

January 2015

## Putting the Plug in the Jug: The Malady of Alcoholism and Substance Addiction in the Legal Profession and a Proposal for Reform

Alexander O. Rovzar

Follow this and additional works at: <http://scholarship.law.umassd.edu/umlr>

 Part of the [Legal Profession Commons](#)

---

### Recommended Citation

Rovzar, Alexander O. (2015) "Putting the Plug in the Jug: The Malady of Alcoholism and Substance Addiction in the Legal Profession and a Proposal for Reform," *University of Massachusetts Law Review*: Vol. 10: Iss. 2, Article 6.  
Available at: <http://scholarship.law.umassd.edu/umlr/vol10/iss2/6>

This Note is brought to you for free and open access by Scholarship Repository @ University of Massachusetts School of Law. It has been accepted for inclusion in University of Massachusetts Law Review by an authorized administrator of Scholarship Repository @ University of Massachusetts School of Law.

# Putting the Plug in the Jug: The Malady of Alcoholism and Substance Addiction in the Legal Profession and a Proposal for Reform

Alexander O. Rovzar

10 U. MASS. L. REV. 426

## ABSTRACT

To members of the legal profession, and many of those familiar with it, the high rate of chemical dependency among practitioners is not a secret. Moreover, there is a strong correlation between chemically dependent attorneys and ethical violations across the nation. Over the past thirty years, the legal profession has generally dealt with the alarming amount of professional misconduct rooted in an attorney's alcoholism or substance addiction by imposing discipline. With the exception of some state-led movements toward rehabilitating the addicted attorney, little has been done on the national level to address chemical dependency among practicing attorneys. Drawing from the Model Rules of Professional Conduct and the "Mitigating Factor approach" used by some state courts, this Note argues that the current method of dealing with ethical violations that arise from the conduct of alcoholic and addicted attorneys does not provide adequate remedies to protect the public, the profession, or the chemically dependent attorneys individually. The Note proposes an amendment to Rule 8.3 of the Model Rules of Professional Conduct to prevent the harm caused by attorney impairment due to substance abuse. This Note argues that such an amendment is a necessary and timely reform.

## AUTHOR NOTE

Alexander Rovzar was elected as the Editor-in-Chief of the University of Massachusetts Law Review for the 2015-16 term. He earned his B.A. in 2005 from Tufts University and expects to receive his J.D. in May 2016. The author would like to thank Nichole Alexis for her constant love and support throughout the Note writing process, and Jeremiah Ho for his guidance and influence in scholarly legal writing. The author would also like to thank the Law Review Editorial Board: Sara Cederholm, Kevin Hart, Alan Battista, Brittany Raposa, and Kelly Wilbur. The author would finally like to thank his editing team members, Jeff McDonald, Matt Tympanick, Angela MacDonald, Rolanzo White, Paul Swann, and Lauren Friel, for their hard work and dedication through the editing process.

I. INTRODUCTION .....	428
II. ALCOHOLISM AND SUBSTANCE ABUSE WITHIN THE LEGAL FIELD .....	431
A. The Disease.....	431
B. History .....	433
C. Legal Profession .....	434
D. A Causal Link.....	436
E. Effects .....	441
III. CURRENT LAW: PROFESSION-WIDE DENIAL AND WILLFUL BLINDNESS? .....	444
A. Model Rules of Professional Conduct .....	444
B. Mitigating Factor Approach.....	448
IV. SOLUTION: TAKING THE OFFENSIVE AGAINST ALCOHOLISM AND CHEMICAL DEPENDENCY IN THE LEGAL PROFESSION .....	453
A. Diagram of Proposed Amendment .....	456
B. The Amendment's Effects .....	457
C. Similar Solutions in Other Professions .....	458
D. Foreseeable Opposition .....	461
V. CONCLUSION .....	462

*Ideas, emotions, and attitudes which were once the guiding forces of the lives of these men are suddenly cast to one side, and a completely new set of conceptions and motives begin to dominate them.*<sup>1</sup>

## I. INTRODUCTION

An estimated 17.6 million Americans<sup>2</sup> are said to be chronic alcoholics with many millions more qualifying as problem drinkers, and as of 2013, an estimated 24.6 million Americans ages twelve or older are reported to be current illicit drug users.<sup>3</sup> Alcoholism and substance addiction do not discriminate and anyone can fall victim to their clutches.<sup>4</sup> For years, doctors and psychiatrists were befuddled and perplexed as to how to handle the crippling symptoms of both diseases.<sup>5</sup> Today, however, there is a solution—a solution which arrests the disease and enables men and women to re-adopt the “[i]deas, emotions, and attitudes which were once the guiding forces of [their] lives.”<sup>6</sup>

Lawyers are not precluded from falling victim to alcoholism and substance addiction.<sup>7</sup> In fact, the prevalence of the ailment amongst

---

<sup>1</sup> ALCOHOLICS ANONYMOUS, ALCOHOLICS ANONYMOUS 27 (Alcoholics Anonymous World Services, Inc. 4<sup>th</sup> ed. 2001).

<sup>2</sup> *FAQS/Facts*, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE INC., <https://ncadd.org/learn-about-alcohol/faqsfacts> (last visited Dec. 15, 2014).

<sup>3</sup> *Report Reveals the Scope of Substance Use and Mental Illness Affecting the Nation*, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE INC., <https://ncadd.org/in-the-news/1253-report-reveals-the-scope-of-substance-use-and-mental-illness-affecting-the-nation> (last visited Dec. 15, 2014).

<sup>4</sup> *Overview*, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE INC., <https://ncadd.org/index.php> (last visited Dec. 15, 2014).

<sup>5</sup> *See e.g.*, ALCOHOLICS ANONYMOUS, *supra* note 1, at 26 (depicting the all too common American businessman with “ability, good sense, and high character” who was deemed by the greatest physicians to be a hopeless alcoholic who should stay under lock and key if he desired to live long).

<sup>6</sup> *Id.* at 27.

<sup>7</sup> Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is it Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988); Timothy D. Edwards & Gregory J. Van Rybroek, *Addiction and Attorneys: Confronting the Denial*, WISCONSIN LAWYER (Aug. 2007), <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=80&Issue=8&ArticleID=1205> (Alcoholism and drug addiction are problems that affect

practicing attorneys is alarmingly high.<sup>8</sup> *The Verdict*, a 1982 courtroom drama starring Paul Newman, portrays an alcoholic attorney who has drowned his career in a bottle of booze.<sup>9</sup> He searches frantically for the one big case that will solve his problems and put his life back together.<sup>10</sup> He finds this opportunity and wins a difficult medical malpractice case in a classic, melodramatic fashion—underdog triumphs in the face of adversity.<sup>11</sup> A harsh reality, however, is that the vast number of attorneys nationwide who suffer from active alcoholism<sup>12</sup> and addiction do not experience similar successful and happy outcomes.<sup>13</sup> Instead, their true life dramas result in a myriad of problems ranging from ethical violations, costly and irreparable damage to clients, destruction of families, disbarment and often, early death.<sup>14</sup>

The current state of the Model Rules of Professional Conduct<sup>15</sup> (hereinafter “Model Rules”) requires that attorneys report known professional misconduct of other lawyers to the appropriate professional authority.<sup>16</sup> Specifically, Rule 8.3(a) requires that 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 authority.”<sup>17</sup> Comment [5] to this

---

thousands of attorneys and studies show a strong correlation between chemical dependency and professional misconducts and malpractice.).

<sup>8</sup> Bloom & Wallinger, *supra* note 7, at 1413 (“About ten to thirteen percent of the general population is alcoholic, but estimates for professionals, including lawyers, range from three to thirty times the average of lay people.”).

<sup>9</sup> THE VERDICT, (Twentieth Century Fox Films Dec. 17, 1982).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Ron Roizen, *Stigma on Alcoholism: A Modest Proposal*, Points: THE BLOG OF THE ALCOHOL AND DRUGS HISTORY SOCIETY (Nov. 8, 2011), <http://pointsadhsblog.wordpress.com/2011/11/08/stigma-on-alcoholism-a-modest-proposal/>.

<sup>13</sup> See, e.g., *In Re Slenker*, 424 N.E.2d 1005 (Ind. 1981). An attorney was disbarred for misappropriating client funds, drafting insufficiently funded checks and abusing alcohol.

<sup>14</sup> *Id.* at 1006.

<sup>15</sup> THOMAS D. MORGAN & RONALD D. ROTUNDA, 2014 SELECTED STANDARDS ON PROF’L RESPONSIBILITY (Foundation Press 2014).

<sup>16</sup> *Id.* at 132.

