

Substance Abuse & Recovery

A talk with Gary Reing

I. Substance Abuse in the Legal Profession and Professional Responsibility Rules

- A. A study conducted by the American Bar Association and the Hazelden Betty Ford Foundation found that attorneys more commonly than people in most other professions struggle with alcoholism and substance abuse and suffer mental health issues like depression and anxiety.¹
 1. The costs of such impairment can be high for both attorneys and clients.
 2. Some factors contributing to high rates:
 - a. Workplace culture
 - b. Stress
 - c. Pressures of the job
- B. Professional responsibility rules
 1. Lawyer's duty to report
 - a. In most jurisdictions, lawyers have an obligation to report colleagues who they know are involved in illegal or illicit activity.
 - b. ABA Model Rule 8.3 places an obligation on a lawyer to inform the appropriate professional authority when they know that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. See Appendix A.
 2. Lawyers reported for an ethics violation stemming from alcohol abuse may instead be diverted to a program to help with rehabilitation and recovery.
 - a. The American Bar Association has a number of 12-Step Programs such as Alcoholics Anonymous, Narcotics Anonymous, and Women for Sobriety, providing assistance to attorneys.
 - b. For more information on these programs visit:
http://www.americanbar.org/groups/health_law/interest_groups/substance_abuse/pages/12StepPrograms.html.
 3. Billing for time spent working on client matters while impaired such conduct will likely run afoul of the professional responsibility rules.
 - a. ABA Model Rule 1.16(a)(2) provides that a lawyer shall not represent a client if the lawyer's ability to do so is materially impaired. See Appendices B & C.

¹ PR Krill, R Johnson, L Albert, 'The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys'

- b. Similarly, working while impaired may harm the competence of the representation to the client in contravention of Model Rule 1.1.
 - c. For example, a lawyer that is missing court dates cannot be said to be providing competent representation. See Appendix D.
- 4. The core provisions of Model Rule 1.15 require that funds belonging to clients or third parties that are entrusted to a lawyer, in connection with a representation, be placed in separate trust accounts to avoid comingling those funds with the lawyer's personal funds, and be properly safeguarded.
 - a. Specific kinds of records relating to the handling of those funds should be preserved.
 - b. Upon receiving funds or other property in which a client or third party has an interest, a lawyer shall promptly notify the client or third person. See Appendix E.

II. Disciplinary Procedure

- A. In many states, certain types of crimes will automatically result in discipline.
 - 1. In NY, the New York Judiciary Law § 90 governs the admission to and removal from practice.
 - 2. An attorney convicted of a felony, whether in New York or elsewhere, is subject to automatic disbarment.
 - a. § 90(4)(a) provides:
 - i. *Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or be competent to practice law as such.*
 - b. § 90(4)(e) provides:
 - i. *For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.*
 - 3. An attorney convicted of a serious crime is subject to suspension.
 - a. § 90 (4)(f) provides in part:
 - i. *Any attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction until a final order is made pursuant to paragraph g of this subdivision.*
 - b. § 90 (4)(d) provides:

4. When considering the attorney's readmission, the courts will consider a variety of factors including any admission of wrongdoing and remorse, absence of other crimes, restitution, evidence of financial responsibility and employment, and any treatment for alcohol or drug abuse.
- H. The Lawyers' Fund for Client Protection protects legal clients from dishonest conduct in the practice of law by reimbursing clients for money that has been misused in practice.⁴

⁴ The Lawyers' Fund For Client Protection of the State of New York:
<http://www.nylawfund.org/who.html>.

Appendix

A. **ABA Model Rule 8.3 Reporting Professional Misconduct**

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct.html

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer who knows 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.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

B. **ABA Model Rule 1.16: Declining or Terminating Representation.**

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation.html

- (a) 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:
 - (1) the representation will result in violation of the rules of professional conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable

warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

C. New York Rules of Professional Conduct 1.16: Declining or Terminating Representation. <http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf>

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law; -27-

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action with which the lawyer has a fundamental disagreement;
- (5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
- (6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
- (7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;
- (8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal; -28-
- (9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
- (10) the client knowingly and freely assents to termination of the employment;
- (11) withdrawal is permitted under Rule 1.13(c) or other law;
- (12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or
- (13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

D. ABA Model Rule 1.1: Competence.

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

E. ABA Model Rule 1.15: Safekeeping property

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_15_safekeeping_property.html

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.