appellate Division may, upon notice to the attorney and after affording the attorney an opportunity to be heard, rescind the order diverting the attorney to the monitoring program and reinstate the disciplinary charges or investigation.

(c) Any costs associated with the attorney's participation in a monitoring program pursuant to this section shall be the responsibility of the attorney.

The Third Department's rules went into effect in September of 2004. Formalization of programs is under consideration in the other two departments.<sup>13</sup> However, in a recently released report, a committee appointed by the Appellate Division of the Second Judicial Department and chaired by the Honorable Gabriel Krausman, recommended against adopting a court-sponsored monitoring program.<sup>14</sup> The Krausman Committee report, without explanation, disapproved the recommendation of its Reinstatement Subcommittee that the Second Department adopt the "Bellacosa Rule" which would have authorized the deferral of a disciplinary investigation or proceeding in order

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<sup>13</sup> Statement of Hon. Sarah L. Krauss, Member, NYS Lawyer Assistance Trust before the ABA Joint Commission to Evaluate the ABA Model Code of Judicial Conduct, May 7, 2004.

<sup>14</sup> COMMITTEE TO REVIEW THE PROCEDURES OF THE COMMITTEES ON CHARACTER AND FITNESS AND THE GRIEVANCE COMMITTEES OF THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, REPORT AND RECOMMENDATIONS 28 (2004) (*hereinafter* "THE KRAUSMAN COMMITTEE REPORT").

to enable an attorney to enter a monitoring program if he or she claims a disability due to alcohol or substance abuse.<sup>15</sup> In another portion of the report, the Discipline Subcommittee (possibly confusing “monitoring” with “mentoring”) offered the following perspective:

The problem envisioned with court-sponsored mentoring is that the court would be perceived as holding out as competent to practice law an attorney who suffers from clinical depression or who is a substance abuser when, in fact, there is some doubt as to that attorney's competence. The consensus was that mentoring is a very valuable tool which should be encouraged through bar associations but which should not be court-sponsored or administered by the Grievance Committees.<sup>16</sup>

At the time these materials went to press, the Krausman Committee recommendations were open for public comment.<sup>17</sup>

- *Is diversion and monitoring an appropriate response generally?*
- *Does it adequately achieve the goal of protecting the public?*
- *Was the Krausman Committee correct in recommending against court sponsorship of diversion and monitoring programs?*
- *What is your view of the Fourth Department's program?*
- *Should it exclude, as it does, cases in which “the alleged misconduct is . . . such that disbarment from the practice of law would be an appropriate sanction,” even when the misconduct is directly related to chemical dependency?*

**7. Law Students, Substance Abuse and Licensing.** So far, we have considered the ramifications of alcohol and substance abuse on lawyers and their clients. What about law students who abuse alcohol or use illegal substances? What effect will—or should—substance abuse have on their admission to the bar? Is there a real risk that students who use alcohol to relieve the stress of law school might become alcoholic lawyers? The following article addresses some of these questions.

## UNDER THE INFLUENCE

CYNTHIA L. COOPER

*Student Lawyer* Volume 32, No. 4, December 2003<sup>18</sup>

Law school without liquor poses a serious problem for Jana Pritchard. The 29-year-old law student in Chicago, who's halfway through her J.D. program, is a self-confessed binge drinker—"wine, beer, mixed drinks, shots on occasion, pretty much anything," she says. She tried giving up alcohol for a while in law school, but, within months, she started again.

"The thought of making it through law school without drinking is stultifying," says Pritchard (who, like some other students interviewed for this article, chose a pseudonym for herself). "Celebrate your victories and drown your defeats.' The law school culture supports that." She notes an irony of law school orientation: A talk on substance abuse is followed by an event at which everyone goes out and gets drunk.

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<sup>15</sup> *Id.* at 18.

<sup>16</sup> *Id.* at 10.

<sup>17</sup> Press Release, *Appellate Division, Second Judicial Department, Makes Report on Attorney Admission and Discipline Available to Public*, Oct. 5, 2004 ([www.nycourts.gov/courts/ad2/](http://www.nycourts.gov/courts/ad2/)).

<sup>18</sup> © 2003 by the American Bar Association. Reprinted by permission.

The pause in Pritchard's intake came after she drank too much at a law school function during her second semester. "Everybody was wasted," she says. "Nobody thought much about it." The next morning, still intoxicated and feeling miserable, Pritchard ran a red light and was pulled over. Although she avoided a drunk-driving charge, she decided her drinking was out of control and began attending Alcoholics Anonymous. But staying sober seemed more than she could bear, so she went back to her drinking ways.

Pritchard's condition, and even her critique of the law school culture, is commanding new attention in legal circles. The issue has ramifications ranging from the health of law students and lawyers to the prospects of bar admission for applicants who struggle with addiction. American Bar Association leaders are among those who say it's time to deal with the problem directly.

"Are law schools doing all they can to prevent the problem of substance abuse? Or, in fact, are law schools, in some way, encouraging the use and abuse of alcohol and other drugs?" asks ABA executive director Robert Stein. Stein and others raised pointed questions to deans at the first-ever conference on the topic, "Meeting Our Responsibilities: Substance Abuse and Law Schools," held in New York City in June [2003]. . . .

The familiar celebrations with abundant carafes of wine and kegs of beer are only the tip of the problem, says Stein, a former law school dean who 10 years ago sat on a committee of the Association of American Law Schools that studied chemical dependency in law schools. Avoidance at law schools is the bigger concern, he told the 150 conference participants from 35 law schools.

"We experienced a lot of denial by deans of law schools at the time," Stein says. "They said, 'It may be a problem somewhere, but not in my law school, I can assure you.'"

The numbers appear to suggest otherwise. The 1993 AALS survey of 3,400 law students at 19 schools found that 3.3 percent of law students said they needed help to control their substance abuse, and approximately 12 percent said they abused alcohol during law school. That amounts to 15,000 law students nationwide who acknowledge problem drinking. Uncalculated are the number who get into trouble when they inhale, shoot, snort, or pop their substances. . . .

During the last decade, the legal profession began facing up to a crisis of chemical dependency problems. Studies indicate that lawyers engage in higher-than-average drug and alcohol abuse, affecting from 15 percent to 18 percent of the profession, compared with 10 percent of the general population. The impact on clients can be devastating when lawyers miss filing deadlines, spend money held in trust, or are asleep at the switch in trial.

Disciplinary bodies discover that chemical dependency problems are at the root of 40 percent to 70 percent of complaints about lawyers, says New York State Chief Judge Judith Kaye, president of the Conference of Chief Justices. "Some of the stories of clients who lost their life savings are heartbreaking," Kaye told participants at the "Meeting Our Responsibilities" conference. "I believe the court system owes it to the public to do all we can."

Every state now operates a "lawyer assistance program," or LAP, to help lawyers and judges with addiction problems confidentially. Last year, members of the ABA Commission on Lawyer Assistance Programs (commonly called CoLAP) started reaching out to law schools. "We need to help lawyers at the earliest possible stage—we need to help law students," says Tennessee Circuit Court Judge Robert Childers, who co-chairs CoLAP's law school outreach committee, formed a year ago. Childers traces his urgency on the subject to the suicide of a colleague in Memphis in 1987.