<sup>17</sup> *Id.*

rule notes an exception to the duty to report an ethical violation where the attorney who has committed the alleged misconduct discloses such information in an approved lawyers' assistance program.<sup>18</sup> The exception encourages attorneys to seek help from these programs before causing further harm to their clients and the public.<sup>19</sup> The Model Rules do not otherwise address the grave issue of alcoholism and drug addiction which has been estimated to affect between ten and twenty percent of all practicing attorneys.<sup>20</sup> The Rules in their current state, and the legal profession as a whole, seem to be in a state of denial regarding the underlying cause of fifty to seventy percent of disciplinary cases.<sup>21</sup>

This Note argues that the Model Rules, as the leading nationwide framework for ethics and attorney behavioral norms in the legal field,<sup>22</sup> should be amended to confront the issue of active alcoholism and addiction among attorneys on a national level by implementing safeguards to protect the public and the profession. Part II discusses the progressive disease of alcoholism and addiction, focusing on its prevalence in the legal profession,<sup>23</sup> and provides a cause and effect analysis illustrating the nexus between the disease and professional misconduct. Part III examines the effects, or lack thereof, that the Model Rules in their current state,<sup>24</sup> and the mitigating factor approach<sup>25</sup> that many courts use in disciplinary proceedings, have on the epidemic of alcoholism and substance abuse within the legal profession. Lastly, Part IV proposes an amendment to Model Rule 8.3. This proposed amendment will mandate an attorney, who knows or

---

<sup>18</sup> *Id.* at 133.

<sup>19</sup> *Id.*

<sup>20</sup> *See generally* MORGAN & ROTUNDA, *supra* note 15, at 132-33 (holding that lawyers are generally obligated to report ethical violations committed by other lawyers unless the misconduct is disclosed in an approved lawyers assistance program thereby implying that an impaired attorney may seek help confidentially); John M. Burkoff, *Impaired Attorneys*, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY § 3:11, at 1 (2014).

<sup>21</sup> Bloom & Wallinger, *supra* note 7, at 1413.

<sup>22</sup> MORGAN & ROTUNDA, *supra* note 15, at 5. Every lawyer is responsible for observance of the Rules of Professional Conduct.

<sup>23</sup> Bloom & Wallinger, *supra* note 7, at 1413.

<sup>24</sup> *See generally* Bloom & Wallinger, *supra* note 7, at 1415 (referring to the reluctance among lawyers to report impaired lawyers as the “conspiracy of silence” which has shown to be the “greatest obstacle to better regulation of the legal profession”).

<sup>25</sup> *See, e.g.*, Okla. Bar Ass’n v. Donnelly, 848 P.2d 543 (Okla. 1992).

reasonably believes that another attorney is suffering from a form of chemical dependency, to report that attorney to an appropriate agency that provides treatment, counseling services, and rehabilitation services as needed.<sup>26</sup>

## II. ALCOHOLISM AND SUBSTANCE ABUSE WITHIN THE LEGAL FIELD

*People say if you consider drug addiction a disease, you are taking the responsibility away from the drug addict. But that's wrong. If we say a person has heart disease, are we eliminating their responsibility? No. We're having them exercise. We want them to eat less, stop smoking.*<sup>27</sup>

### A. The Disease

The twelve-step recovery programs often refer to insanity as “repeating the same mistakes and expecting different results.”<sup>28</sup> Behavior stemming from alcoholism and addiction, which can be defined as “compulsive use of a substance by a person despite negative consequences to his life and/or health,”<sup>29</sup> has supported this concept of insanity.<sup>30</sup> The alcoholic/addict<sup>31</sup> often becomes obsessed with

<sup>26</sup> American Medical Association, *Opinion 9.0305 – Physician Health and Wellness*, AMERICAN MEDICAL ASSOCIATION (December 2003), <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion90305.page?> (The medical profession requires that impaired physicians cease practice to seek necessary treatment and establishes reporting mechanisms for physicians who continue to practice while impaired.).

<sup>27</sup> Nora D. Volkow, *The Changed Brain: Addiction is a Brain Disease*, NATIONAL INSTITUTE ON DRUG ABUSE, <http://www.attcnetwork.org/explore/priorityareas/science/disease/> (last visited Dec. 15, 2014).

<sup>28</sup> NARCOTICS ANONYMOUS, NARCOTICS ANONYMOUS 11 (World Service Conference Literature Sub-Committee, 1981).

<sup>29</sup> CYNTHIA KUHN ET AL., BUZZED: THE STRAIGHT FACTS ABOUT THE MOST USED AND ABUSED DRUGS FROM ALCOHOL TO ECSTASY 275 (3<sup>rd</sup> ed. 2008).

<sup>30</sup> See e.g., ALCOHOLICS ALCOHOLICS, *supra* note 1, at 26 (depicting the American businessman who would repeatedly make short-term progress in his battle with alcoholism only to find himself drunk and powerless some time later).

<sup>31</sup> MOSBY'S MEDICAL DICTIONARY 37 (8<sup>th</sup> ed. 2009). Mosby's Medical Dictionary defines an addict as a “person who has become physiologically or psychologically dependent on a chemical such as alcohol or other drugs to the extent that normal social, occupational, and other responsible life functions are disrupted.” For the purposes of this Note, “addict” refers to an individual who is

obtaining and using alcohol and drugs and abandons morals, values, and personal goals in the process.<sup>32</sup> Health, family, and career success go to the wayside as the stubborn and persistent addict continues to spiral uncontrollably downward in his or her addiction.<sup>33</sup> Some addicts have been successful in abstaining on their own but a vast majority have required some form of outside assistance, whether it be medical, spiritual, mental, emotional, physical, or any combination of these.<sup>34</sup>

The debate over classifying addiction as either a disease or a personal choice has been ongoing for over 200 years.<sup>35</sup> The modern debate has shifted towards categorizing addiction as a disease and a social problem since Bill W. and Doctor Bob founded Alcoholics Anonymous in 1935.<sup>36</sup> Moreover, seventy-six percent of lawyers in the legal profession believe that addiction is correctly categorized as a disease.<sup>37</sup> Proponents of addiction as a disease have constructed a model which depicts addicts as “different” from non-addicts and this “difference” is a catalyst to psychological, sociological, and physiological changes.<sup>38</sup> These changes, progressive and irreversible in nature, are identifiable symptoms of the disease.<sup>39</sup> As the symptoms worsen, the victim of the disease continues to use alcohol or drugs because he has lost control and is unable to abstain.<sup>40</sup> Advocates of the disease theory contend that successful treatment relies on emphasizing

---

dependent on alcohol, drugs or both. Similarly, “addiction” refers to an individual who suffers from alcoholism, substance addiction, or both.

<sup>32</sup> *Addiction, Depression and Treatment*, LA. STATE BAR ASS’N., <https://www.lsba.org/LAP/LAPAddiction.aspx> (last visited Dec. 15, 2014).

<sup>33</sup> *Id.*

<sup>34</sup> Melinda Smith, Lawrence Robinson, & Jeanne Segal, *Alcohol Abuse Treatment and Self-Help*, HELPGUIDE.ORG, <http://www.helpguide.org/articles/addiction/alcohol-addiction-treatment-and-self-help.htm> (last updated Dec., 2014).

<sup>35</sup> William L. White, *Addiction Disease Concept: Advocates and Critics*, COUNSELOR, Feb. 2001, at 1, available at <http://www.bhrm.org/papers/Counselor3.pdf>.

<sup>36</sup> Stephen Strobbe, *Alcoholics Anonymous: Personal Stories, Relatedness, Attendance and Affiliation* (2009) (unpublished Ph.D. dissertation, Univ. of Michigan) (on file with author).

<sup>37</sup> Bloom & Wallinger, *supra* note 7, at 1412.

<sup>38</sup> GLENN R. CADDY, *ALCOHOL USE AND ABUSE: HISTORICAL TRENDS AND CURRENT PERSPECTIVES* 15 (1983).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

the permanency of this “difference” between addicts and non-addicts, and only through permanent abstinence can the disease be arrested.<sup>41</sup>

## B. History

Alcoholism and substance abuse have held a presence in American society since the days of early colonialism.<sup>42</sup> By the late 1700s, alcohol consumption was rampant in America and the early settlers referred to alcohol as the “water of life.”<sup>43</sup> Alcohol played a role in virtually all aspects of life in colonial America, and alcohol continues to maintain its hold on Americans today.<sup>44</sup> Narcotics dependency in America, a close cousin to alcoholism and an active player in the concept of addiction,<sup>45</sup> first revealed its face during the Civil War.<sup>46</sup> Morphine was commonly used on the battlefields, and the gruesome horrors of war overshadowed its prevalent uses that led to a rise in addiction.<sup>47</sup>

As tensions between the North and South began to simmer after the Civil War, the societal issue of addiction reemerged under the national spotlight and continued to occupy a presence in America.<sup>48</sup> In 1920, the government made an attempt to curtail this growing issue and passed the *Prohibition Act*,<sup>49</sup> which forbade the manufacturing, trade, and sale of alcohol.<sup>50</sup> Thirteen years later, however, after American citizens had made it clear through countless *Prohibition Act* violations that they would not be deprived of the “water of life,” the Act was repealed with the passage of the twenty-first amendment to the United States Constitution.<sup>51</sup>

---

<sup>41</sup> *Id.*

<sup>42</sup> James F. Davis, *The History of Alcoholism in America*, RECOVERY FIRST INC. (June 2, 2011), <http://www.recoveryfirst.org/the-history-of-alcoholism-in-america.html/>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> GOSNOLD ON CAPE COD, <http://www.gosnold.org/glossary-addiction-treatment/> (last visited Mar. 8, 2015) (enumerating narcotics as a separate class of substances which may lead to dependency among users).

