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The Ethical and Malpractice Risks of Impaired Lawyers and Their Unimpaired Associates

Other articles in this issue of the *Bench & Bar* provide a description of the problem for the legal profession of lawyers impaired by a mental illness or substance abuse, information for firms and individual lawyers on how to recognize and address impaired lawyer issues, and a review of the functions of the KBA's Kentucky Lawyers Assistance Program (KYLAP). This article focuses on the professional troubles that await lawyers who for whatever reason become impaired -- bar discipline, malpractice claims, and criminal convictions.

The article begins with a review of the kinds of acts that impaired lawyers commit that lead to professional ruin. With this as a background, the article identifies the Kentucky Rules of Professional Conduct (KRPC) most often implicated with impaired lawyer misconduct. This is followed by an analysis of the malpractice risks impaired lawyers pose for themselves and the lawyers around them. The article concludes with a review of risk management strategies that most directly address the typical malpractice claims that an impaired lawyer may cause.

The intent of this article is to encourage impaired lawyers to seek help by bringing out in bold relief the consequences of their behavior, to alert lawyers who may be in denial of a nascent problem of the seriousness of allowing the condition to grow, and to impress on all lawyers in practice with an impaired lawyer that they cannot idly stand by for their own sake as well as their colleague's.

Categories of Impaired Lawyers' Errors, Omissions, and Misconduct

Impaired and unimpaired lawyers commit many of the same kinds of misconduct and errors. A review, however, of some of the most recent disciplinary actions involving impaired lawyers posted on the National Organization of Bar Counsel Website reveals patterns that are helpful in analyzing the problem and developing risk management strategies. These patterns can be broken down into four categories that are somewhat predictable. Under each category is listed the gravamen of an individual disciplinary action.

Neglect and Procrastination:

Neglect of client matter
Incompetent effort
Failure to file medical evidence in lawyer's possession
Ignored client's inquiries
One response to 35 phone calls
Failure to surrender client file after discharge
Case neglect, abandonment, failure to prosecute case
Missed statute of limitations
Giving false information to client
Repeated difficulty in managing office and case files
Neglected to file taxes leading to $16,000 IRS penalty
Fell asleep during trial
Failed to appear at hearing, did not provide competent representation, bad communication with

client, failed to expedite litigation, false statement of material fact to a tribunal, failed to return file after discharge

Money:
Mishandled client funds
Bad checks
Failure to refund fees
Over-billing
Improperly withheld funds from client's settlement
Commingled client funds with personal funds
Converted client funds for personal use
Deliberate destruction of financial records
Failed to get contingency fee in writing

Criminal acts:
False statement to police
Illegal drug purchases
Drunk driving
Lied to probation officer
Aggravated assault
Domestic violence
Multiple convictions for DWI
Induced witness to sign false affidavit
DWI – fatal accident
DWI – negligent homicide
Assault and battery
Vehicular homicide
Impersonating a police officer
Driving while license revoked
Forged drug prescription

Sexual Misconduct:
Sexual contacts with clients and *pro se* party opponent
Induced client to pose for pornographic pictures
Sexual relations with clients

Bar Regulation Violations:
Failed to pay bar dues
Failed to respond to bar disciplinary authorities
Failed to meet CLE requirements
False statements to bar disciplinary authorities
Lawyer destroyed financial records, client records, and his computer
Failed to cooperate with the bar
Lying on reinstatement questionnaire

Professional Responsibility Misconduct Risks

A violation of the KRPC is misconduct and subjects a lawyer to bar discipline. Rule 8.3 provides " It is professional misconduct for a lawyer to: (a) Violate or attempt to violate the

Rules of Professional Conduct, knowingly assist or induce another to do so, or to do so through the acts of another." It is important to note that the rule contains a clear indication that lawyers other than the lawyer actively violating a rule may be disciplined for its violation. This has special significance for lawyers associated with an impaired lawyer.

Just as the specific kinds of misconduct impaired lawyers tend to commit can be categorized, the professional responsibility rules violated by impaired lawyers also show a pattern.

Neglect and Procrastination:
Rule 1.1 Competence
Rule 1.3 Diligence
Rule 1.4 Communication
Rule 3.2 Expediting Litigation

Money:
Rule 1.5 Fees
Rule 1.15 Safekeeping Property
Rule 1.8 Conflict of Interest: Prohibited Transactions (a) Business transactions with client and (c) Gift from client
Rule 1.16 Declining or Terminating Representation (d) "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as … surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned."