"People are suffering from these issues," Childers says. "Rather than sit around at a wake, I thought there ought to be some way to help."

The ABA is urging law schools and state LAPs to step up their efforts to reach out to students before they crash. And it's not just students—professors are a concern, as well. The 1993 AALS commission [study] noted that law school faculty are not immune from the problems of substance abuse. It recommended a clear, written policy for faculty and a plan for "early, informal intervention." . . .

John Sebert, the ABA's consultant on legal education and former dean of the University of Baltimore School of Law, recalls sending a substance-abusing faculty member to treatment as one of the hardest things he encountered in his tenure. "I didn't have a choice," Sebert says. "I had a duty to my students."

Lawyer assistance programs aim to heighten awareness of the problem in law schools by going on the road, although some schools don't cooperate and some students "laugh it off," says William Hammond, chair of the New York City LAP. But Meloney Crawford Chadwick, a lawyer on the staff of the Oregon Attorney Assistance Program who frequently speaks at law schools, persists anyway.

"I'd rather talk to a law student today who might have some issues than talk to a lawyer who is in deep trouble and says his problems began in law school," Chadwick says.

Chadwick is a recovering alcoholic who became sober in 1988 when she experienced embarrassing blackouts, seven years after her graduation from Temple University School of Law.

"I started to cross the line in law school," she says. "My attitude was, 'I'm working hard, I'm going to play hard.' I would have said, 'Everybody does this,' but, in retrospect, I don't think everybody did do it.

"You can tell yourself a lot of things that seem to make sense. No one starts out thinking 'I'm going to be an alcoholic' or 'I'll have a drug problem.' You think, 'I'm having a bad day,' and this is the answer. You can be really intelligent in some ways and have a blind spot when it comes to your own impairment." . . .

To encourage law school deans to take action on chemical dependency, the ABA outreach committee opened a hotline, printed stickers and advertisements, and is developing an informational kit. CoLAP operates a closed online forum for law students dealing with alcoholism and substance abuse. Approximately two dozen students nationwide participate in the e-mail list, according to commission director Donna Spilis.

James Moore, chair of the New York State Lawyer Assistance Trust, says schools should have a written policy to address alcohol and drug use, serve less alcohol at student functions, create relationships with LAPs in order to help students confidentially, warn students that an unaddressed problem may affect their ability to be admitted to practice, and enlist someone as a designated person for student assistance. . . .

But if the designee is on the faculty, few students are likely to pour out their problems, says Natasha Woodland, a 2003 graduate of the University of Maine School of Law who served as the only student member on the ABA law school outreach committee.

"I would hear the deans say, 'Our doors are always open, you can talk to us,'" Woodland says. "My response was, 'Excuse me, do you really think they are going to talk to you?' Students see how they deal with someone who is late to class. How are they going to deal with someone who is drunk in class?" As a solution, Woodland urges that student representatives be identified to meet confidentially with their peers.

At Touro Law Center in Huntington, N.Y., associate dean Kenneth Rosenblum recruited first-year student Edwin Grasmann to act as an on-campus representative on substance abuse, in conjunction with the state's LAP.

"Students come to me. I proceed gingerly and carefully because they are all scared," says Grasmann, 47, a medical doctor who himself is in recovery for substance abuse. One Touro student, troubled by his alcohol intake, now attends recovery meetings; a half-dozen others sought advice. "You're not going to help a person unless they are ready for help," Grasmann says. "I'm there, and I'm available."

For some law students, law school is recovery, and they want to keep it that way. At South Texas College of Law in Houston, Alfred "Cal" Baker, a second-year student, founded Law Students Anonymous, which began meeting this fall. Baker, 42, is now a licensed chemical dependency counselor. But in his earlier years, he found his way to a cornucopia of substances—alcohol, marijuana, LSD, mushrooms, cocaine, methamphetamines.



"I kept saying I was going to stop, but I could not," Baker says. "I had pretty much lost everything-my job, my apartment, my transportation. I traded my motorcycle for a pound of pot."

Twelve years ago, Baker entered a 30-day residential treatment program. He has been clean and sober since. At night, he counsels teenagers with substance abuse problems.

"I tried to be part of student activities in law school," Baker says. "Everything the student bar promotes is in the form of 'let's go blow off stress' and involves alcohol. I don't have any interest in it."

Baker secured support of assistant dean Gena Lewis Singleton to start a peer assistance group with a hotline and regular meetings at the school. "When we talk with peers, we're helping other students cope with the stress-rather than [being] a legal fraternity with another of their parties," he says. "These are people who understand the pressures of law school and don't want to deal with them in a bad way."

An issue of great concern to law students in recovery is bar admission. For the bar application process, most states require disclosure of legal infractions related to substance abuse, such as drunk-driving arrests; others inquire into substance abuse or treatment. Some establish a period of probation or other conditions to admission; others do not. . . .

Early on in law school, Adam Walton (a pseudonym he chose for this article) contacted the character and fitness committee of his state's bar. A second-year student at a southeastern law school, Walton cleaned up six years ago, leaving behind a "colorful" history, he says. He is monitored by monthly reports and participates in a random drug-screening program. Three to four nights a week he meets with lawyers and law students in recovery-oriented meetings. ("It gets people on the right track, and it's also great networking," Walton says.) In August, the character and fitness committee announced that he will be permitted to apply for admission.

"If you do have a DUI on your record [and will be seeking admission to the bar], you want to talk to us," says Betty Daugherty, director of the Lawyers and Judges Assistance Program of the Mississippi Bar. "Offenses that have to do with drinking are red flags. If you have gone to treatment, we are able to work with the bar admission committee."

New York lawyer Kathleen Kettles-Russotti, who entered law school after five years in sobriety, worried about how the bar admissions committee would respond to a drunk-driving conviction. She explained on her application that the conviction was a decade old, she had no further infractions, and she participates in recovery meetings. At an in-person interview, the examiner commended her recovery program.

Even with the positive experiences of applicants like Walton and. . . . Kettles-Russotti, many with substance abuse problems are concerned. Some law students say their colleagues avoid treatment because they fear that getting help would send the wrong signals to bar examiners and result in denial of bar admission.

"Students think once they get treatment, they are on a blacklist. That's a real bad dynamic to have out there," says Colin Wellenkamp, a 2003 graduate of Creighton University School of Law in Omaha, Neb., and a former student delegate to the ABA House of Delegates. The ABA Law Student Division is helping to research and promote a "best practices" standard on recovery and bar admission, Wellenkamp says. . . .

The topic is said to offer a fiery educational tool. "You want to get a group of law students interested in the subject of substance abuse? Talk to them about whether they deserve to be admitted to the bar or not," says Aviva Orenstein, a professor at Indiana University School of Law in Bloomington, now visiting at Benjamin N. Cardozo School of Law in New York. . . .