<sup>46</sup> Davis, *supra* note 42.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> U.S. CONST. amend. XVIII, § 1.

<sup>50</sup> Davis, *supra* note 42.

<sup>51</sup> *Id.*

Alcoholism in America has not changed much since the nation's earliest years.<sup>52</sup> Likewise, substance abuse symptoms and cycles have run a consistent course amongst addicts for over 150 years.<sup>53</sup> Alcohol consumption occupies a significant portion of American culture today, and as state governments continue to relax standards governing the use of marijuana and medical professionals continue to liberally prescribe pain medication, our tradition of socially consuming alcohol and stigmatizing drug use has blurred.<sup>54</sup> Thus, it is not inconceivable that this growing trend not only affects personal lives, but poses issues in professional lives as well.<sup>55</sup>

### C. Legal Profession

The legal profession is competitive, complex, and demanding,<sup>56</sup> and as such, lends itself to the clutches of alcoholism and substance abuse.<sup>57</sup> Many lawyers will turn to drugs and/or alcohol as an elixir or decompression mechanism for the constant pressures that are inherent in the profession.<sup>58</sup> Generally, lawyers tend to be perfectionists who are often driven on sheer self-will, and as a result, are hesitant to reach out to others for help.<sup>59</sup> Moreover, lawyers are generally well-spoken,

---

<sup>52</sup> *Id.*

<sup>53</sup> *See generally id.* (explaining how Americans still associate alcohol with almost every aspect of life).

<sup>54</sup> *See* Deborah Sutton, *Marijuana legalization in Colorado brought about uncertainties after one year*, DESERET DIGITAL MEDIA (March 7, 2015), <http://newsok.com/marijuana-legalization-in-colorado-brought-about-uncertainties-after-one-year/article/5399622> (noting that Colorado became the first state to legalize marijuana for commercial production and sale and other states have and are expected to follow suit); *see also* Jacob B. Nist, *Liability for Overprescription of Controlled Substances*, 23 J. LEGAL MED. 85, 86 (2002) (describing how prescription drug use in the United States is widespread).

<sup>55</sup> Bloom & Wallinger, *supra* note 7, at 1413; Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 268-69.

<sup>56</sup> Tyger Latham, *The Depressed Lawyer*, THERAPY MATTERS (May 2, 2011), <http://www.psychologytoday.com/blog/therapy-matters/201105/the-depressed-lawyer>.

<sup>57</sup> *Why are Lawyers at Risk?*, DRUG AND ALCOHOL ABUSE & ADDICTION IN THE LEGAL PROFESSION, 1, [www.benchmarkinstitute.org/t\\_by\\_t/mcle/sa.pdf](http://www.benchmarkinstitute.org/t_by_t/mcle/sa.pdf) (last visited Dec. 15, 2014).

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.*

intelligent, and articulate people who are trained in argumentation.<sup>60</sup> On the one hand, such attributes are useful in daily legal reasoning; however, on the other hand, such skills enable lawyers to craft arguments in denial—such as developing facades and circumventing situations, relationships, and discussions.<sup>61</sup>

Although statistical studies on addiction within the legal profession vary, common denominators amongst all of them indicate addiction is more prevalent amongst attorneys than it is in the general public.<sup>62</sup> One particular study in the *International Journal of Law and Psychiatry* showed that eighteen percent of lawyers who practiced law from two to twenty years were problem drinkers<sup>63</sup> compared with ten percent of the general population and twenty-five percent of lawyers who practiced for twenty years or longer abused alcohol.<sup>64</sup> The American Bar Association reported that twenty-seven percent of attorney discipline cases in 1997 involved alcohol abuse by attorneys, and the same study revealed that the longer an attorney remains active in his or her addiction increases the likelihood that he or she will be a defendant in a malpractice suit.<sup>65</sup>

A similar study conducted by law professor and attorney John M. Burkoff estimates that between ten and twenty percent of all practicing attorneys are alcoholics and approximately fifty to seventy percent of disciplinary proceedings in New York and California involve alcoholic attorneys.<sup>66</sup> An Oregon survey, examining correlations between chemical dependency and attorney malpractice, determined that sixty percent of the attorneys undergoing treatment for addiction had been sued at least once for malpractice.<sup>67</sup>

---

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at 3.

<sup>62</sup> *See, e.g.,* Bloom & Wallinger, *supra* note 7, at 1413.

<sup>63</sup> SEGEN'S MEDICAL DICTIONARY (2012), available at <http://medical-dictionary.thefreedictionary.com/problem+drinker> (defining problem drinker as one who consumes more than 5+ drinks, on any one occasion, at least once per month, experiences at least one social consequence from drinking, and displays one or more symptoms of alcohol dependence—e.g., having an alcoholic drink upon awakening, shaking hands, memory loss of events that occurred while drinking).

<sup>64</sup> Justin J. Anker, *Attorneys and Substance Abuse*, BUTLER CENTER FOR RESEARCH, [www.hazelden.org/web/.../bcrup\\_legalresearch.pdf](http://www.hazelden.org/web/.../bcrup_legalresearch.pdf) (last visited Dec. 15, 2014).

<sup>65</sup> *Id.*

<sup>66</sup> Burkoff, *supra* note 20, at 1; Bloom & Wallinger, *supra* note 7, at 1413.

<sup>67</sup> Anker, *supra* note 64, at 1.

#### D. A Causal Link

The statistics cited above and the cases that will be illustrated in this subsection indicate that there is a causal connection between addiction and ethical violations in the legal profession.<sup>68</sup> As the cases below will indicate, the legal standard to prove causation requires that the respondent in a disciplinary proceeding provide specific evidence that the ethical violation resulted from the alcoholism or other chemical dependency from which the respondent suffered. In the event that a respondent fails to meet this relatively high standard governing legal causation, he or she will likely face a less merciful form of discipline.<sup>69</sup>

Courts in many jurisdictions have applied strict, multi-factored tests when an attorney who has committed professional misconduct uses his alcoholism or chemical addiction as an affirmative defense.<sup>70</sup> In the *Matter of Johnson*, the petitioner claimed that acute alcoholism caused him to misappropriate client funds and fail to maintain accurate trust account records.<sup>71</sup> In March 1977, Johnson, a solo practitioner and functioning alcoholic, settled a personal injury case with a client for \$3,300.<sup>72</sup> Johnson, per the fee agreement, was entitled to \$1,100 of the settlement.<sup>73</sup> Johnson did not inform his client that the matter settled and, without his client's knowledge, forged the client's signature on the release document and used the entire \$3,300 to prevent a foreclosure on his own home.<sup>74</sup> For three years, Johnson lied to his client and claimed that the case had not yet been settled.<sup>75</sup> In October 1980, the client filed a complaint with the Minnesota state bar, which investigated the matter.<sup>76</sup>

When Johnson caught wind of the investigation, he made good on his \$2,200 debt to his client, but by drawing from unauthorized funds.<sup>77</sup> The ethics committee investigator appointed by the bar

---

<sup>68</sup> See, e.g., *In Re Johnson*, 322 N.W.2d 616 (Minn. 1982).

<sup>69</sup> See, e.g., *Attorney Grievance Comm'n v. White*, 614 A.2d 955 (Md. 1992).

<sup>70</sup> *Johnson*, 322 N.W.2d at 618-19.

<sup>71</sup> *Id.* at 616.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 616-17.

