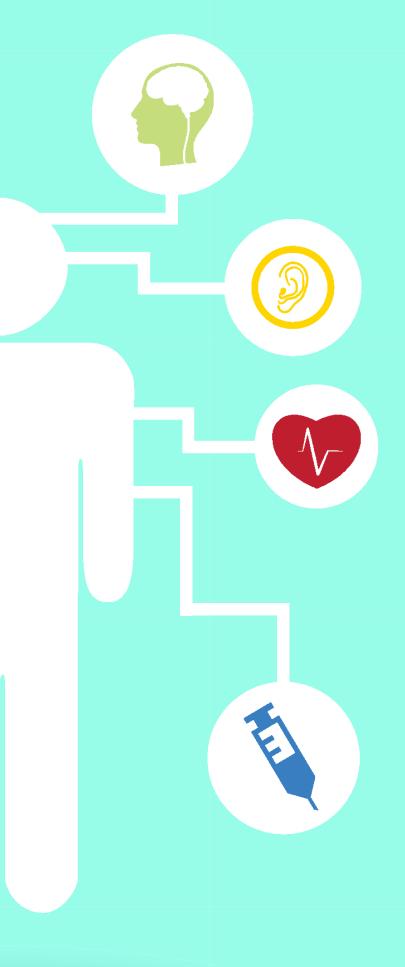


Do the Right Thing

Every lawyer in Texas will encounter an impaired colleague sooner or later.

BY MICHAEL W. EATON



I BEGIN BY MAKING A BOLD CLAIM THAT EVERY LAWYER READING THIS ARTICLE HAS BEEN IMPAIRED AT SOME TIME DURING THE

PAST YEAR. I make this assertion to highlight the broad nature of impairment. Some of you have been impaired because you were working too late and were sleep-deprived. Some of you were impaired because you were sick with a cold or the flu but had a deadline you felt you had to make. Others of you were impaired because some aspect of your personal life or emotional state (e.g. anger or grief) interfered with your ability to work. Some of you were impaired because the effects of aging have diminished your physical abilities or mental capabilities, including memory or critical thinking. Still some of you were impaired because of alcoholism, drug abuse, or untreated or insufficiently treated mental illness. Many of us think only of this last set of categories when the term "impaired lawyer" comes to mind, but let's be clear—any condition that interferes with the normal use of mental and physical faculties needed for the practice of our profession constitutes impairment.

In addition to personally experiencing periods of impairment due to illness, fatigue, or emotion, every lawyer in Texas will encounter impaired colleagues during his or her career. For some, those encounters will be frequent. One need not be educated in psychiatry or psychology to perceive that a peer is in trouble or in need of assistance. Often, the signs are easy to see—isolation, neglect of daily responsibilities, inappropriate responses to others, or frequent unexplained absences. Diagnostic expertise is not required to be empathetic to our fellow lawyers' condition.

In recent years, awareness of mental health issues has expanded tremendously, but stigmatization is still very real and often deters those who suffer from seeking a diagnosis or pursuing a course of treatment. Mental illnesses are medical conditions that disrupt a person's thinking, feeling, mood, ability to relate to others, and general daily functioning. Just as diabetes is a group of diseases of the pancreas, mental illnesses are medical conditions that often result in a diminished capacity for coping with the ordinary demands of life. Unfortunately, many people remain bogged down by misconceptions and think mental illness is somehow less "real" than other types of illnesses.

Mental illnesses are serious. They cannot be overcome through willpower and are not related to a person's character or intelligence. Mental illness falls along a continuum of severity. The National Institute of Mental Health reports that in 2012, there were an estimated 43.7 million adults aged 18 or older in the U.S. with a mental illness in the past year. This represented 18.6 percent of all U.S. adults.¹

As advances in nutrition, exercise, and health care continue, so does the average life expectancy of the typical American. One result of this longevity is that professionals are working later in life. It is not uncommon to find octogenarian lawyers actively practicing and doing so in productive and successful ways. However, as more lawyers work until later ages, the impairments that come with age also come into play. Loss of hearing, diminished eyesight, memory lapses or loss, and other similar conditions can impair a lawyer's ability to practice and, like all other types of impairment, endanger clients' interests.

Addiction is also common among lawyers and can coincide with other impairing behaviors. Some statistics on the matter can offer insight into the significance of the problem:

- It is estimated that 18 to 20 percent of lawyers abuse drugs or alcohol (compared to 8 to 10 percent of the general population).²
- Lawyers use cocaine at twice the rate of the general population.³
- Thirty-three percent of lawyers suffer from mental health disorders.⁴
- Among more than 100 occupations studied by Johns Hopkins University, lawyers were most likely to suffer from depression and were 3.6 times more likely than the average to do so.⁵
- Male lawyers ages 20 to 64 are more than twice as likely to die from suicide as men in other careers.⁶

What ethical considerations do we, as lawyers, have regarding the impaired lawyer? Apart from the aspirational goal of seeking to care for our brothers and sisters of the bar, we also have rule-based obligations with respect to impairment, whether that impairment is suffered by others or ourselves. The most fundamental of the Disciplinary Rules of Professional Conduct is the first:

1.01 Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence⁷...