Dishonesty:
Rule 3.1 Meritorious Claims and Contentions
Rule 3.3 Candor Toward the Tribunal
Rule 4.1 Truthfulness in Statement to Others
Rule 8.3 Misconduct "(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;" and "(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation…."

The rule that makes the most direct reference to impaired lawyers is 1.16(a) that provides

> "Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> ….
>
> (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client …."

Note that this is a mandatory rule and poses complicating considerations for lawyers helping impaired lawyers in their rehabilitation. Do you violate Rule 8.3 if you assist a seriously impaired lawyer in continuing to represent clients when under Rule 1.16 (a) withdrawal is mandatory?

Typically, bar discipline for violation of professional responsibility rules by impaired lawyers is prosecuted on a case-by-case basis. The impairment may or may not be a mitigating factor depending on the circumstances of the case and the causal connection between the misconduct

and the impairment. At this point it is appropriate to point out that some impaired lawyer misconduct is subject to criminal jurisdiction as well as bar discipline. The criminal justice system and the legal profession's regulatory system in dealing with impaired lawyers differ in several important respects in how they are intended to protect the public. An impaired lawyer may find considerable support from bar activities such as KYLAP that is concerned primarily with rehabilitation, while encountering a much less sympathetic and punitive experience in the criminal courts.

The Ethical Considerations in Practicing Law with an Impaired Lawyer

It is only fitting that the primary considerations in going to the aid of an impaired lawyer is the protection of clients and the impaired lawyer's welfare. But a consideration almost as important is that the KRPCs place a heavy burden on partners and supervisory lawyers to ensure compliance with the ethics rules. Rule 5.1, Responsibilities of a Partner or Supervisory Lawyer, provides:

> (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct only if:
>
>> (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>>
>> (2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The comments to the rule describe in detail who is covered by the rule and give some guidance on appropriate measures for complying with the rule:

> [1] Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.
>
> [2] The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult

> ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

ABA Formal Opinion 03-429 (6/11/03), Obligation With Respect to Mentally Impaired Lawyer in the Firm, provides this guidance for compliance with Rule 5.1:

> If reasonable efforts have been made to institute procedures designed to assure compliance with the Model Rules, neither the partners in the firm nor the lawyer with direct supervisory authority are responsible for the impaired lawyer's violation of the rules unless they knew of the conduct at the time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action. (*footnote omitted*)

The opinion next considers how to deal with an impaired firm lawyer who has violated the Model Rules. The key issues are whether Rule 1.16(a) requiring withdrawal from representation by an impaired lawyer applies to the situation and what the affected clients should be told. Complicating the situation further is the issue of responsibilities the firm has to accommodate an impaired lawyer under the American with Disabilities Act.

Finally, the opinion addresses issues arising when an impaired lawyer is leaving or has left the firm. The opinion takes the position that: "Rule 1.4 [Communication] requires the firm to advise existing clients of the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel. In doing so the firm must be careful to limit any statements made to ones for which there is a reasonable factual foundation." (*footnote omitted*) The opinion advises that the firm should not to do anything that could be taken as an endorsement of a departed lawyer's competence such as a joint letter with the departed lawyer regarding the transition.

The Malpractice Risk

Kentucky lawyers are always personally liable for their own malpractice and that of lawyers under their direct supervision. Obviously, practicing with an impaired lawyer poses serious malpractice exposure for firm partners, shareholders, and supervising lawyers. While impaired lawyers can malpractice in all the same ways that unimpaired lawyers do, by far the biggest risk for impaired lawyers centers on the fact that many impaired lawyers simply lose control of the administration and management of their practice resulting in lack of diligence and procrastination. This in turn leads to missed deadlines, filings, and statute of limitations violations. One authority describes the problem well:

> "Lack of diligence is a special and widespread variety of incompetence. It consists of incompetently failing to act when advancing or protecting a client's interests calls for action. The types of inactivity range from virtual abandoning of the client to procrastination. Some few lawyers in particular matters seem to be seized by

> pathology of extreme inaction similar to abandoning a client. A pattern repeated in the cases is that a client will have an initial interview with such a lawyer, often an advance fee payment is made, and the lawyer undertakes the representation. Thereafter, the lawyer does little or nothing to advance the client's interests, retains the fee, and fails entirely to communicate with the client. Sometimes inaction occurs at a particular sticking point. Representative are situations in which a lawyer apparently handles a matter with reasonable competence but then fails to take a critical step such as filing a pleading or appearing for a hearing. Often procrastination cases are accompanied by a failure to consult with the lawyer's client, failure to return client requests for information about the matter, or misrepresentation of the status of the matter. Variants of procrastination problem seem to affect some types of practitioners or areas of practice, such as probate work, more than others. Procrastination may also be symptomatic of professional burnout, alcoholism, or mental problems."