<sup>75</sup> *Id.* at 617.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

discovered Johnson's fraud.<sup>78</sup> Furthermore, Johnson had been using his trust accounts to evade taxes and personal creditors.<sup>79</sup> On March 16, 1981, a group of Johnson's friends who were involved with Lawyers Concerning Lawyers (LCL),<sup>80</sup> intervened and, as of the proceedings, Johnson successfully had abstained from alcohol use.<sup>81</sup>

Based on these facts, the referee of the disciplinary proceedings concluded that Johnson had violated multiple ethical rules.<sup>82</sup> In his opinion, the referee stated that the cause of Johnson's ethical violations lay not in a lack of honesty, integrity, or fitness to practice law, but rather in the excessive use of alcohol.<sup>83</sup> The referee opined, that so long as Johnson continue to refrain from using alcohol, he would revert to the ethically and morally sound attorney that he was known as throughout the community prior to his involvement with alcohol.<sup>84</sup> The referee recommended that Johnson be permitted to continue practicing law under supervision for a two-year period in which he must completely abstain from alcohol.<sup>85</sup>

The Supreme Court of Minnesota adopted the referee's recommendation in *Johnson* but clarified that although alcoholism may be the cause of professional misconduct, it is never an excuse.<sup>86</sup> Furthermore, misconduct is no less severe simply because it is rooted in alcoholism.<sup>87</sup> The Court, in deciding *Johnson*, set forth a five-factor test to apply whenever an attorney commits ethical violations and uses his active alcoholism as a defense.<sup>88</sup> These five factors are (1) that the accused attorney is affected by alcoholism, (2) that the alcoholism caused the misconduct, (3) that the accused attorney is recovering from alcoholism and from any disorders which caused or contributed

---

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> LAWYERS CONCERNED FOR LAWYERS, <http://www.mnlcl.org/services/groups/groups-overview/> (last visited Dec. 15, 2014). LCL provides free, confidential peer and professional assistance to Minnesota lawyers, judges, law students, and their immediate family members on any issue that causes stress or distress.

<sup>81</sup> *Johnson*, 322 N.W.2d at 617.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 618.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

to the misconduct, (4) that the recovery has arrested the misconduct and the misconduct is not apt to reoccur, and (5) that the accused attorney must establish these criteria by clear and convincing evidence.<sup>89</sup>

Courts may require specific evidence showing that addiction was the precipitating factor of an attorney's misconduct.<sup>90</sup> A mere recitation of a lengthy history of alcoholism and a generalized claim that an ethical violation was caused by alcohol dependence is not enough to establish the existence of a causal relationship.<sup>91</sup> In *Attorney Grievance Comm'n v. White*, the respondent represented a mother and her son in a motor vehicle accident, which resulted in the death of the father.<sup>92</sup> White settled the case for \$20,000 and disbursed \$11,982 to the mother.<sup>93</sup> The Circuit Court judge, assigned to make findings of fact and conclusions of law on the matter, discovered that \$5,000 of the \$11,982 was placed in a bank account naming White as trustee for the mother and the child.<sup>94</sup> Within ten years, the amount in question doubled and White transferred the money to another bank account, requesting that the statements be sent to his home rather than his law office.<sup>95</sup>

Upon the mother's death, the child's uncle adopted him and used White as his attorney in doing so.<sup>96</sup> White never advised the uncle of the account being held for the child.<sup>97</sup> When asked to account for the child's money by Bar Counsel, White stated that \$14,147.16 was being held in the Chesapeake Bank.<sup>98</sup> The investigating judge found, however, that White had been using this money for "personal and office expenses" and that White was fully aware that he was violating the "Safekeeping Property Provisions" of Rule 1.15(a)-(c).<sup>99</sup>

At the hearing, White and the director of Lawyer Counseling for the Maryland State Bar testified that White suffered from chronic

---

<sup>89</sup> *Id.*

<sup>90</sup> *Attorney Grievance Comm'n v. White*, 614 A.2d 955, 959 (Md. 1992).

<sup>91</sup> *Id.* at 960.

<sup>92</sup> *Id.* at 956.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 957.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*; MD. RULES OF PROF'L CONDUCT R. 1.15(a)-(c) (2014).

alcoholism and that he recently had completed a thirty-day inpatient rehabilitation program.<sup>100</sup> After his release from rehab, White involved himself in the fellowship of Alcoholics Anonymous and remained abstinent from alcohol.<sup>101</sup> White urged the court to find that his alcoholism and resultant alcoholic thinking caused his ethical violations.<sup>102</sup> The court, relying on prior opinions concerning ethical violations where alcoholism and addiction were involved, looked to the evidence to determine whether White's alcoholism was the "root cause" of the misappropriation.<sup>103</sup> The court held that the evidence proffered by White did nothing more than show that he was in the throes of alcoholism at the time he misappropriated his client's funds.<sup>104</sup> White did not meet the burden of establishing a sufficient nexus between his alcoholism and the misappropriation of client funds that Maryland courts require.<sup>105</sup>

An attorney whose alcoholism or addiction has become so severe that he repeatedly appears in court and meets with clients while intoxicated and causes harm to the administration of justice directly violates a Model Rule.<sup>106</sup> In *Wyllie*, the accused appeared in court in an intoxicated state on more than one occasion, and in one instance was unable to comprehend the judge's question regarding the case.<sup>107</sup> *Wyllie* was referred to the lawyers' local assistance committee to undergo treatment for his alcoholism, which he failed to complete successfully.<sup>108</sup> Soon after the treatment, the accused appeared at another trial under the influence of alcohol and the professional responsibility board afforded him another opportunity to receive treatment.<sup>109</sup> *Wyllie* was subsequently diagnosed as a "late stage"<sup>110</sup>

---

<sup>100</sup> *White*, 614 A.2d at 957.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 958.

<sup>103</sup> *Id.* at 959.

<sup>104</sup> *Id.* at 960.

<sup>105</sup> *Id.*

<sup>106</sup> *In Re Wyllie*, 952 P.2d 550, 553 (Or. 1998).

<sup>107</sup> *Id.* at 551-52.

<sup>108</sup> *Id.* at 551.

<sup>109</sup> *Id.*

<sup>110</sup> Roxanne Dryden-Edwards, *What are the stages of alcohol use disorder?*, ALCOHOL ABUSE AND ALCOHOLISM (Jan. 21, 2014), [http://www.medicinenet.com/alcohol\\_abuse\\_and\\_alcoholism/page6.htm#what\\_are\\_the\\_stages\\_of\\_alcohol\\_use\\_disorder](http://www.medicinenet.com/alcohol_abuse_and_alcoholism/page6.htm#what_are_the_stages_of_alcohol_use_disorder) ("The final and most serious fifth stage of alcohol use is defined by the person only feeling normal when they are using alcohol. During this

alcoholic and the lawyers' assistance committee recommended he attend intensive inpatient treatment for his disease.<sup>111</sup>

Upon receipt of the letter from the lawyers' assistance committee urging that he seek treatment, Wyllie disputed the doctor's assessment and declined treatment.<sup>112</sup> Upon refusal to cooperate with the lawyers' assistance committee's remedial plan, the court held that Wyllie's repeated instances of intoxication, both in court and during meetings with clients, constituted conduct prejudicial to the administration of justice.<sup>113</sup>

As illustrated in *Johnson*, *White*, *Wyllie*, and countless other disciplinary cases,<sup>114</sup> the prevalence of alcoholism and addiction within the legal profession is causally related to attorney misconduct.<sup>115</sup> Although some courts require a heightened standard to prove legal causation between alcoholism and an ethical violation, there is a significant nexus between attorneys afflicted with addiction and ethical misconducts.<sup>116</sup>

---

stage, risk-taking behaviors like stealing, engaging in physical fights, or driving while intoxicated increase, and they become most vulnerable to having suicidal thoughts.”).

<sup>111</sup> *Wyllie*, 952 P.2d at 551.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 553.

<sup>114</sup> *In Re Johnson*, 322 N.W.2d 616 (Minn. 1982); *Attorney Grievance Comm'n v. White*, 614 A.2d 955, (Md. 1992); *In Re Wyllie*, 952 P.2d 550 (Or. 1998); *See, e.g., In re Osmond*, 54 P.2d 319 (Okla. 1935) (disbarring attorney who was a “habitual drunkard” on grounds that his conduct deemed him unfit, unsafe, and untrustworthy); *see also In Re Rushton*, 335 S.E.2d 238 (S.C. 1985) (suspending indefinitely an attorney who met with clients while intoxicated and co-mingled funds by depositing their money in his personal account); *In Re Brooks*, 621 S.E.2d 664 (S.C. 2005) (holding attorney with a deep disciplinary history and four DUI's be indefinitely suspended from the practice of law); *Attorney Grievance Comm'n v. Kenney*, 664 A.2d 854 (Md. 1995) (holding that attorney's alcoholism was the root cause of professional misconducts and determining indefinite suspension the appropriate sanction).

<sup>115</sup> *See generally Johnson*, 322 N.W.2d 616 (holding misappropriation of client funds and failure to maintain proper trust account records, while suffering from alcoholism, warrants public censure and suspension from practice of law, with suspension stayed subject to specified conditions); *see also Wyllie*, 952 P.2d at 554 (imposing one year suspension on alcoholic attorney after deciding that the aggravating factors of the case outweigh the mitigating ones).