Enhanced policies also are working their way into law school handbooks. St. John's University School of Law in Jamaica, N.Y., says consumption of alcoholic beverages "should never be the primary focus of any student

activity." Cornell University policies, which extend to the law school, prohibit "all-you-can-drink" events and require that non-alcoholic beverages be served when alcohol is . . .

#### *Law Grad Finds 'The Other Bar'*

Years of cocaine addiction finally caught up with Sara St. Phalle, a 1999 California law school graduate. Even though she passed California's demanding bar exam, St. Phalle can't practice. It's the other part of the bar admission process-demonstrating good character and fitness-that's the stumbling block.

Addiction "took away every potential that I had," says the 32-year-old (who chose a pseudonym for herself for this article).

During her years in law school, St. Phalle did cocaine daily in the school's restroom. She was especially adept at hiding her addiction, she says. "I plowed through law school and did really well," she says. "I didn't consider myself a junkie. To me, it was 'why wouldn't you do this?' It gave me a fake sense of self-confidence."

At the same time, her drug use outgrew her wallet, so St. Phalle began writing herself "loans" on her employer's account. The scheme unraveled after she had received her J.D., and St. Phalle was slapped with felony charges for fraud. Even then, she clung to her drugs until, while awaiting sentencing, the police stopped a car in which she was riding with 3 grams of cocaine in her bag. The officer didn't conduct a search, but, she says, "It was a wake-up call. I was so fearful that night. It wasn't fun any more. I said, 'This is it.'"

A lawyer helped St. Phalle connect with a self-help group. She served a year incarcerated in a halfway house on the fraud conviction. Now released, she's studying drug counseling and participating in a group of legal professionals who are recovering from substance abuse - "The Other Bar."

Down the road, St. Phalle hopes to prove she can be trusted to practice law. "I'm in a repair mode," she says. "It's tragic, but it's changed my life for the better."

#### NOTES

The Drug-Free Schools and Communities Act Amendments of 1989<sup>19</sup> imposes an obligation on all institutions of higher education to develop, implement and publicize their policies concerning substance and alcohol abuse. Schools are also required to disseminate: (1) their disciplinary standards for conduct violating their policies; (2) an outline of state and federal criminal sanctions for unlawful possession or distribution of illicit drugs and alcohol; (3) a description of the health risks of use of illegal drugs and abuse of alcohol, and (4) a description of counseling, treatment and rehabilitation programs available to employees and students with alcohol or substance abuse issues.

- *Has your school provided this information? If so, have you read it carefully? If you don't recall receiving such information, now might be a good time to request a copy from your school's administration.*

#### **\*\*\* In New York:**

The New York State Lawyer Assistance Trust has urged each law school to recruit a student to serve as an on-campus LAP representative. As agents of the New York State Bar Association Committee on Lawyer Alcohol and Drug Abuse, these students are covered by Judiciary Law Section 499, which insures confidentiality and immunity from prosecution.<sup>20</sup>

<sup>19</sup> Pub. L. 101-226; 20 U. S.C. § 1213 as amended 20 U.S.C. § 1145g (1989).

<sup>20</sup> LAT News, Vol. 3, No. 2 (Summer 2004), p 14. See N.Y. JUDICIARY LAW S. 499 (1) (McKinney's 2003).  
Lawyer Assistance Committees:

1. Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar

- Do you know whether your school has a student LAP representative and, if so, who that person is?

As suggested in the above article, the consequences for abusing alcohol or using illegal substances may threaten a lot more than one's health. Law students discovered to be using controlled substances risk expulsion. Even if less dire sanctions are imposed, an incident involving drugs or alcohol may be reported to the Character & Fitness Committee. Possession and distribution of illegal drugs may result in criminal prosecution by the state or federal government. For example, in New York, possession of more than 25 grams of Marijuana is a class B misdemeanor punishable by up to three months in jail or a \$500 fine. Possession of any amount of cocaine is a class A misdemeanor punishable by up to a year in jail or a \$1000 fine, while possession of as little as a third of an ounce of cocaine is a Class C felony, punishable with up to fifteen years in prison. While there is no automatic disqualification of an applicant with a substance abuse conviction, it is certainly something the applicant will have to explain to the Character & Fitness Committee.

### ***Licensing Issues in New York***

The only questions relating to alcohol or substance abuse on the New York Bar application are as follows:

13. State whether you have . . . (c) any mental or emotional condition or substance abuse problem that could adversely affect your capability to practice law? \_\_\_\_\_ Are you currently using any illegal drugs? \_\_\_\_\_.

In addition, any arrests involving alcohol or substance abuse would also have to be disclosed. Question 13 also asks the applicant whether he or she has

*(e) ever been a party to or otherwise involved in any civil or criminal action, proceeding or investigation not covered by answers to the foregoing subdivisions of this question.*<sup>21</sup>

If the answers to any parts of question 13 are affirmative, the applicant is required to "state the facts as fully as possible."

Some states have explicit policies as to how an affirmative answer might affect bar admission. The Georgia Supreme Court website, for example, contains extensive information about the character and fitness process and policies.<sup>22</sup> A new rule provides that if a student has a DUI (Driving Under the Influence) conviction in the last year of law school, she is automatically barred from sitting for the July bar exam.<sup>23</sup>

New York, along with the majority of jurisdictions including Georgia, does not treat a felony conviction as an absolute bar to admission.<sup>24</sup> Also, like most jurisdictions, New York has no provision for conditional

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association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation which has furnished information to the committee.

2. Immunity from liability. Any person, firm or corporation in good faith providing information to, or in any other way participating in the affairs of any of the committees referred to in subdivision one of this section shall be immune from civil liability that might otherwise result by reason of such conduct. For the purpose of any proceeding, the good faith of any such person, firm or corporation shall be presumed.

<sup>21</sup> Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York, New York Supreme Court Appellate Division (Revised Oct. 2002).

<sup>22</sup> <http://www.gabaradmissions.org>.

<sup>23</sup> <http://www2.state.ga.us/courts/bar/pages/duiamendment.html>.

<sup>24</sup> States that do automatically bar convicted felons from admission include Indiana, Mississippi, Missouri, Oregon, and Texas. Comprehensive Guide to Bar Admission Requirements 2003; National Conference of Bar Examiners and ABA Section of Legal Education and Admission to the Bar 6-7.

admissions.<sup>25</sup> Compare Texas, where although a felony conviction is an automatic bar, the Board of Law Examiners may issue a two-year probationary license upon a finding, after hearing, that the applicant suffers from chemical dependency.<sup>26</sup> The ABA's Commission on Lawyer Assistance Programs (CoLAP) has undertaken the development of a model conditional admission policy.<sup>27</sup>

Both applicants and law schools—in New York and elsewhere—often lack sufficient information as to what effect a history of substance abuse will have on an applicant's admission to the bar in each state.<sup>28</sup> New York has no published character and fitness standards. Thus it is difficult to predict what effect, for example, the existence of a substance abuse problem or a DWI (Driving While Intoxicated) conviction will have on an applicant's admission to the New York State bar; the interviewer has tremendous discretion.<sup>29</sup> If a law student or law school applicant has a previous conviction, has been dismissed or suspended from public office or employment, or has been dishonorably discharged from the armed forces, he or she may petition the Character and Fitness Committee for an advanced ruling.<sup>30</sup>

In 1993, a special committee of the Association of American Law Schools (AALS) issued a major report on the problems of substance abuse in law schools. One of the committee's 21 recommendations was as follows:

**Recommendation 11:** Law schools should endeavor to persuade the relevant state bar admission authorities to agree that:

- the authorities will maintain the general confidentiality of substance abuse information divulged to them;
- any inquiries that bar admission authorities make concerning an applicant's history of substance abuse or treatment for substance abuse will be limited to reasonably recent events (such as over the past five years); and
- otherwise qualified applicants who are recovering from substance abuse will be admitted to practice.

