

# Our Duty to Care

by Barbara A. Williams



“The duty of care” requires us to act toward others with the same degree of watchfulness, attention, caution, and prudence a reasonable person in like circumstances would exercise. In addition to our duty of care, lawyers have a professional responsibility I call *the duty to care*. ABA Model Rules of Professional Conduct 5.1 and 5.3 require lawyers who have managerial responsibility to make reasonable efforts to ensure that lawyers and staff they supervise conduct themselves in accordance with the rules. The duty to care includes helping colleagues deal with substance abuse and mental health issues in order to anticipate and prevent rules violations. Model Rule 1.16 specifically prohibits a lawyer from undertaking or continuing to represent a client if an impairment materially limits the lawyer’s ability to represent the client.

Anyone who follows current events knows that substance abuse and mental health

issues abound in the general population. What you might not realize is that lawyers are far more susceptible to substance abuse and mental health issues than other people. In 2014-15, the ABA and the Hazelden Betty Ford Foundation surveyed 12,825 licensed lawyers employed as clerks, paralegals, associates, partners, and judges. The results of the Hazelden survey were published in the January/February 2016 issue of *Journal of Addiction Medicine*. The survey found that 20.6 percent of respondents reported problematic use of alcohol, 28 percent indicated they suffer from depression, and 19 percent said they struggle with anxiety. The Hazelden survey suggests that lawyers who are 30 years old or younger and work for private law firms have higher levels of distress than more experienced lawyers.

According to the Substance Abuse and Mental Health Services Administration, 6.4 percent of adult Americans abuse alcohol and 6.6 percent experienced major depression in 2014. Comparing those statistics to the Hazelden survey findings, US lawyers are three times more likely to have an alcohol or mental health problem than most people.

One reason we have a duty to care about the members of the legal profession is that impairment can adversely affect the delivery of legal services. Studies preceding the Hazelden survey established a strong link between substance abuse and legal malpractice claims

and lawyer disciplinary proceedings. One study found that 65 percent of legal malpractice claims and 85 percent of trust account violations involve lawyers who are impaired. While the Hazelden survey calls attention to the number of younger lawyers dealing with substance abuse and mental health issues, other studies emphasize the tsunami of baby boom lawyers suffering from dementia and other illnesses causing cognitive deficits.

It is well established that impaired lawyers rarely seek help voluntarily due to fear they will be “outed” and their reputations and livelihoods irreparably damaged. But, ignoring impairment issues is not a viable option. In January 2014, the Centers for Disease Control and Prevention released data indicating that lawyers rank fourth after dentists, pharmacists, and physicians in the incidence of suicide. The same year, CNN reported that suicide is the third leading cause of death among lawyers. By comparison, suicide is the tenth leading cause of death in the general population.

Because the legal profession is self-policing, impairment is an issue lawyers and law firms ignore at our own peril. Nonetheless, regulators have been slow to address lawyers’ duty to care under the Rules of Professional Conduct. On June 11, 2003, the ABA issued Formal Op. 03-429, the first ethics opinion addressing lawyers’ obligations with respect to firm lawyers impaired by substance abuse and mental health issues. More than ten years passed before any state followed the ABA’s lead. On July 1, 2014, Kansas issued LEO No. 14-01 indicating that lawyers can satisfy their professional duties by reporting attorney memory lapses to Lawyers Helping Lawyers rather than to bar disciplinary authorities. On July 25, 2014, North Carolina issued Formal Ethics Opinion 8: Responding to the Mental Impairment of Firm Lawyers. On July 16, 2016, the Virginia State Bar Standing Committee on Legal Ethics issued for review and comment draft LEO 1886: Duty of Partners and Supervisory Lawyers in a Law Firm When a Lawyer in the Firm Suffers from Significant Impairment.

The legal ethics opinions emphasize lawyers’ duty to prevent impaired lawyers within a law firm from violating the Rules of Professional Conduct. The opinions advise law firms to make “reasonable efforts” to establish internal policies and procedures designed to provide “reasonable assurance” that

lawyers and other firm personnel comply with the rules.

Some firms have adopted policies requiring employees who have reliable information of a substance abuse problem to refer the affected individual to the employee assistance program or Lawyers Helping Lawyers (LHL). LHL is an invaluable resource for those who are concerned that another lawyer may have a possible impairment or problem. Among the potential concerns LHL can address are substance abuse, depression, and aging-related issues. If in doubt, contact LHL. Upon receipt of a referral, LHL assesses the need, and if appropriate, provides information, peer support (individual or group), intervention, and referral to Alcoholics Anonymous, Narcotics Anonymous, Gamblers Anonymous, a therapist, or a rehabilitation center.

Confronting a lawyer or staff member who is impaired, but in denial about having a problem, is not easy. Many of us would prefer to adopt the “not my problem” approach. Fortunately, Lawyers Assistance Programs (LAPs), including Lawyers Helping Lawyers in Virginia, share a common mission: helping individuals of every age, gender, race, and economic status deal with impairment issues. Impairment is an equal opportunity affliction, but the workplace is usually the last place where substance abuse and mental health issues manifest themselves. Lawyers and other legal professionals try to hide impairment issues at work, especially if their professional standing is an important part of their self-identity. An impaired person likely has been suffering for a long time before problems emerge at work.

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Aside from our professional duty to care and personal desire to help those in need, LAP referrals are a good risk-management strategy. If an assessment reveals a problem and the impaired person agrees, in most jurisdictions, a monitoring contract can be established before

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disciplinary, legal, or employment-ending problems arise. Contracts can mandate adherence to a professionally prescribed treatment plan, random testing for drugs and alcohol, counseling, regular meetings with an LAP staff member or volunteer who agrees to monitor the impaired lawyer, and other terms tailored to each situation.

Recovery is almost impossible without professional help and a strong support network. The good news is that studies show lawyers in recovery receive fewer malpractice claims and bar complaints than the general lawyer population. The even better news is that lawyers and others in recovery are outstanding members of the bench, bar, and legal community and make positive contributions to the legal profession, the judicial system, and society every day.

In the course of practicing law for more than twenty-five years, including eight years as the chief prosecutor and spokesperson for the Virginia State Bar's attorney disciplinary system, I became keenly aware of the growing need for the services that LAPs provide. That is why after I left the VSB and returned to private practice in 2006 I joined Virginia Lawyers Helping Lawyers' board of directors and served as its president from

July 2012 through June 2015. Lawyers are professionally obligated to care because by helping troubled colleagues we protect the public and our profession. Equally, if not more importantly, heeding our duty to care and helping those in need may spare impaired colleagues and their loved ones the potentially devastating consequences of failing to recognize and address substance abuse and mental health issues in a timely and effective manner.



**Barbara Ann Williams** provides ethics and risk management advice to McGuireWoods LLP in her role as a deputy general counsel. Between 1998 and 2006, as bar counsel, she managed the Virginia State Bar's professional regulation staff and prosecuted lawyer disciplinary matters. Her service as bar counsel followed sixteen years in private practice, litigating commercial, product liability, and professional liability matters. She served on Lawyers Helping Lawyers' board from July 2006 to June 2012, as its president from July 2012 through June 2015, and currently is an emeritus board member.