<sup>116</sup> *See e.g., Wyllie* 952 P.2d at 554 (suspending alcoholic attorney who repeatedly appeared in court intoxicated and would not cooperate with the local lawyers assistance program).

### E. Effects

In cases where an attorney's addiction maintains a presence as an underlying factor of the resultant misconduct, the effects are exposed through the disciplinary measures and remedial actions taken by courts.<sup>117</sup> The disciplinary measures courts have chosen vary on a case-by-case basis according to a totality of the circumstances.<sup>118</sup>

An actively alcoholic attorney<sup>119</sup> whose disease is the "root cause" of an ethical violation may face less drastic disciplinary action when the client has not suffered grave economic harm as a result of the misconduct.<sup>120</sup> In *Donnelly*, a couple hired the respondent to represent them in a suit demanding that a well-servicing company perform its end of a contract and pay the couple roughly \$25,000 of which they were allegedly entitled.<sup>121</sup> When the couple asked the respondent for a status report, he told them that he was moving forward with the case and that a hearing would soon be held.<sup>122</sup> The attorney deceived his clients for approximately ten months on the status of the suit until he finally informed them of the truth: no case had been filed against the well-servicing company.<sup>123</sup> The couple sought new counsel and shortly thereafter settled their suit against the well-servicing company.<sup>124</sup>

The court in *Donnelly* illustrated that attorney misconduct falls into one of two categories: serious or minor.<sup>125</sup> A serious violation occurs when a client suffers grave economic harm from the attorney's conduct, whereas a minor violation does not yield such a substantial harm.<sup>126</sup> In *Donnelly*, the respondent, although deceitful toward his

---

<sup>117</sup> *Id.*

<sup>118</sup> See *Okla. Bar Ass'n v. Donnelly*, 848 P.2d 543, 548 (Okla. 1992) (imposing public reprimand as a sanction for an attorney's unethical conduct because such conduct was considered minor in nature). *But see, In Re Slenker*, 424 N.E.2d 1005 (Ind. 1981) (holding that disbarment was an appropriate remedial measure for an attorney who misappropriated client funds and was unable to prove the requisite nexus between his misconduct and chemical dependency).

<sup>119</sup> Roizen, *supra* note 12. "Active alcoholism" is a term used to describe periods in which an alcoholic is drinking whereas "recovery" denotes periods of remission or abstinence from alcohol.

<sup>120</sup> *Donnelly*, 848 P.2d at 548.

<sup>121</sup> *Id.* at 544.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 548.

<sup>126</sup> *Id.*

client and toward the Professional Responsibility Tribunal in prior proceedings where he did not reveal his alcoholism, did not cause the grave economic harm that Oklahoma Courts look for in administering the harshest forms of discipline.<sup>127</sup> Thus, the respondent could not be categorized as a serious offender and public reprimand was an appropriate sanction for his misconduct.<sup>128</sup>

With the steadily increasing prevalence of chemically dependent attorneys facing misconduct,<sup>129</sup> courts have ordered both parties in a disciplinary proceeding to introduce evidence which will assist in evaluating the chemically dependent attorney's (1) propensity toward recovery, (2) moral fitness to practice, and (3) causal relationship between his impairment and the alleged misconduct.<sup>130</sup> In *Dumaine*, the attorney was convicted in criminal court for the illegal discharge of a weapon and was sentenced to one year of hard labor.<sup>131</sup> The appeals court affirmed the conviction and the sentence, and the attorney appealed to the Supreme Court of Louisiana which affirmed the conviction but also set aside the sentence so the attorney would not have to serve jail time.<sup>132</sup>

In a disciplinary proceeding two years prior, the attorney was suspended from the practice of law for eighteen months for violating the ethical rules by misappropriating client funds and neglecting his client's legal matters.<sup>133</sup> In the current disciplinary case, which was initiated in response to the attorney's criminal conviction, the only evidence produced from either party was the record of the attorney's criminal proceeding.<sup>134</sup> Neither the attorney nor the disciplinary committee introduced information about the attorney's chemical dependency or fitness to practice law, but requested that the attorney be reinstated to practice law upon successful completion of a recovery

---

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 549.

<sup>129</sup> See *La. State Bar Ass'n v. Dumaine*, 550 So.2d 1197, 1203 (La. 1989) ("In fact, there is now convincing evidence that chemical dependency is so widespread among the legal profession that it cannot be deterred or even coped with by the normal enforcement of the disciplinary rules. Instead, it is clear that the evil has become ascendant and, if it is to be curbed, must be addressed openly, vigorously and holistically by the entire organized bar.").

<sup>130</sup> *Dumaine*, 550 So.2d 1197 at 1204.

<sup>131</sup> *Id.* at 1198 (citing *State v. Dumaine*, 541 So.2d 880 (La. 1989)).

<sup>132</sup> *Id.* at 1198-99.

<sup>133</sup> *Id.* at 1199-1200.

<sup>134</sup> *Id.* at 1200.

plan.<sup>135</sup> The court concluded that concrete evidence of the attorney's chemical dependency and moral character are essential for prescribing the appropriate disciplinary remedy.<sup>136</sup> Accordingly, the case was remanded for an additional hearing so that both parties may present additional evidence.<sup>137</sup> In light of the seriousness of the criminal offense, the court held that the attorney be suspended indefinitely from the practice of law and would bear the burden to show whether he should be reinstated to practice in Louisiana.<sup>138</sup>

In a disciplinary proceeding where the record is silent as to causation or other factors that may have contributed to an attorney's misconduct, but the effects reflect a serious abandonment of ethical obligations, disbarment is an appropriate sanction.<sup>139</sup> In *Slenker*, a three-count complaint was filed against an attorney with the Disciplinary Commission of the Indiana Supreme Court.<sup>140</sup> A Hearing Officer was appointed to decide the facts of the case alleged in the complaint and a hearing was held in which neither the respondent nor any counsel appearing on his behalf attended.<sup>141</sup> The first count of the complaint alleged that the attorney-respondent withdrew \$4,000 from one of his client's estate accounts and used the said amount for personal expenses.<sup>142</sup> Count two alleged that the respondent, on several different occasions, knowingly drafted checks that were backed by insufficient funds.<sup>143</sup> Lastly, count three alleged that the attorney suffered from the disease of alcoholism.<sup>144</sup>

The Court concluded that the respondent's misconduct displayed an utter disregard for the ethical standard by which all attorneys in the state of Indiana are required to abide.<sup>145</sup> The Court further acknowledged that the respondent was unfit to practice law in the state and did not envision him re-adopting his ethical values in the future.<sup>146</sup>

---

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1204.

<sup>137</sup> *Id.* at 1205.

<sup>138</sup> *Id.*

<sup>139</sup> *In Re Slenker*, 424 N.E.2d 1005 (Ind. 1981).

<sup>140</sup> *Id.* at 1006.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

For these reasons, the respondent was disbarred as an attorney in the state.<sup>147</sup>

The strong correlation, supported by the statistics and cases above, between addiction and attorney misconduct is indisputable.<sup>148</sup> For years, a cycle has operated within the legal profession in which chemically impaired lawyers, whose diseases have spun out of control, behave in ways that harm the profession, themselves, and most importantly, their clients.<sup>149</sup> Courts throughout the nation hear the facts of each particular case and, in a rather machine-like fashion, impose discipline upon the addicted attorney.<sup>150</sup> All too often, in the end, the client is still injured, the attorney is still impaired, and the legal profession's reputation is further compromised.<sup>151</sup>

### III. CURRENT LAW: PROFESSION-WIDE DENIAL AND WILLFUL BLINDNESS?

*The court also ignored the major villain: a local bar committed more to a skewered notion of friendship than to its oath and profession. How could lawyers and judges pretend for seven years not to notice the bloodshot eyes, peppermint breath, lost paperwork, blackouts, and missed court dates?*<sup>152</sup>

-Howard Gutman<sup>153</sup>

#### A. Model Rules of Professional Conduct

The second Restatement of Agency states that agency is a “fiduciary relation”—a duty of the finest loyalty<sup>154</sup>—where there must be some “manifestation of consent by one person [the principal] to another [the agent] that the other [the agent] shall act on his [the

<sup>147</sup> *Id.*

<sup>148</sup> See, e.g., *Slenker*, 424 N.E.2d 1005; see also *La. State Bar Ass’n v. Dumaine*, 550 So.2d 1197 (La. 1989).

<sup>149</sup> See, e.g., *Slenker*, 424 N.E.2d 1005; see also *Dumaine*, 550 So.2d 1197.

<sup>150</sup> See, e.g., *Slenker*, 424 N.E.2d 1005; see also *Dumaine*, 550 So.2d 1197.