Compounding the seriousness of the malpractice that results from lack of diligence and procrastination is that almost invariably there is no defense to liability. The statue of limitations was missed, the personal injury case is irreversibly lost, and the only question remaining is how much is owed the client and where to send the check. "I was drunk at the time" is not an affirmative defense to a malpractice claim. Consider the following hypothetical that is a synthesis of claims that Lawyers Mutual has seen all too frequently:

> At 3:30 on a busy Friday afternoon partner X in the law firm of X, Y & Z is trying to finish a set of interrogatories. The firm receptionist suddenly enters the office to tell X she needs help with an agitated client and there is no other lawyer is in the office to help her. Reluctantly, X puts the file she is working on to one side and follows the receptionist to the common area where an extremely agitated client is waiting.
>
> "I came in six months ago because I had heard of Mr. Y, who has been handling real estate cases in this community for twenty-five years. I hired him to represent me because my neighbor sued me asserting that he had the right to use my driveway to access his farm. I paid a $5,000 retainer to this firm and Mr. Y talked to me and told me that my neighbor was wrong and introduced me to a new firm lawyer, Mr. Newbie. He told me Mr. Newbie would be helping him with my case. Since then, I have called and called this law firm and I have never again talked to Mr. Y. I have talked to Mr. Newbie and he always tells me that everything is fine, but never has any details. Today my neighbor started up my driveway with his tractor pulling a plow and when I challenged him, he handed me this."
>
> X read the adverse judgment entered thirty-five days ago at a hearing not attended by the client, Newbie, or Y. She then told the client that she would get to the bottom of it, sent a paralegal to the courthouse, and took herself into. Newbie's office. Confronting him with his lack of diligence she learned that he was in clinical depression over law school loans and a failing marriage. A quick review of his files revealed numerous matters in similar disarray. Confronting Y with this information she learned that Y blithely had assumed all was well and had found no need to check on what progress Newbie was making with this or any other representation.

> Twenty-six months, fourteen fee refunds, seven malpractice settlements, and seven deductibles later, after countless non-billable hours were spent cleaning up the mess, X, Y & Z is still trying to figure out how they missed that Newbie was doing so little work and so much harm, and why.

Unfortunately, depressed and addicted lawyers often appear to their busy partners and associates to be performing competently, but they are not. These busy partners and associates need to look up from their own work for the sake of clients and their own protection and be sensitive to what is going on around them everyday that signals the possibility that an impaired lawyer is practicing with them.

Impaired Lawyer Risk Management

Every firm regardless of size should have a comprehensive risk management program. To review the full spectrum of what such a program could entail review the *Risk Management and Professional Responsibility Law Practice Assessment* available in the Risk Management section of Lawyers Mutual's Website at www.lmick.com. What follows are risk management considerations most relevant to impaired lawyer malpractice risks.

Docket and Work Control: As the hypothetical shows the catastrophic risk impaired lawyers present is when they lose control of the administration and management of their practice resulting in a deluge of indefensible claims. The best way to prevent this negligence is to implement docket and work control management systems that force frequent periodic review of all active matters in the firm.

Docket systems can be maintained on computers, paper calendars, or a combination of both. Every time sensitive matter in the firm should be recorded in three places – the lawyer's personal calendar, the lawyer's secretary's calendar, and a central firm calendar monitored by a third member of the firm who follows-up to assure that the responsible lawyer responds to a reminder on time. Solo practitioners can program their computer to act as their 'third person.' The system should operate to alert lawyers of a pending time sensitive matter with ample lead time to respond. Reminders then should occur the day before the deadline and the day of the deadline. Computer programs that show this information to lawyers when they first start their computer in the morning are especially effective. If the docket and work control information is maintained exclusively on computers, daily backup is mandatory and off-site storage of computer data is essential.

