

AMERICAN BAR ASSOCIATION  
COMMISSION ON IMPAIRED ATTORNEYS  
STANDING COMMITTEE ON LAWYER COMPETENCE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association adopts the **Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines**, dated August 1990, and commends them to law firms, legal departments, other legal services offices and state and local bar associations for consideration and adoption.

## REPORT

### Introduction

To assist law firms, legal departments, other legal services offices, and state and local bar associations, the American Bar Association offers the ABA Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines.

This effort is in keeping with the ABA's commitment to assist lawyers and their support personnel who have impairments arising from emotional or behavioral problems and including drug and alcohol abuse and dependency. The policy is to accomplish this objective through the earliest possible intervention, counseling, treatment and rehabilitation by qualified outside agencies or persons, i.e., Lawyer Assistance and Employee Assistance Programs. It is hoped that the model policy statement, which is part of the ABA's four-part drug and alcohol abuse education and prevention program, will not only offer guidance to the legal profession but also will be an impetus for other professions and organizations to do the same. In this way, the ABA hopes to make a meaningful contribution not only to those affected but, by addressing drug and alcohol abuse, to assuring a drug-free America. /1/

The policy statement and guidelines have been developed to be adapted to different settings, from large to small law firms, corporate and public legal departments, legal services agencies and bar association offices. Changes in terminology and organizational references will be needed to tailor the policy statement and guidelines to the variety of offices for which they are intended. Sole practitioners may lack the resources available to law firms to establish programs for themselves and their administrative personnel, if any. Bar associations should explore the possibilities of establishing group programs for them.

The policy statement and guidelines recognize that substance abuse endangers the health of lawyers and administrative personnel, entails a substantial risk of legal malpractice, and leads to violations of professional conduct standards. The policy statement and guidelines also place responsibility for implementation at a high level, make clear that the policy is proactive rather than passive, and emphasize the importance of confidentiality.

It is contemplated that the policy statement and guidelines will become part of an office's personnel and procedures manual or rules. If there are no formalized policies in writing, the policy and guidelines nevertheless may be adopted, encouraging the creation of a more complete manual. In some instances, a legal department may be part of a larger corporate or governmental organization that already has a drug and substance abuse policy to which its personnel may be subject. Those policies, however, may not recognize professional conduct responsibilities contained in this policy statement and guidelines.

## The Problem

Impairment of professional and administrative personnel contributes to the deterioration of their well-being. It also directly and adversely affects the ability of a law firm or legal department to provide quality legal services and can lead to exposure to unnecessary professional liability, to the violation of professional conduct standards, to loss of public esteem, and even to criminal law violations. Major contributors to impairment are clinical depression, chemical and substance dependency, and drug or alcohol abuse. /2/ Alcoholism and other chemical dependency taken together have been estimated to be a factor in 40 to 60 percent of professional discipline cases. /3/

The 1988 National Institute on Drug Abuse Household Survey, the ninth taken by NIDA, estimates the number of persons using any illegal drug on a "current" basis--that is, at least once during the 30 days preceding the survey--at 14.5 million. /4/

An estimated 18 million adults 18 years and older experience problems as a result of alcohol use. These problems may include symptoms of alcohol dependence such as loss of memory, inability to stop drinking until intoxication, inability to cut down on drinking, and withdrawal symptoms. /5/

The National Drug Control Strategy transmitted to Congress in 1989 by the Bush Administration, urges that "adult professionals who enjoy positions of special trust must take a clear stand on drug use. The national organizations that represent doctors, lawyers, school teachers and college professors, sports figures, police and other professionals should set firm, no-use policies and should announce clear sanctions for violators."/6/

The American Bar Association began formulating policy and model programs addressing drug and alcohol abuse in the early 1970s. "As members of the legal profession, "former ABA President Robert D. Raven has stated, "we were becoming increasingly alarmed not only about the tragic toll illegal drug use was taking on human lives and its devastating effect on every segment of our society, but also about its serious impact on our entire system of justice."/7/

The ABA's activities have included virtually every aspect of attacking substance abuse: 1) public education; 2) prevention; 3) demand and supply reduction; 4) diagnostic, treatment and rehabilitation resources; 5) law enforcement; 6) judicial training; 7) criminal justice; and 8) drug testing in the workplace.

The ABA has endorsed and supports the Alcoholism and Intoxication Treatment Act (2/1972), the Drug Dependence Treatment and Rehabilitation Act (2/1974), the decriminalization of alcoholism. (2/1975), and the Uniform Alcoholism and Treatment Act (2/1975). The ABA also has adopted 20 principles with respect to youth alcohol and drug abuse (7/1985). These principles relate to prevention, education, treatment, law reform and raising the necessary financial support to implement them. /8/

The ABA Model Rules for Lawyer Disciplinary Enforcement and the ABA Standards for Imposing Lawyer Sanctions provide procedures and policies for dealing with lawyers whose impairments have led to professional misconduct. /9/ Procedures for initiating temporary disability, suspension, probation and reinstatement, including conditions attached to each, vary by jurisdiction.