Many who give this provision a cursory reading will identify "competence" as competence in the legal subject matter or the engagement. I, however, would suggest that the true meaning of competence in this regard is far broader and encompasses the most fundamental type of mental and emotional competence. A lawyer who is an

active alcoholic or substance abuser is not competent to "accept or continue employment in a legal matter," nor is a lawyer who suffers from untreated mental illness competent to practice. But the sad reality is that impaired lawyers *do* engage in the practice of law in Texas and across the nation—and at staggering rates.

The aforementioned rule-based obligation is to reject or cease an engagement when you identify your own incompetency, but what do we do when we believe another lawyer is impaired? Again, we have a rule-based obligation for reporting:

8.03 Reporting Professional Misconduct

(a) ... 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.⁸

Does this mean that if we believe a lawyer is suffering from alcoholism, drug addiction, or even dementia, he or she must be reported to the grievance committee? Fortunately, no; our bar is enlightened and has a long history of reaching out to impaired lawyers to provide a pathway to assistance and recovery. Initially, this is done through another rule-based mechanism:

(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to ... 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....

In Texas, the Texas Lawyers' Assistance Program has a hotline at (800) 343-8527 to handle all questions, concerns, or requests for assistance in complete confidentiality. Once contact is made with TLAP, the caller is imbued with immunity pursuant to the provisions of the Texas Health and Safety Code¹⁰, which together with the confidential nature of the communication, is intended to eliminate any concern or reluctance a caller may have about reporting a lawyer, law student, or member of the judiciary. Keep in mind, the call generates a response by lawyers educated in recovery and who are a part of the recovery community; it can literally be the difference between life and death for a suffering lawyer. When in doubt, make the call to TLAP. The experts will ask the questions, and you will both fulfill your rule-based obligation to report and your moral responsibility to care for your fellow members of the bar.

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In addition to TLAP, Texas lawyers may form ad hoc groups to address matters of local concern with great effectiveness. Sometimes, creative solutions can allow elderly lawyers to maintain their dignity while addressing impairments associated with aging and protecting client interests. For example, I know of one small East Texas county in which an elderly lawyer had practiced for many years. He was a mainstay of the community but memory lapses and increasing confusion threatened both his clients' interests and his reputation as a truly great lawyer. A group of local lawyers approached the senior counselor and advised him that in honor of his many years of service, he had been elected "counselor emeritus" to the bar of that county and that all of the lawyers would be gratified if he would accept that position, which entailed meeting at the local cafe once a week to answer lawyers' questions and to regale them with war stories of old. This wonderful epilogue to a memorable career allowed the lawyer to avoid problems that may have arisen from a reported lack of continuing competence and safeguarded both his dignity and legacy. I would love to see this kind of example replicated around our great state.

To completely fulfill your duty to the legal profession and to your clients, you need to do more than merely recognize and commit to fulfilling your professional obligations. You should have some basic knowledge about alcoholism, addiction, and mental illness and other impairments. Develop an understanding of the signs and symptoms of these problems, and know how to access help—whether for yourself or a colleague. TBJ

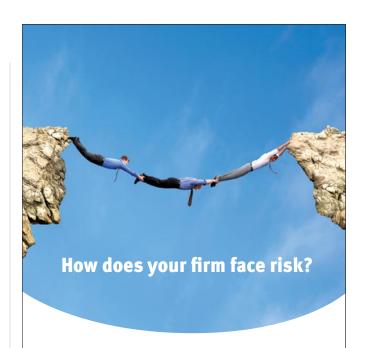
NOTES

- National Institute of Mental Health, National Survey on Drug Use and Health, (2012).
- Allan, Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?
 Treighton Law Review 265 (1997).
- Benjamin, Darling, and Sales, The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers, International Journal of Law and Psychiatry, Volume 13, Issue 3, Pages 233–246 (1990).
- Elwork and Benjamin, Lawyers in Distress, 23 Journal of Psychiatry and Law 205 (1995).
- Eaton, Occupations and the Prevalence of Major Depressive Disorder, 32 Journal of Occupational Medicine 1079 (1990).
- Addiction Strikes the Nation's Best and Brightest Lawyers, (April 2014). Available at http://www.drugrehab.us/news/addiction-strikes-lawyers.
- 7. Texas Rule of Disciplinary Conduct 1.01.
- 8. Texas Rule of Disciplinary Conduct 8.03 (a).
- 9. Texas Rule of Disciplinary Conduct 8.03 (c).
- 10. Texas Health and Safety Code Sec. 467.008.



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