Read the following excerpt from that report:

**REPORT of the AALS SPECIAL COMMITTEE ON PROBLEMS OF SUBSTANCE ABUSE IN THE LAW SCHOOLS**

44 J. LEGAL EDUC. 35, 77-78 (1994)<sup>31</sup>

Since bar admission authorities have a legitimate interest in protecting the public from the risk of attorneys impaired by the effects of substance abuse, law schools are in a dilemma: on one hand is the authorities' legitimate need for information, and on the other is the risk that the student's fear of disclosure will create a serious barrier to seeking counseling and treatment for substance abuse.

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<sup>25</sup> States that do have provisions for conditional admissions include Arizona, Connecticut, Florida, Idaho, Indiana, Kentucky, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Texas, and West Virginia.

<sup>26</sup> Heil, Tricia S., Chemical Dependency and Mental Health Issues in Licensing and Discipline. *Texas Bar Journal*. Feb 2001, p. 159.

<sup>27</sup> *LAT News*, Vol. 3, No. 2 (Summer 2004), p 10.

<sup>28</sup> *Id.*

<sup>29</sup> Information from July 14, 2004 telephone conversation between Dorothy Beard, Principal Appellate Court Clerk, First Department and Mili Makhijani.

<sup>30</sup> See 22 NY ADC 602.1(o) (1st Dep't); 22 NY ADC 690.19 (2nd Dep't); 22 NY ADC 805.1(o) (3rd Dep't); 22 NY ADC 1022.34(o) (4th Dep't).

<sup>31</sup> Reprinted by permission of the Association of American Law Schools.

In attempting to resolve this dilemma, the law schools can benefit from the experience of the medical schools, which have worked closely with their state licensing agencies. The medical schools disclose information about their graduates' substance abuse problems to state programs for impaired physicians. But these programs maintain the confidentiality of the information, and licensing agencies have assured the medical colleges that an otherwise qualified graduate who has successfully completed a rehabilitation program and is in recovery will obtain licensure.

- *Do you agree with the AALS Committee's recommendations?*

No one, for sure, wants to endure three or four years of law school and the bar exam only to encounter the fate of MEF:

**In the Matter of [MEF], an Applicant for Admission to the Bar.**

**[MEF], Petitioner.**

**MEMORANDUM AND ORDER**

**Calendar Date: March 17, 2003**

**Before: Cardona, P.J., Mercure, Spain, Carpinello and Kane, JJ.**

**Per Curiam.**

Petitioner passed the New York State Bar exam and has been certified for admission to this Court by the New York State Board of Law Examiners (*see* 22 NYCRR 520.7 [a]).

After holding a formal hearing on the application, the Committee on Character and Fitness issued a decision concluding that petitioner should be denied admission. Petitioner seeks an order granting his application for admission to practice notwithstanding the Committee's decision (*see* 22 NYCRR 805.1 [m]).

The petition is denied. Our review of the record indicates that the Committee's decision fully and reasonably assessed the character and fitness concerns raised by the application, as well as the mitigating circumstances proffered by petitioner. The character and fitness concerns included petitioner's misconduct in college, history of substance abuse, criminal record and lack of candor since college concerning such matters. We are not satisfied that petitioner presently possesses the character and general fitness requisite for an attorney and counselor-at-law (*see* Judiciary Law § 90 [1] [a]).

In New York—and likely most other places as well—students with concerns about bar admission can have a confidential conversation about their concerns with a LAP representative. LAP is also available to Character and Fitness Committees to perform assessments of law graduates who have reported a history of alcohol or substance abuse on their bar applications.<sup>32</sup>

**8. Stress and Its Avoidance.** If there were better ways to avoid stress in the first place, perhaps fewer people would get to the point of needing intervention. From time to time, various surveys have attempted to measure lawyer's stress. In 1990, an ABA study involving responses from over 3,000 lawyers found widespread professional dissatisfaction and a significant level of destructive behavior. For example, 13% of the lawyers responding admitted having six or more drinks a day, a rise from a .5% level in 1984. Astonishingly, fully 20% of the woman lawyers interviewed reported having six or more drinks a day.

The article below documents some other arguably more healthy methods of stress avoidance, and some which may be decidedly unhealthy. As you read this article, consider your own life as you approach the beginning of your career as a lawyer—a career which is likely to have more than a desirable amount of stress. What have you done to

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<sup>32</sup> LAT News, Vol. 3, No. 2 (Summer 2004), p 10.

prepare yourself to meet and deal with this stress? The best time to put a workable plan in place is now, before the reality of the daily practice of law has begun to take its toll

## **MARY MEDLAND, THEATER, HANDGUNS SERVE AS STRESS REDUCERS FOR LAWYERS**

*The Daily Record (January 9, 1993)*<sup>33</sup>

Layoffs. Law firms imploding. Long-term clients defecting. Draws chopped. Receivables skyrocketing.

Being a lawyer has always been stressful. But trying to build or maintain a civil or criminal defense practice in a staggering economy has pushed most attorneys' stress levels off the chart.

To vent the extra pressures Maryland lawyers employ a variety of coping techniques which range from meditation to Shakespeare to packing a .357 Magnum to seriously abusing drugs or alcohol.

For criminal defense specialist Craig Gendler, economics is not the cause of most of his sleepless nights these days. It's the thought that an innocent client might wind up in jail.

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So far, Gendler says he's been able to avoid letting the pressures of juggling a heavy criminal practice get to him—at least not to the point of taking things out on his family.

But other lawyers aren't so lucky.

New York criminal defense specialist Seymour Wishman notes in a New York Times article that "this 'professionalism' that makes a virtue out of noninvolvement with client fosters an attitude of dissociation that can distort other parts of your life."

Wishman contends that the stress that comes with having criminal clients routinely and automatically lie about their cases prompts defense counsel to start mistrusting everyone—including his or her own family.

### *Packing Heat*

And that mistrust can cause you to do some strange things. Consider the case of a former Baltimore City prosecutor who was so stressed out by prosecuting violent drug gangs that he started packing a .357 Magnum to work every day in a shoulder holster.

"Having it made me feel more secure, like I could handle any threat that came at me," says the prosecutor, who has since left the office and gone into private practice. He also has started leaving the gun at home.