<sup>151</sup> See, e.g., *Slenker*, 424 N.E.2d 1005; see also *Dumaine*, 550 So.2d 1197.

<sup>152</sup> Bloom & Wallinger, *supra* note 7, at 1429.

<sup>153</sup> Howard Gutman is the Associate editor of the ABA publication *Litigation*, and offered commentary on *In re Kersey*, 520 A.2d 321 (D.C. 1987); Bloom and Wallinger, *supra* note 7, at 1429.

<sup>154</sup> *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

principal's] behalf and subject to his [the principal's] control."<sup>155</sup> Further, there must be "consent by the other [the agent] so to act."<sup>156</sup> The attorney-client relationship is a common law agency relationship whereby the client is the principal and the lawyer is the agent.<sup>157</sup> Preserving the integrity of the fiduciary relationship between lawyer and client is vital to achieving the purpose<sup>158</sup> of the Model Rules and on a broader scale, pursuing justice and upholding the sanctity of the legal profession.

The legal profession is self-regulated, and as such, carries special responsibilities of self-government.<sup>159</sup> The Model Rules are a guide designed autonomously to protect the public rather than to further self-interested concerns of the bar.<sup>160</sup> Every practicing attorney is responsible for abiding by these rules, and "neglect of these responsibilities compromises the independence of the legal profession and the public interest which it serves."<sup>161</sup> The purpose of imposing discipline is not to punish the attorney, but rather to protect the public, vindicate public and private rights, and deter other bar members from engaging in unethical behavior.<sup>162</sup>

The Model Rules in their current state constitute, at best, a near miss in addressing the underlying issue of alcoholism and substance abuse within ethical violations among practicing attorneys. Rule 8.3(a) of the Model Rules provides that a lawyer has a duty to report another lawyer to a professional authority when the lawyer knows that the other lawyer has violated the Rules of Professional Conduct, and such a violation raises a substantial question as to that lawyer's honesty,

---

<sup>155</sup> RESTATEMENT (SECOND) OF AGENCY § 1.01 (2006).

<sup>156</sup> *Id.*

<sup>157</sup> See Deborah A. DeMott, *The Lawyer as Agent*, 67 *FORDHAM L. REV.* 301, 301 (1998) (explaining that the attorney-client relationship is a "commonsensical illustration of agency" whereby the attorney "acts on behalf of the client, representing the client, with consequences that bind the client"); Austin Scott, *The Fiduciary Principle*, 37 *CAL. L. REV.* 539, 541 (1949) (fiduciary relationships include "trustee and beneficiary, guardian and ward, agent and principal, attorney and client, executor or administrator and legatees and next of kin of the decedent").

<sup>158</sup> MORGAN & ROTUNDA, *supra* note 15, at 5.

<sup>159</sup> *Id.* at 4.

<sup>160</sup> *Id.* at 5.

<sup>161</sup> *Id.*

<sup>162</sup> *In re Kersey*, 520 A.2d 321, 327 (D.C. 1987).

trustworthiness, or fitness to practice law.<sup>163</sup> Comment [1] to this rule acknowledges the importance of reporting a violation in situations where the victim is unaware of the offense.<sup>164</sup> Comment [3] emphasizes the fact that a lawyer carries the burden of using his best judgment in determining which offenses raise a “substantial” question as required by the rule.<sup>165</sup> For the purposes of Rule 8.3, “substantial refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.”<sup>166</sup> If a lawyer decides the violation meets the substantiality standard, he should file his report with the bar disciplinary agency, unless another review agency is available to deal with the violation.<sup>167</sup>

Rule 8.4 of the Model Rules contains six subsections illustrating behaviors construed as types of misconduct.<sup>168</sup> The comments do not address whether subsections 8.4(a)-(f) are exhaustive; however, Rule 8.4 as a whole is designed in a manner in which virtually any socially deviant act or conduct is subjected to its authority.<sup>169</sup> Subsection (d), which states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice, is particularly broad and has been used as a catch-all by courts and committees imposing discipline on lawyers.<sup>170</sup> Comment [2] notes that the rule is one that aims at preventing conduct that reflects “moral turpitude,” such as offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice.<sup>171</sup> Repeated instances of minor misconducts have fallen into this category as well.<sup>172</sup>

---

<sup>163</sup> MORGAN & ROTUNDA, *supra* note 15, at 132.

<sup>164</sup> *Id.* at 133.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 134.

<sup>169</sup> *See id.* at 134-35.

<sup>170</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 5 (2000). Modern lawyer codes contain one or more provisions (sometimes referred to as “catch-all” provisions) stating general grounds for discipline, such as engaging “in conduct involving dishonesty, fraud, deceit or misrepresentation” (ABA Model Rules of Professional Conduct, Rule 8.4(c) (1983)) or “in conduct that is prejudicial to the administration of justice” (*id.* Rule 8.4(d)).

<sup>171</sup> MORGAN & ROTUNDA, *supra* note 15, at 134.

<sup>172</sup> *Id.*

Rules 8.3 and 8.4, along with their respective comments, do not directly address the issue of alcoholism or other chemical dependence underlying an overwhelming number of ethical violations.<sup>173</sup> It appears as though the infamous denial that accompanies cases of alcoholism or addiction has moved passed consuming victims on an individual basis and has manifested itself in the legal profession as a whole.<sup>174</sup> The Model Rules, in their current state, address only the effects of the disease.<sup>175</sup> Specifically, the rules prescribe discipline when a client is harmed by an attorney's impaired decision, which is in essence, a secondary effect. A primary effect of the attorney's addiction, whether it be "powder, pill or potion," would be the impaired decision itself.<sup>176</sup>

As of 2014, the Model Rules are not adequately protecting the public from the infestation and spread of alcoholism and addiction in the legal profession. Disciplining an attorney months, sometimes years, after his or her actions have harmed clients, does not protect the previously injured clients in any way.<sup>177</sup> At best, assuming impaired attorneys are either suspended, disbarred, or achieve and maintain a state of recovery, future clients may be protected from the erratic conduct of the comparatively small percentage<sup>178</sup> of addict attorneys who have been exposed and subjected to discipline.<sup>179</sup> In years past, the current method of dealing with misconduct arising from chemically dependent lawyers may have been an acceptable standard of public protection, but with ethical violations stemming from addicted attorneys reaching all-time highs in recent years, more is

---

<sup>173</sup> *Id.* at 132-35.

<sup>174</sup> DRUG AND ALCOHOL ABUSE & ADDICTION IN THE LEGAL PROFESSION, *supra* note 57, at 3.

<sup>175</sup> See generally MORGAN & ROTUNDA, *supra* note 15, at 134-35 (labeling certain acts professional misconducts and subjecting lawyers who commit such misconducts to discipline).

<sup>176</sup> "Powder, pill, or potion" is a common figure of speech in the Halls of AA and NA signifying that the chemical itself of which the addict is powerless over matters little, as the issue lies within the individual and not the chemical itself.

<sup>177</sup> See e.g., *In Re Slenker*, 424 N.E.2d 1005 (Ind. 1981).

<sup>178</sup> See Legal Prof'l Assistance, *Drug and Alcohol Abuse & Addiction in the Legal Profession* 1, 7, available at [www.benchmarkinstitute.org/t\\_by\\_mcle/sa.pdf](http://www.benchmarkinstitute.org/t_by_mcle/sa.pdf).

<sup>179</sup> See e.g., *In Re Tidball*, 503 N.W.2d 850 (S.D. 1993) (imposing a three-year suspension on an attorney who regularly commingled client funds while impaired from alcoholism); see also *In re Kersey*, 520 A.2d 321 (D.C. 1987) (staying the execution of disbarment of an attorney who committed twenty-four ethical violations in a two-year span while in the throes of alcoholism).

needed to provide the public with the protection they deserve.<sup>180</sup> After all, this is the premise upon which the Model Rules were originally designed.<sup>181</sup>

### **B. Mitigating Factor Approach**

Courts in many jurisdictions have begun to acknowledge the fact that disbarment and suspension as disciplinary remedies for attorney misconduct caused by an underlying chemical dependency may not serve as the most effective solution to the problem.<sup>182</sup> In deciding appropriate remedial measures in these types of situations, an attorney's proactive steps towards recovery and successful abstinence from alcohol or other chemicals have been recognized as a mitigating factor in the severity of the disciplinary action imposed.<sup>183</sup> Further support of this concept is illustrated in the ABA's Standards for Imposing Lawyer Sanctions, which allows for mitigation of discipline when an attorney is able to demonstrate a period of successful rehabilitation for a sustained amount of time and is truthful and cooperative throughout the disciplinary proceedings.<sup>184</sup>

Although courts have never recognized alcoholism and/or substance abuse as a defense to professional misconduct, many jurisdictions have held it as a mitigating factor when determining appropriate discipline for the misconduct.<sup>185</sup> In *Kersey*, the attorney began to encounter alcohol related problems at an early age, but was nevertheless able to graduate law school, pass the D.C. bar, and become a successful litigator.<sup>186</sup> Throughout his professional career he continued down the progressive spiral of alcoholism, drinking as much

---

<sup>180</sup> See *La. State Bar Ass'n v. Dumaine*, 550 So.2d 1197, 1203 (La. 1989) ("The problem of chemical dependency among lawyers is so prevalent, however, that this court must soon adopt more systematic rules and procedures for evaluating disciplinary cases involving alcohol and drug abuse.").