Other procedures to use in combination with a docket and work control system are:

No new file is opened without applicable limitations periods being recorded in the file in writing by a lawyer or that there are none.
Stamp on the front of a file applicable limitations periods.
The responsible lawyer after meeting a deadline should record the next deadline for the file.
Assign an alternative lawyer responsibility to respond to a reminder notice if the responsible lawyer is unavailable or fails to respond.
Conduct stale file reviews on a regular basis – review all files that have had no docketing or billing activity for three months.
Inspect at regular intervals all office filing locations for inactive files, stale files, and missing

files.
Establish file closing procedures that check for whether any required action has been overlooked.

Follow the Money: Mismanagement of funds, conversion, commingling, and failure to account for and return fees are a major impaired lawyer risk. Firms should have a strict system of internal controls to assure that no one person in the firm has the ability to unilaterally expend firm and client funds. Limit check writing authority, require double signatures on high dollar checks, and whenever possible have two people involved in a financial transaction (*e.g.,* if one person deposits money someone else records the deposit in the office books). Outside annual CPA audits are recommended.

Beware New and Lateral Hires: Anthony Davis, an expert on risk management, cautions that hiring firms who fail to do due diligence before hiring a new lawyer or one moving from another firm often find themselves with a Trojan Horse. This is an especially apt warning in the context of impaired lawyers – they often find it necessary to change firms.

Before hiring, screen candidates thoroughly by checking for: (1) legal qualifications by getting authority to obtain information from law schools and bar admission and disciplinary authorities; (2) ethics complaints and malpractice claims -- inquire about potential claims; (3) financial status and credit record; (4) membership in organizations; (5) officer, director, or other interests in business; (6) fiduciary services such as trustee, conservator, administrator, or executor; and (6) powers of attorney held involving financial matters. After hiring: (1) perform a lawyer review of every file brought by the new lawyer; (2) determine if the new lawyer has client funds and, if so, have them immediately deposited in the firm's client trust account; and (3) inventory client property for which the new lawyer is responsible.

Establish a Firm Point of Contact for Ethics and Personnel Concerns: Designate a lawyer in the firm as a person that anyone in the firm can contact to discuss ethical questions, suspected substance abuse, and personal problems on a confidential basis.

KYLAP Is Good Risk Management: KYLAP permits third party referrals on a strictly confidential basis and grants the referring party immunity from liability to the person who is the subject of the referral, or to any other person. While there is an understandable reluctance to anonymously refer a fellow lawyer to KYLAP, doing so can be a kindness to the impaired lawyer, a service to the clients at risk, and can avoid malpractice claims. This is especially true for solo practitioners. Since many impaired lawyers are in serious denial of their problem, it usually takes an intervention before the impaired lawyer can be helped. Impaired lawyers practicing in a firm have the advantage of the intervention often coming from those with whom they are in practice. Impaired solo practitioners need members of the bar – all Officers of the Court -- to take the lead in seeing that they receive the help they require and that the public is protected from incompetent service. KYLAP is an invaluable resource for troubled solo practitioners, the most frequent form of practice in Kentucky.

Conclusion

The ultimate consequences for impaired lawyers who do not overcome their disability in time

are disbarment, civil liability, and in extreme cases, criminal conviction. Every judge and lawyer in Kentucky has an obligation to protect the general public from the ethical violations and malpractice of impaired lawyers. Fortunately, in meeting this obligation impaired lawyers will receive the help they need to overcome their condition and return to being productive members of the bar and society.

Rule 5.3 provides similar guidance for nonlawyer assistants.

American with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq.(2003).

SCR 3.024.

Wolfrom, *Modern Legal Ethics* (1986), § 5.1, p.191.

Zwicker, *A Successful Law Firm*, p.394 (1995) is the source for these procedures.

This list is derived from Professor of Law Susan Saab Fortney paper "Insurance Issues Related To Lateral Hire Musical Chairs," and the Alexander & Alexander article "Evaluating and Managing the Risks of Mergers, Acquisitions and Lateral Hires" edited by Mr. Anthony Davis; and from their presentation at the "On The Road Again: Ethics Issues Regarding Arriving and Departing Lawyers" presented at the ABA 26th National Conference on Professional Responsibility.

SCR 3.960 (2) and (3).