"What's even more weird is that I never was a big gun person before getting assigned to these drug cases. I'd never owned one before and my family didn't keep guns around," recalls the ex-prosecutor, who spoke on the condition he not be named. "The thought of having a gun scared me at first. But as I got deeper into these cases, the thought of not having a gun scared me even more."

David Irwin, who served as both a federal and state prosecutor before moving into defense work, says he considered carrying a gun, but gave up on the idea "because I'd probably shoot myself in the foot."

....

### *Billable-Hour Stress*

Unlike their colleagues in the criminal defense and prosecution bar, civil lawyers don't have to face the day-to-day horrors of street crime. . . .

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But the stress of living life in 10-or 15-minute increments, having to constantly stroke prospective clients, meeting new deadlines every day with millions of dollars on the line can be just as debilitating.

For example, a fifth-year associate at a large downtown Baltimore law firm says he's gotten so conditioned to billing out his time in bite-sized chunks that he catches himself doing it at home on the weekends.

"I'll be watching TV and catch myself looking at the clock or my watch every 5 minutes," says the associate, who requested anonymity to avoid ribbing from his colleagues. "It really started freaking me out, so I started making an effort to only ask my wife what time it was and not look at the clock."

Glenn L. Klavans, a senior associate in Baltimore's Polovoy & McCoy, has taken a more theatrical approach to job stress. He acts out his problems doing Shakespeare as part of a community theater troupe.

"It's something completely different from the law and that provides a release for me," says Klavans.

A veteran plaintiffs' lawyer in Towson who has "pulled out three or four heads of hair" over some of the abusive discovery tactics of his opponents, decided to deal with his work stress through meditation.

Instead of hyperventilating when a defense attorney faxes over a 17-page request for admissions motion at 5 p.m. on a Friday afternoon with a hearing scheduled Monday morning, the plaintiffs' lawyer shuts the door to his office and sits in the lotus position for 15 minutes.

"If I do that, I can get myself calmed down and centered and figure out how to make the deadline without killing my whole weekend," says the partner, who spoke only on the condition he not be identified.

....

One of the biggest stresses in any young lawyer's worklife is the climb to partnership in their law firm.

That climb has become Mount Everest-like recently as the number of seats around the partners' table has been steadily reduced by the recession and competition for them has become razor sharp.

To make the climb less taxing, younger lawyers are scaling back their career and financial expectations, spurning offers to become equity partners and seeking limited, or salaried, partnerships that don't require as many hours or marketing time. . . . Predictably, the increased stress also has more lawyers than ever headed to the bar or open-air drug market to wash away the frustrations of the workday. . . .

**9. Distress Among Law Students and Lawyers—It Starts in Law School!** It is no revelation that law students, like lawyers, often feel "stressed out." Yet the extent of *distress* within the profession may come as an unwelcome surprise. For more than two decades, empirical research has demonstrated that law schools have failed to prepare as many as 40% of law students to cope effectively with the demands of the educational process as well as with the demands of life after law school.<sup>34</sup> Law students experience clinical depression to a significantly higher degree than other populations. Depression is characterized by "a depressed mood or loss of interest or pleasure in usual activities and relationships," plus at least five of the following symptoms:

- Poor appetite and weight loss, or the opposite, increased appetite and weight gain;
- Sleep disturbance: sleeping too little, or sleeping too much in an irregular pattern, for instance early morning awakenings;
- Loss of energy;

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<sup>34</sup> See G. Andrew H. Benjamin, et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, AM. B. FOUND. RES. J. 225 (1986). This study found that thirty-two percent of law students suffered from depression by late spring of the first year of law school, and that the percentage increased to forty percent by late spring of the third year.



- Change in activity level, either increased or decreased;
- Decreased sexual drive;
- Diminished capacity to think or concentrate;
- Feelings of worthlessness or excessive guilt that may reach grossly unreasonable or delusional proportions;
- Recurrent thoughts of death or self-harm, wishing to be dead or contemplating suicide.<sup>35</sup>

A recent study by law professor Lawrence Krieger and psychology professor Kennon Sheldon has confirmed the results of earlier studies and demonstrated that while students who enter law school are as emotionally healthy as the general population, their sense of well-being and satisfaction with their lives declines precipitously within a few months.<sup>36</sup> In addition, students move away from *intrinsic* motivators—such as intimacy, community and personal growth—which have been shown to correlate with well-being—and towards *extrinsic* motivators—such as money, image and fame. Students tended to lose interest in the values they brought to law school, becoming more self-absorbed, and less interested in community. The Sheldon and Krieger study demonstrates that something happens *during law school* that creates this distress, and it doesn't seem to diminish over the course of the next three to four years. Although this and other studies have not yet demonstrated empirically *what* about law school causes this to happen, the knowledge that many students suffer significant loss of healthy values and motivation may help us focus on what could be done to prevent or reverse the pervasive effects of this distress. Many have speculated about the causes of distress in legal education. Here's the list that Sheldon and Krieger culled from their research:

Many researchers and commentators have proposed that legal education may be the common source of some of the problems among both students and lawyers. Potential negative aspects of legal education include excessive workloads, stress, and competition for academic superiority; institutional emphasis on comparative grading, status-seeking placement practices, and other hierarchical markers of worth; lack of clear and timely feedback; excessive faculty emphasis on analysis and linear thinking [“thinking like a lawyer”], causing loss of connection with feelings, personal morals, values, and sense of self; teaching practices that are isolating or intimidating, and content that is excessively abstract or unrelated to the actual practice of law; and conceptions of law that suppress moral reasoning and creativity.<sup>37</sup>

Empirical research has also shown that the negative effects of the law school process increase during the three years of law school and continue on to afflict a substantial number of law school graduates.<sup>38</sup> Research demonstrates that as many as one third of the practicing bar are impaired by depression, problem-drinking or cocaine abuse at any given time.<sup>39</sup> It is likely that the dysfunction that begins in law school contributes to depression, alcoholism and drug abuse as the individual graduates law school and moves on into the practice of law.<sup>40</sup> A 1990 Johns Hopkins study found that lawyers had the highest incidence of depression among 104 occupational groups.<sup>41</sup> Another study of Washington lawyers suggested “that nearly 70% of lawyers are likely candidates for alcohol-related problems at some time within the duration of their legal careers.”<sup>42</sup>

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<sup>35</sup> G. Andrew H. Benjamin, et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*. 13 INT'L J. L. & PSYCHIATRY 233, 233-34 (1990) (citing AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 222-23 (3d ed. rev.1980)).

<sup>36</sup> Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261 (2004).

<sup>37</sup> *Id.* at 262 (citations omitted).

<sup>38</sup> See Benjamin et al., *Prevalence of Depression*, *supra* note 35.

<sup>39</sup> *Id.* at 242.

<sup>40</sup> See Connie J. A. Beck et al., *Lawyer Distress: Alcohol-related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*. 10 J. L. & HEALTH 1, 2 (1995).

<sup>41</sup> Sheldon & Krieger, *supra* note 36, at 262 (citing William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MEDICINE 1079 (1990)).