<sup>181</sup> MORGAN & ROTUNDA, *supra* note 15, at 5.

<sup>182</sup> *In re Driscoll*, 423 N.E.2d 873, 874 (Ill. 1981) (acknowledging the issue of impaired attorneys and explaining that courts must help them get the help they need to overcome their addiction).

<sup>183</sup> *Kersey*, 520 A.2d at 326 ("Today we hold that alcoholism is a mitigating factor to be considered in determining discipline.").

<sup>184</sup> ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.32(i) (May 2012).

<sup>185</sup> See generally *Kersey*, 520 A.2d at 321 (holding that alcoholism is a mitigating factor to be considered in determining discipline and that failing to consider alcoholism as a mitigating factor "would be to defy both scientific information and common sense").

<sup>186</sup> *Id.* at 324.

as a fifth of rum per day.<sup>187</sup> The attorney's crippling battle with alcohol was no secret to his colleagues and friends as he constantly appeared unshaven, ill-dressed, and disheveled.<sup>188</sup> He was frequently late for court appearances, and when he appeared he was often unprepared and confused.<sup>189</sup> The attorney's bloodshot eyes, consistent blackouts, and perpetual odor of alcohol, along with the testimonies of friends and colleagues, confirmed that the attorney was in fact an alcoholic.<sup>190</sup>

The attorney in *Kersey* committed an astounding twenty-four ethical violations in a two-year span—ranging from misappropriation of client funds to basic neglect.<sup>191</sup> In recommending that disbarment was the appropriate disciplinary measure for the misconducts, the Board of Professional Responsibility noted that it could not recall a respondent in prior disciplinary proceedings that engaged in such a wide array of ethical violations.<sup>192</sup> The Board's findings were referred to the D.C. Court of Appeals for review, and during the interim, the attorney entered a detox program and managed to maintain complete abstinence from alcohol.<sup>193</sup>

On review of the Board's recommendation to disbar the attorney, the court analyzed the level of culpability of which an attorney, who has committed a series of ethical violations while suffering in the throes of severe alcoholism, should be held.<sup>194</sup> Upon a scientific examination of the disease of alcoholism and its incapacitating effects on human behavior, the court established that the attorney's misconduct was substantially affected by his alcoholism.<sup>195</sup> "But for" the attorney's alcoholism, his misconduct would not have occurred, thereby satisfying the causation element in disciplinary proceedings concerning alcoholism/substance abuse.<sup>196</sup> The court held the attorney's alcoholism and current state of rehabilitation to be a mitigating factor in its determination of discipline and opted to stay the

---

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 324-25.

<sup>191</sup> *Id.* at 324.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 322-25.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 326.

<sup>196</sup> *Id.* at 327.

execution of disbarment and implement a five-year probationary period predicated on the attorney's continued abstinence from alcohol.<sup>197</sup>

An attorney, who is able to proffer evidence that his professional misconduct is a product of convoluted judgment and an irrational decision-making process due to alcoholism or chemical addiction, may mitigate the disciplinary burden he must bear.<sup>198</sup> However, the attorney cannot eliminate the burden entirely.<sup>199</sup> In *Driscoll*, the respondent converted money that rightfully belonged to two of his clients.<sup>200</sup> Eventually, after the clients' repeated demands, the respondent repaid the clients with another client's funds, thus committing a second ethical violation.<sup>201</sup> Charges were brought on both misconducts and the respondent introduced evidence that he was an alcoholic at the time of the offenses.<sup>202</sup> Testimonies by the respondent, his wife, and doctor in charge of an alcoholism-treatment program at a local hospital all indicated that the respondent drank alcoholically for five years, and at the time of the infractions, he had undergone significant physical, mental, and emotional changes.<sup>203</sup> "Nothing mattered to him except a drink."<sup>204</sup>

The Hearing Board rejected the mitigating evidence and recommended the respondent be disbarred.<sup>205</sup> Subsequently, the majority of the Review Board recommended that a thirty-month suspension was appropriate, but a minority of the board proposed a one-year suspension upon the condition that the respondent remains proactive in recovery.<sup>206</sup> The respondent originally accepted the idea of a one-year suspension, but upon Illinois Supreme Court review of the recommended sanctions, he argued for a probation arrangement in lieu of suspension.<sup>207</sup>

---

<sup>197</sup> *Id.* at 328.

<sup>198</sup> *In re Driscoll*, 423 N.E.2d 873 (Ill. 1981).

<sup>199</sup> *Id.* at 874.

<sup>200</sup> *Id.* at 873.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* This idea may be difficult for non-addicts to conceptualize, but is an all too familiar reality to the addict.

<sup>205</sup> *Id.* at 874.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 875.

The court took two factors into consideration in deciding appropriate disciplinary action.<sup>208</sup> First, the court acknowledged evidence that demonstrated the respondent was in fact an alcoholic and his disease caused his erratic and self-destructive behaviors.<sup>209</sup> The court opined that when abstinent from alcohol, as he once was and currently is, the respondent is neither a thief nor a liability to his clients.<sup>210</sup> Second, the court looked at the gravity of the misconduct and could not agree with the respondent's suggestion that no suspension be administered.<sup>211</sup> It held that theft from a client is unacceptable under all circumstances—and although it may be mitigated as it was here, it cannot be excused.<sup>212</sup> The court ordered the respondent be suspended from practice for six months with a conditional reinstatement on continued abstinence from alcohol.<sup>213</sup>

Merely admitting to being an alcoholic and later using the admission as a request for leniency in a disciplinary proceeding does not suffice as a mitigating factor unless substantial evidence of recovery and fitness to practice law is offered.<sup>214</sup> In *Tidball*, an attorney committed numerous ethical violations, which included the commingling of client funds, lying to clients, and withholding settlement money from clients.<sup>215</sup> Complaints were filed to the Grievance Committee, which gave the attorney multiple opportunities to appear before the board and address the charges.<sup>216</sup> The attorney did not respond and the Committee, noting that failures to respond to communications will be weighed heavily against the attorney in the imposition of discipline, sided with previous case law and recommended disbarment.<sup>217</sup>

The respondent pointed to *Walker*,<sup>218</sup> where the court used the mitigating factor approach and prescribed a probationary period to a

---

<sup>208</sup> *Id.* at 874-75.

<sup>209</sup> *Id.* at 874.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 875.

<sup>214</sup> *In Re Tidball*, 503 N.W.2d 850, 856-57 (S.D. 1993) (quoting *In Re Walker* 254 N.W.2d 452, 457 (S.D. 1977)).

<sup>215</sup> *Id.* at 852.

<sup>216</sup> *Id.* at 852-55.

<sup>217</sup> *Id.* at 851, 855.

<sup>218</sup> *In Re Walker*, 254 N.W.2d 452, 455 (S.D.1977).

recovering alcoholic who had been clean and sober for two and a half years, and requested lenient discipline because he too, was an alcoholic.<sup>219</sup> The court, in issuing its determination, held that the attorney had not demonstrated the requisite recovery that the respondent in *Walker* had at the time of his disciplinary hearing.<sup>220</sup> Moreover, the court stated that protecting the public is the paramount concern in the determination of a disciplinary action, and decided that suspension for three years was appropriate to satisfy this concern and give the attorney time to establish sobriety so he may practice law again in the future.<sup>221</sup>

The mitigating factor approach is used in many jurisdictions to determine a fair disciplinary measure for an attorney who has committed professional misconduct while afflicted with addiction.<sup>222</sup> Essentially, the courts look to the gravity of the violations, evidence of chemical dependency, a causal relationship between the dependency and the violations, and lastly and most importantly for the attorney, whether he has actively and successfully pursued recovery.<sup>223</sup>

As stated in the Model Rules, and affirmed by various judicial opinions, protection of the public's interest is the primary goal of the Rules.<sup>224</sup> The mitigating factor approach displays forward progress in achieving this goal, while simultaneously encouraging an addicted attorney to remain active in his recovery.<sup>225</sup> After all, the legal profession, although founded on the principles of a fiduciary relationship, is a self-regulating one, which does care for the well-being of its members.<sup>226</sup>

---

<sup>219</sup> *Tidball*, 503 N.W.2d at 856.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 857.