Disciplinary agencies and courts have treated drug-related offenses as grounds for professional discipline, but the lawyer's recognition of his or her impairment, willingness to undergo treatment for rehabilitation, and to continue participation in a program of recovery usually are regarded as mitigating factors in sanctioning. /10/

### The Policy and Guidelines

#### A. Policy and Purposes

The term “[the entity]” is used to indicate the law firm, legal department or other office that adopts the policy and guidelines. It is important to declare the policy and to make clear that the purpose of the policy and guidelines is to provide means for qualified outside assistance to impaired persons. It also is important that the policy and guidelines be in writing so that all personnel are aware of them, and so that individuals with impairments are offered the same opportunities for assistance and treatment. The declaration of the policy helps to affirm the entity's concern for the well being of its personnel and to assure the integrity of the entity and the quality of its services. Every firm, department or office takes pride in its work and seeks to attain and uphold a high reputation. The statement recognizes that the declared policy furthers these aims and that impairments, unless addressed, can have a negative impact on that objective.

The policy statement and guidelines should apply to all professional and administrative or support personnel. While different persons with different impairment or dependency problems may require different treatment, the policy must be applied equally.

The purpose of this policy statement and guidelines is not to punish, degrade or embarrass impaired persons but to identify and assist them to recovery. The emphasis of the policy statement and guidelines is on assistance, treatment and the return of impaired persons to productive service.

The breadth of application of the policy and guidelines requires sensitivity. They should apply while people are in the workplace or performing services in other locations for the entity, but illegal activities and drug and alcohol abuse and dependency should not be condoned at any time.

## B. Implementation

There should be a person or group within the entity, referred to as the “[contact],” to develop and implement the policy statement and guidelines. The contact must have the support of the entity's management and must be a person or group both accessible and trusted. Neither the contact nor other personnel of the entity, however, should undertake counseling or treatment of impaired personnel. These functions should be performed by outside agencies or persons.

At least two strong considerations support this procedure. First, prompt referral to outside agencies and programs assures professional or trained evaluations, counseling and treatment, thus maximizing the prospects for recovery. Second, the entity will reduce whatever reporting obligations might arise because of disclosures during treatment by impaired persons and transfer those obligations to professional or trained personnel who by statute or court rule may be accorded confidential status or immunity.

The contact will be responsible for publicizing the existence of the policy and guidelines, for explaining them, and for assuring that all personnel are aware of lawyer assistance, employee assistance and other programs available. The contact should conduct briefing and training for supervisors and management, including regular communication to professional and administrative personnel about the availability of assistance programs.

The entity should make arrangements with lawyer and employee assistance programs and other community resources, and the expense of referral and treatment should be borne, at least to some extent, by the entity. Assistance programs should be operated by outside agencies, not from within the entity. It is important that the contact assure that competent and professional evaluations are made and effective treatment plans are devised. Insurance coverage may be available for some of the treatment and rehabilitative services. Law firms and legal departments should aggressively seek such insurance and should encourage insurers to provide coverage for a range of treatment and rehabilitative services.

The contact may make or facilitate the making of referrals to treatment and must maintain confidentiality. The success of impairment treatment programs depends on confidentiality.

### C. Operation

A personnel impairment program should be structured to make self-referral the most used method of entering evaluation, treatment and rehabilitation programs, but procedures for identification and early intervention by the entity and third-party referrals to LAPs and EAPs are equally important. The availability of these services and resources should be widely publicized (for example, in the entity's newsletter and in new personnel orientations) and listed in the entity's telephone directory.

For both professional and nonprofessional personnel, employee assistance programs are widely available throughout the United States. These programs provide the means to improve job performance and personal health through assistance to persons with impairments, including alcoholism, substance abuse, and clinical depression. /11/ There are two national organizational networks—Employee Assistance Professionals Association/12/ and Family Service America /13/.

For professional personnel, bar-related lawyer assistance programs, known as LAPs, are widely available. According to a survey conducted by the American Bar Association Commission on Impaired Attorneys in the summer of 1989, there are approximately 100 lawyer assistance programs or committees in the United States. The commission believes, however, that the report of its survey reflects only a sampling of the lawyer assistance effort underway nationwide. /14/ Many LAPs maintain "hot lines."