<sup>42</sup> Beck et al., *supra* note 40, at 3.

The worst aspect of a law student's development of one or more psychological, alcohol, and drug abuse symptoms appears to be the establishment of long-term dysfunctional patterns of behavior. Among these behaviors are work overload, time famine, poor relationships skills (that eventually lead to greater career dissatisfaction) and an abandonment of intrinsic motivation and personal values. Although these patterns of dysfunctional behavior exist in a number of professions, lawyers suffer in much greater percentages than any other professional group including physicians, nurses, and teachers. These patterns of behavior leave many law students and lawyers suffering not only from clinically high levels of depression and alcohol abuse but also from chronically elevated levels of hostility, cynicism and aggression, which in turn can lead to a lower survival rate over the course of a life in practice. One research study that followed University of North Carolina law students over a 30-year period suggested that lawyers with significantly elevated levels of hostility are far more likely to die prematurely due to cardiovascular disease.<sup>43</sup>

These studies raise many questions and concerns. Is legal education in general, and the competitive atmosphere in particular, *unhealthy*? Or are the problems that cause impairment more discrete? What if anything should law schools be doing differently? And given that legal education is what it is today, what can any individual law student do to minimize the chances that he or she will be among the statistics cited? What can *you* do to maximize your health and well-being, and minimize the possibility that you will suffer from problem drinking, drugging, depression or other emotional or psychological distress?

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#### NOTES

In 1999, a group of forward-thinking law professors led by Larry Krieger of Florida State University began an on-line discussion group on “humanizing” legal education. By 2001, the discussion group had led to workshops and a conference that focused, as one of the group’s coordinators, [Florida Coastal] law professor Susan Daicoff put it, on “ways of practicing law and resolving legal disputes that are positive, healing, and humanistic.” In addition to more traditional views, the group looked well beyond the legal profession itself, examined holistic solutions, and made a conscious effort to begin searching for better ways of protecting the health of the minds and bodies of lawyers and law students alike. Increasingly, practitioners are discovering ways to practice law that are healthy, healing and rewarding.<sup>44</sup> In April 2003, for example, Touro Law Center sponsored a CLE Conference on *Lawyering and its Discontents: Reclaiming Meaning in the Practice of Law*, which brought together academics, psychologists and practitioners exploring individual and institutional strategies for transforming the practice of law into a healthy and healing profession.

**10. Stress, Drug Use, and the Reality of Law Practice.** Many lawyers, competitive and driven people, find satisfaction and stress reduction in physical activity, be it aerobics, jogging, mountain biking, basketball, or a myriad of other activities. Many argue that there is nothing like an hour on the stairmaster—or the basketball court—to get stress out of your system. Others choose a more sedentary route: they write, or read voraciously. There are as many healthy ways to reduce stress as there are attorneys who need to do it. The key for all practitioners is finding out the best way for ourselves. Still, it would be simplistic to ignore the reality of a law firm practice, and both the peer pressure and professional pressure it creates. The peer pressure to go out drinking, for example, can be substantial at certain firms, where it can become a way of life for most of the lawyers who practice there. Young associates who do not carefully consider these issues can get swept up into a lifestyle they did not affirmatively choose. Those who are prepared to deal with these questions may fare the best. Still, it is difficult at best to resist the expectations of one’s own law firm. Retreats at some firms can turn into late night parties, where it is hard to “just say no” without standing out among your friends and colleagues, or, perhaps worse, your superiors. Many associates report that partners expect them to go out drinking with clients, reminding them that “wining and dining” is what the client wants and expects. Thus, doing this becomes a matter of economic survival rather than strictly a matter of choice.

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<sup>43</sup> John C. Barefoot et al., *The Cook-Medley Hostility Scale: Item Content and Ability to Predict Survival*. 51 PSYCHOSOMATIC MED. 46 (1989). Initially 15.8% of the students scored one standard deviation above the mean score on a hostility measure. When compared to those who scored one standard deviation below the mean, the 15.8% group was 4.19 times more likely to die prematurely of cardiovascular disease.

<sup>44</sup> See, for example, Steven Keeva’s excellent book, *Transforming Practices: Finding Joy and Satisfaction in the Legal Life* (ABA Press 2002). Other related resources, including websites for Therapeutic Jurisprudence and the Renaissance Law Society, can be found in the list of resources at the end of these readings.

It would also be simplistic to say that merely joining the local athletic club or finding a good book will protect all of us from using—and sometimes abusing—drugs or alcohol. First, many lawyers, particularly young associates faced with seemingly insurmountable billable hours requirements, may be too tired, too overworked, or too burned out to always keep their stress-reduction programs in place. Second, many lawyers *like* to have a drink or two when they socialize, and feel, correctly, that it never negatively affects their performance.

Lawyers have at times used illegal drugs as well. Does drug use necessarily impair performance? It's hard to know the answer, at least in the short run. A few years ago, a story circulated in legal circles about a west Coast public defender who on occasion gave herself a "treat" of heroin. She was discovered only when arrested making a drug purchase. Neither her superiors nor the judges before whom she appeared could point to anything negative in her performance as a lawyer. . . .

**11. How Should We Treat the Mentally Ill Lawyer?** Sometimes the stress of life manifests itself in something even worse than alcoholism or drug addiction. Robert Rowe came back from the abyss—almost literally back from the dead—and tried to regain a place in his former profession. Should he be afforded that opportunity?

### **DAVID MARGOLICK, AT THE BAR: 15 YEARS LATER, DISBARRED LAWYER CAN'T ERASE HORROR'S STIGMA**

*The New York Times (May 15, 1993)*<sup>45</sup>

One winter morning 15 years ago, a 48-year-old lawyer named Robert T. Rowe simply snapped. As his eldest son lay sleeping, Mr. Rowe killed him with a baseball bat. Then he killed his daughter, and then his second son, in the same grisly way. When his wife returned from work, he bludgeoned her to death as well.

Unable to turn the bat on himself, Mr. Rowe instead turned on the gas stove at his home in Mill Basin, Brooklyn. He was saved from suicide only when neighbors smelled the fumes and called the police.

For Mr. Rowe, a veteran of the Korean War and a graduate of St. John's University Law School, the carnage culminated years of psychological turmoil, brought on primarily by the strain of caring for one son who was deaf and blind and another who suffered from asthma, a congenital hip disease, and other ailments. Having lost his job with an insurance company, failed as a cabdriver and seen his wife reduced to working 16 hours a day, he apparently saw the killings as an act of love, a way to spare his family the humiliation of poverty.

Society first pronounced Mr. Rowe blameless in the killings; in the language of the law, not guilty by reason of mental disease or effect. Then after institutionalizing him for two years and providing him psychotherapy for eight more, it pronounced him cured. But despite an eight-year legal struggle by Mr. Rowe, it will not let him practice law again, as he did for 22 years before what he calls "the incident" or "the tragedy" occurred.

For those who can get past its horrific facts, Mr. Rowe's case raises profound questions about mental illness, punishment and the legal profession. How high a price must someone pay for conduct for which he is found not culpable? When psychiatrists vouch for a patient's recovery, does anyone really believe it? And should public perceptions of insanity—and the courts' fear of those perceptions—govern who is deemed fit to practice law?

In 1978, three months after he was institutionalized, the Appellate Division of the State Supreme Court in Brooklyn suspended Mr. Rowe's law license "for an indefinite period." Twelve years later, a psychiatrist appointed by the same court to examine Mr. Rowe concluded that he made a "complete recovery" and that any risk of recurrence was minor.

"Mr. Rowe is, from the psychiatric point of view, fully able to practice his profession," the psychiatrist, Dr. Henry Pinsker, concluded in 1990.

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But when Mr. Rowe tried to retrieve his license, the Appellate Division disbarred him instead. “We have taken into consideration the mitigating circumstances advanced by the respondent,” it ruled in January 1992, referring to Mr. Rowe. “Nevertheless, the respondent is guilty of serious professional misconduct. Accordingly, the respondent is disbarred forthwith.”

Mr. Rowe then took his case to the New York Court of Appeals, the state’s highest. Between hearing arguments in the case in October 1992 and deciding it the following month, its own Chief Judge, Sol Wachtler, suffered a mental breakdown of his own and resigned. Still, the court upheld Mr. Rowe’s disbarment. Though Mr. Rowe’s conduct was not criminal, it held, what mattered was whether it “tended to undermine public confidence” in the bar. “Lawyers play a critical role in sustaining the rule of law and thus it is necessary that the legal profession maintain its unique ability to do so by earning the respect and confidence of society,” Richard D. Simmons, then acting Chief Judge, wrote for the court. Now, Mr. Rowe is down to his court of last resort: the United States Supreme Court.

Mr. Rowe, who remarried in 1989, has spent the past 13 years mostly doing volunteer work, teaching children and illiterate adults, working at a hospice in Queens, and studying history and Asian studies at St. John’s University. As he recuperates from heart surgery, he paints and earns pocket money doing investigations for lawyers.

Practicing law again, Mr. Rowe said, would mean more than another chance to do what he does best. It would allow him to add another, happier last chapter to his life, to ease things for his 2-year-old daughter when she learns of his past. It would afford him an opportunity to help people in the mental health system, something he has come to appreciate from the inside.

#### *A Blow Against Ignorance*

More than anything else, he said, it would strike a blow against what he considers the nation’s ignorance—and the bar’s hypocrisy—on the subject of mental illness. Mr. Rowe, who has heretofore declined to speak with reporters and still refuses to be photographed, said the legal establishment was unable to acknowledge mental illness in its midst, and was sacrificing him to protect its own battered reputation.

“I had been a lawyer in good standing before the tragedy, and it seemed terribly logical to me that if you become unmentally ill, you’d be reinstated,” he said. “But instead of pointing to me, and saying ‘One of our own came back,’ they went after me as though I were a criminal.”

“What is the matter with me?” he said. “What is the matter with me? This thing happened 15 years ago. You can live three lifetimes in 15 years.”

....

Mr. Rowe recounts his story matter-of-factly until the topic turned to the killings. “I’m going to start bawling,” he said quietly. “Let’s not even talk about it. That’s four people who aren’t here.”

Were he reinstated, he said, he would represent clients in the mental health system. “I’ve been inside some very strange places,” he said. “I’d tell them, ‘I was there and you can come out of it.’”

“I don’t know what I’d be taking away from the profession,” he said. “The reputation of lawyers is really at the bottom of the pile.”

Robert Rowe’s story is compassionately portrayed in Julie Salamon’s book, *Facing the Wind: A True Story of Tragedy and Reconciliation*.<sup>46</sup> Rowe, who subsequently remarried and had another child, died of cancer in 1997, at the age of 68.

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<sup>46</sup> Random House (2001).

## NOTES

If we allow alcoholism to be used as a mitigating circumstance, should we not be more lenient in readmitting an attorney who acted through a mental illness of which he has not been effectively cured? Or is the horror of the act, coupled with the need for the organized bar to maintain the public's trust, sufficient to cause this lawyer's lifetime expulsion?

Some courts have concluded that bipolar (manic depressive) disorder is *not* a mitigating factor warranting relief from disbarment, even though it is a recognized disability under the Americans With Disabilities Act. (See, e.g., *Florida Bar v. Peter Charles Clement*, 662 So.2d 690 (Fla. 1995).) The *Clement* court reached its decision in part on the fact that no doctor could guarantee that Clement wouldn't suffer a relapse.

## SUPPLEMENTAL READINGS

1. Patricia Sue Heil, *Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline*, 24 ST. MARY'S L.J. 1263 (1993), is an extensive evaluation of how and in what ways alcoholism is or is not accepted as a mitigating factor in bar disciplinary proceedings.

2. Nathaniel S. Currall, *Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease Within the Profession*, 12 GEO. J. LEG. ETHICS 739 (1999). This excellent law student note argues strongly for treating alcoholism as a disease—and allowing it to be considered a mitigating factor in discipline. For additional articles on whether and to what extent chemical dependency should be considered a mitigating factor in lawyer disciplinary proceedings, see Blane Workie, Note, *Chemical Dependency and the Legal Profession: Should Drugs and Alcohol Ward off Heavy Discipline?* 9 GEO. J. LEG. ETHICS 1357 (1996). (arguing that abuse of alcohol or legal drugs should only be considered a mitigating factor in less serious offenses, such as client neglect, and that illegal substance use should never be considered a mitigating factor.) and Janine C. Ogando, Note, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEG. ETHICS 459 (1991) (arguing that using mitigating factors fails to adequately protect the public).

3. In *Matter of Schunk*, 126 A.D. 2d 772 (3<sup>rd</sup> Dept. 1987), the Appellate Division reversed a default judgment suspending attorney Philip Schunk, and, in light of mitigating factors including Schunk's participation in Alcoholics Anonymous and submission to monitoring, imposed a censure. It might be interesting to look at the following related cites; they trace the pattern of misconduct and disciplinary proceedings involving Schunk, resulting from his alcoholism, beginning in 1986 and "ending" with his reinstatement to practice in 1998: *Matter of Schunk*, 123 A.D.2d 480 (3d Dept. 1986); *Matter of Schunk*, 124 A.D.2d 928 (3d Dept. 1986); *Matter of Schunk*, 142 A.D.2d 840 (3d Dept. 1988); *Matter of Schunk*, 148 A.D.2d 877 (3d Dept. 1989); *Matter of Schunk*, 247 A.D.2d 756 (3d Dept. 1998).

4. *In re Solymosy*, 683 N.Y.S. 2d 251, N.Y.A.D. (1st Dept. 1999). The court overruled a hearing panel's recommendation of disbarment of a lawyer who had engaged in client neglect and misrepresentations, and, instead, imposed a four year suspension in light of mitigating factors, including psychiatric evidence.