LAPs are established by court or bar rules and provide lawyer-to-lawyer counseling and support for the impaired lawyer, primarily through peer counseling. The Washington State Bar Association Lawyers Assistance Program experiences about 65 percent self-referrals, about 32 percent third party referrals, with the remainder coming from other sources, including the disciplinary agency. /15/

Ideally the cost of treatment should be borne by the entity, in view of the objective of treatment and return, to service. But this may not be possible in all cases, either because of a policy decision or because the expense would be too great and not affordable. Many other arrangements, such as a sharing of expenses, insurance coverage or payment for a given period of time, are possible.

### D. Professional Conduct Requirements and Illegal Activities

While the primary objective of the policy statement and guidelines is to provide a means for the recognition and treatment of impaired personnel, those impairments may lead to or be the cause of criminal violations, such as possession of illegal drugs, driving while intoxicated or conversion of clients' funds, or to violation of professional conduct standards.

The commitment of all personnel of the entity is needed to make the policy and

guidelines effective. The primary reason for maintaining confidentiality is to encourage self-referrals, as well as other referrals, but the policy statement and guidelines also recognize that both professional and administrative personnel may face statutory obligations to report or not to conceal criminal conduct and that professionals may confront the additional professional conduct obligation of reporting the wrongful conduct of a fellow lawyer.

The effect of the professional obligation to report on the maintenance of confidentiality in the operation of lawyer assistance programs has been recognized but not completely resolved. One solution to date is that in Washington State, where the reporting requirement is to an “appropriate professional authority,” and the lawyers assistance program is recognized as such an authority. /16/

Disciplinary Rule 1-102 of the former ABA Model Code of Professional Responsibility, still in effect in some states, prohibits a lawyer from engaging in “illegal conduct involving moral turpitude” (DR 1-102 (A) (3)) or “in conduct that is prejudicial to the administration of justice” (DR 1-102 (A) (5)). This is enforced by DR 1-103 (A), which requires a lawyer “possessing unprivileged knowledge” of the violation of DR 1-102 to report it to a tribunal or other disciplinary authority. Rule 8.3 (a) of the current ABA Model Rules of Professional Conduct requires a lawyer possessing “knowledge that another lawyer has committed a violation of the Rules of Professional Conduct” to inform disciplinary authorities if the violation “raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” While information that comes from a privileged source need not be reported (Rule 8.3 (c)), most information concerning another lawyer’s impairment through alcohol abuse or chemical dependency will come from unprivileged sources. /17/

The duty to report the misconduct of fellow lawyers has been highlighted by the Illinois Supreme Court’s 1988 decision in In re Himmel, 125 Ill. 2d 531, 490 N. E. 2d 1062, in which, in a setting not involving drugs or substance abuse, the court suspended for one year a lawyer who did not report his knowledge of the conversion of a client’s funds by another lawyer. Illinois retains the Code of Professional Responsibility, and its Rule 1-103 requires a “lawyer possessing unprivileged knowledge” of another lawyer’s engaging “in illegal conduct involving moral turpitude” or “in conduct involving dishonesty, fraud, deceit or misrepresentation” to report that knowledge. The court turned down the argument that the information came to the nonreporting lawyer from his client and therefore was privileged. It adopted an evidentiary definition of privilege, rather than the broader standard of confidentiality in the Model Code. /18/ The Model Rules protect more information than does the evidentiary privilege.

Some states provide that the relationship between members of the lawyers assistance program’s counseling group and the impaired lawyer is regarded the same as the relationship between attorney and client. /19/ The efficacy of these provisions may be affected by the Illinois Supreme Court’s construction of the attorney-client privilege in

Himmel. Other states take a broader view by simply providing that lawyers are not required to report knowledge of violations acquired while the lawyer is participating in a LAP. /20/

#### E. Governmental Requirements

In some instances, the entity may be required to comply with governmentally imposed standards. /21/

Employers potentially are subject to at least four separate and differing sets of federal requirements relating directly to substance abuse. These are: (1) Department of Defense regulations applicable to certain defense contractors; (2) the Drug –Free Workplace Act of 1988 (Pub. L. 100 – 960, Title V, Subtitle D; 102 Stat. 4304), which places obligations on certain federal contractors and on all individual federal grant recipients; (3) Department of Transportation and its subagencies’ regulations applicable to the industries and occupations subject to DOT jurisdiction; and (4) the Nuclear Regulatory Commission rule relating to nuclear power plants.

Of these, the Drug-Free Workplace Act, which went into effect March 18, 1989, is more likely to be applicable to law firms, legal departments and bar associations than the others. Under this act, to be eligible to obtain any federal contract or grant of \$25,000 or more, the contractor or grantee must verify that it will provide a drug-free workplace by agreeing to fulfill seven requirements, including a policy statement, an employee awareness program and notification of violations procedure. Individuals who receive a contract or grant must certify that they will not engage in the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the performance of the contract or grant. The act does not require testing. /22/