5. George Edward Bailey, *Impairment, the Profession and Your Law Partner*, 11 THE [ABA] PROFESSIONAL LAWYER, No. 1, p.2 (Fall 1999) presents an excellent overview of the subject, discussing impairment, discipline, mitigation, and the *Kersey* case, the New Jersey no-mitigation rule, and—at some length—how to cope with the impaired lawyer in the law firm setting.

6. For additional empirical work on alcoholism, substance abuse, mental health and legal education, see Lawrence S. Krieger, *Institutional Denial about the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002).

7. *Willner v. Thornburgh*, 738 F. Supp. 1 (D.D.C. 1990). Willner, an attorney who had been offered a job in the Antitrust Division of the Justice Department, objected to the department policy of requiring a drug test for each new employee. The federal district court agreed, and barred the testing.



8. Randall Samborn, *Firms Slowly Come to Grips with Addiction*, NATIONAL LAW JOURNAL, December 10, 1990, describes emerging efforts in the law firm community to deal with the problems of addiction among its own.

9. Does a lawyer have an obligation to help a *client* who is suffering from a drug or alcohol problem? Two practicing attorneys came to opposite conclusions in two 1992 articles. John A. Wasowicz, in the January 1992 VIRGINIA LAWYER, writes that “a lawyer has done a less than adequate job . . . if the problem of addiction is not addressed in the context of the attorney-client relationship.” Francis D. Doucette evaluates Wasowicz’s reasoning and respectfully disagrees in his article in the May 4, 1992 MASSACHUSETTS LAWYERS WEEKLY, *Advocacy, Ethics and the addicted Client*.

## Resources

Where do you turn? Friends, family members and colleagues can play a role in identification and treatment of an addict by becoming familiar with the symptoms of the disease. The organized bar has several alternatives for obtaining assistance.

The New York State Bar Association has a full-time Director of the Lawyer Assistance Program, **Ray López**. He may be reached at: 800-255-0569. **Eileen Travis** is the Director of the Association of the Bar of the City of New York’s Lawyer Assistance Program. William Hammond is the Chair of the ABCNY LAP Committee. Both may be reached at (212) 302-5787.

You need not be a bar association member to receive their Free, Confidential advice. All LAP services are confidential under Judiciary Law §499.

Eleven local bar associations have volunteer committees who can provide advice and support to lawyers suffering from alcohol and substance dependency:

### **Brooklyn** Bar Association

Lawyers Helping Lawyers Committee  
Sarah Krauss (718) 643-3700

Bar Association of **Erie** County  
Lawyers Helping Lawyers Committee  
Katherine S. Bifaro (716) 852-8687

**Monroe** County Bar Association  
Lawyers Concerned for Lawyers Committee  
John Crowe (585) 234-1950

**Nassau** County Bar Association  
Lawyer Assistance Program Committee  
Henry Kruman (516) 599-6420  
Kathy Devine 24 hour crisis hotline (888) 408-6222

**New York** County Lawyers Association  
Committee on Substance Abuse  
Andral Bratton (212) 401-0748

**Oneida** County Bar Association  
Lawyer Assistance Committee  
Tim Foley (315) 733-7549

### **Onondaga** County Bar Association

Lawyer to Lawyer Committee  
Kenneth Ackerman (315) 233-8203  
or Noreen Shea (315) 476-3101  
Family Service Associates (315) 451-3886

**Queens** County Bar Association  
Committee on Alcohol and Substance Abuse  
David Dorfman (917) 256-0355  
or Lori Zeno 718-261-3047 ext. 517

**Schenectady** County Bar Association  
Lawyer Assistance Program Committee  
Vincent Reilly (518) 388-4350

**Suffolk** County Bar Association  
Committee on Alcohol and Substance Abuse  
Richard Reid (631) 286-3560  
24 hour crisis hotline (631) 697-2499

**Westchester** County Bar Association  
Committee on Alcohol and Substance Abuse  
John Keegan, Jr. (914) 949-7227

**On-line Resources****General:**

<http://www.abanet.org/legalservices/colap>

Website for ABA Commission on Lawyer Assistance Programs. Contains links to LAP programs nationwide.

<http://www.alcoholics-anonymous.org/>

Headquarters website for Alcoholics Anonymous (AA). Offers information about their methods for recovery and how their meetings work. The site also includes a scored test with signs that may indicate an addiction problem.

<http://www.marijuana-anonymous.org/>

Marijuana Anonymous world services page. Describes the twelve steps of the program. Twelve questions to determine a problem. Includes listing of online and in person meetings.

<http://www.wsoinc.com/>

Narcotics Anonymous world services site. Basic information about the program. Links to local service websites.

<http://www.ca.org/>

Cocaine Anonymous world services website. Group is for users of all types of cocaine as well as other mind-altering substances such as alcohol, marijuana, and heroine. Includes a self-test for cocaine addiction.

<http://www.crystalmeth.org/>

Crystal Meth Anonymous. Recovery group specifically for users of crystal meth. Uses AA type twelve-step program.

<http://www.draonline.org/>

Dual Recovery Anonymous. Twelve step program for people with chemical dependency and emotional or psychiatric illness. Frequently asked question section with information dual recovery in general.

<http://www.ilaa.org/>

International Lawyers in Alcoholics Anonymous. Includes a listing of some open meetings in New York State.

<http://www.hazelden.org>

Website of the Hazelden center, a drug and alcohol treatment facility. Started in Minnesota currently with five treatment locations around the country. Information on assessment of a problem, including a four question self test. One section gives good information, unspecific to Hazelden center, about breaking through denial, what happens in treatment, alcohol poisoning and the risks of liver disease. Under resources there is also a section for those who need immediate help. This links to various hotlines such as the Hazelden information specialist hotline, suicide hotlines, and state crisis hotlines.

<http://www.al-anon.alateen.org/>

Al-Anon/Alateen headquarters site. Recovery for adults and young adults who have been affected by a family member's addiction. Self-quizzes to decide if the organization is right for you. Includes explanation of the twelve step method and meeting locator.

<http://www.therapeuticjurisprudence.org/>

Website for International Network on Therapeutic Jurisprudence (TJ). TJ is an approach that concentrates on the law's impact on emotional health and psychological well-being. Contains numerous resources and links to related cites that focus on law as a healthy, healing profession.



<http://www.renaissancelawyer.com>

Renaissance Lawyer Society promotes law as an instrument of innovation and transformation. Links to numerous related organizations, and publishes an on-line newsletter of announcements, events and training sponsored by these organizations.

*New York Specific Resources:*

<http://www.nylat.org>

Website for New York State Lawyer Assistance Trust. Contains links to LAP programs and resources throughout the state.

<http://www.ma-newyork.org>

Marijuana Anonymous of New York. General information about the twelve-step program as well as listings of meetings in the New York area. Also includes other marijuana anonymous links.

<http://www.theagapecenter.com/AAinUSA/New-York.htm>

Extensive list of links to New York Area AA groups.

<http://www.nynaranon.org/>

New York area Nar-Anon for families of addicts. Includes meeting times and places in the New York area as well as information on the group's twelve step program and question to determine if the group is right for you.

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