<sup>222</sup> *See, e.g., In re Kersey*, 520 A.2d 321, 326 (D.C. 1987) (“Today we hold that alcoholism is a mitigating factor to be considered in determining discipline.”).

<sup>223</sup> *See generally id.* (holding that the court should consider (1) alcohol as a mitigating factor in determining discipline of an attorney who violates professional responsibility; (2) but-for the attorney's alcoholism, his conduct would not have occurred; (3) rehabilitation from that condition will be considered a significant factor in imposing discipline). *But see generally, Tidball*, 503 N.W.2d 850 (holding that attorney misconduct caused by substance addiction will not shield him or her from the consequences of such actions).

<sup>224</sup> MORGAN & ROTUNDA, *supra* note 15, at 5; *see, e.g., Kersey*, 520 A.2d. at 327.

<sup>225</sup> *See generally Kersey*, 520 A.2d 321 (holding that “when alcoholism has been a causal factor leading to professional misconduct, rehabilitation from that condition will be considered a significant factor in imposing discipline”).

<sup>226</sup> MORGAN & ROTUNDA, *supra* note 15, at 4-5.

Although the mitigating factor approach is moving in a positive direction toward successfully dealing with the issue of addiction, which underlies so many professional misconducts, the issue still poses a major threat to the public, the profession as a whole, and the individual attorneys who suffer from the effects of the disease.<sup>227</sup> The current methods of dealing with addiction and dependency in the legal field, as described above, do not attempt to prevent the harm from occurring.<sup>228</sup> In essence, the legal profession is playing *defense* in a game that can only be won through an aggressive *offense*. Instead of waiting for the insidious disease to claim more victims, only to respond by prescribing yet another disciplinary measure, affirmative action should be taken in the early stages of the disease. The prevalence of addiction in the profession has grown too greatly to abate with just the current weapons in place.<sup>229</sup> A new and more powerful device must be introduced that will disarm the opponent before it can strike. It is time to take initiative and at the very least, attempt to prevent the harm before it occurs.

#### **IV. SOLUTION: TAKING THE OFFENSIVE AGAINST ALCOHOLISM AND CHEMICAL DEPENDENCY IN THE LEGAL PROFESSION**

*“There is now convincing evidence that chemical dependency is so widespread among the legal profession that it cannot be deterred or even coped with by the normal enforcement of the disciplinary rules. Instead, it is clear that the evil has become ascendant and, if it is to be curbed, must be addressed openly, vigorously and holistically by the entire organized bar.”*<sup>230</sup>

- Justice Dennis<sup>231</sup>

---

<sup>227</sup> La. State Bar Ass’n v. Dumaine, 550 So.2d 1197, 1203 (La. 1989) (“The problem of chemical dependency among lawyers is so prevalent, however, that this court must soon adopt more systematic rules and procedures for evaluating disciplinary cases involving alcohol and drug abuse.”).

<sup>228</sup> See, e.g., *Tidball*, 503 N.W.2d 850.

<sup>229</sup> See *supra* notes 62-67 and accompanying text.

<sup>230</sup> *Dumaine*, 550 So.2d at 1203.

<sup>231</sup> Associate Justice of the Supreme Court of La. 1975-1995.

As mentioned in Part III, neither the Model Rules, nor the Mitigating Factor Approach used by courts to determine disciplinary measures, prevents the public from suffering the actual injury.<sup>232</sup> Both models merely punish the attorney who has violated an enumerated rule of professional conduct, accomplishing only what the rules and opinions interpreting the rules have stated that they were not intended to do.<sup>233</sup> The profession should, as a whole, remove its blinders and confront the issue of addiction face to face. The Model Rules should be amended so that the underlying issue of alcoholism and addiction in so many of today's ethical violations can be addressed and remedied before the harm to the public occurs. Specifically, Model Rule 8.3, titled "Reporting Professional Misconduct," should add a clause, either within the rule itself or as a comment, to attempt to identify a potentially addicted attorney and provide him with assistance in arresting the disease at the earliest stage possible. The likely result of such an amendment, made on a national level, would prevent many client injuries from occurring, and consequently, reduce the overall number of professional misconducts, particularly those deeply rooted in alcoholism or other chemical dependency.

Some state and local bar associations have already implemented programs attempting to remedy the issue of alcoholism and addiction among practicing attorneys, before the public suffers injury at the hands of such impaired attorneys.<sup>234</sup> In 1986, the Florida Supreme Court mandated that Florida implement a lawyers' assistance program in order to aid addicted professionals in the legal profession.<sup>235</sup> Funded primarily by the state bar, the Florida Lawyers Assistance Program developed a model that sought the early identification of chemically dependent attorneys.<sup>236</sup> It also introduced a diversion program that

---

<sup>232</sup> See, e.g., *Tidball*, 503 N.W.2d 850.

<sup>233</sup> See *In re Kersey*, 520 A.2d 321, 327 (D.C. 1987) (Factors that are generally considered in all disciplinary cases include the protection of the public, the vindication of public and private rights, and deterrence to the bar. Our purpose in imposing discipline is not to visit punishment upon an attorney.).

<sup>234</sup> Bloom & Wallinger, *supra* note 7, at 1424-25. Washington, for example, developed a prevention and intervention-based program in the late 1980s which successfully addressed many attorney impairment cases before the public was harmed.

<sup>235</sup> Myer J. Cohen, Harry G. Goodheart III, & Charles O. Hagan, Jr., *The Lie is Over—We do Recover*, FLORIDA LAWYERS ASSISTANCE, INC. (Dec. 1999), <http://fla-lap.org/literature/1299-bar-journal/the-lie-is-over-we-do-recover/>.

<sup>236</sup> *Id.*

provided an impaired attorney, who had committed an ethical violation, the option to enter into a written contract with the lawyers' assistance program.<sup>237</sup> The terms of the contract required the addicted attorney to enter into a long-term treatment and recovery plan in lieu of, or in some cases, in cohesion with, discipline prescribed by the grievance committee.<sup>238</sup>

In a similar example of a state-level remedy to the dilemma of alcohol and substance abuse related misconduct, the State Bar of California, in 1989, devised a program to intervene early when an attorney is suffering from alcoholism or other chemical dependency.<sup>239</sup> The program provides that, in certain instances, a chemically dependent attorney may enter into confidential agreements to obtain the necessary treatment in lieu of facing discipline.<sup>240</sup> An attorney facing potential discipline is allowed one opportunity to utilize this program.<sup>241</sup> William W. Davis, a legal advisor to the California State Bar, stated the purpose of the diversion program was to "identify individuals who need help [early] and get them to come forward [in order to avoid] more serious problems down the road."<sup>242</sup> In 2001, California expanded upon the diversion program implemented in the late 1980s, hiring mental health experts and professionals to guide impaired attorneys down their road to recovery.<sup>243</sup> California's Lawyers Assistance Program has expanded greatly since its official enactment in 2001 and continues to support recovering attorneys in their rehabilitation and competent practice of law.<sup>244</sup>

Programs such as those implemented by Florida and California have proven to yield favorable results, but on far too small of a scale.<sup>245</sup> Addiction in the legal profession is a nationwide epidemic

---

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Stephanie B. Goldberg, *Drawing the Line: When is an Ex-Coke Addict Fit to Practice Law?*, A.B.A. J., Feb. 1990, at 52.

<sup>240</sup> *See id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *State Bar Alcohol Diversion Program Starts to Take Shape*, CAL. ST. B. J., (Dec. 2001), <http://archive.calbar.ca.gov/calbar/2cbj/01dec/page11-1.htm>.

<sup>244</sup> *See* ANNUAL REPORT FOR LAWYER ASSISTANCE PROGRAM, LAWYER ASSISTANCE PROGRAM OF THE STATE BAR OF CA, 2009.

<sup>245</sup> *See id.* at 4. As of 2009, 541 California attorneys were enrolled in the program's structured recovery plan.

that continues to grow exponentially.<sup>246</sup> State Bar programs, and other local remedies, do not bring the requisite punch to knock out adversity of such magnitude. A systematic change to the current state of the law must be made on a national level if the legal profession wishes to reduce the harm to the public, the profession, and the afflicted attorneys themselves.

### **A. Diagram of Proposed Amendment**

Within Model Rule 8.3, I propose the following system, creating subsection (d):

- (1) Every lawyer who knows or reasonably believes that another lawyer's job performance, appearance, health, or over-all wellness is substantially declining as a direct result of alcoholism or other chemical dependency shall refer that lawyer to an appropriate intervention/assistance program.
- (2) A confidential hearing will take place in front of the members of an intervention/assistance panel in which relevant evidence will be introduced.
- (3) In the event that the panel determines that the lawyer has been abusing alcohol or other chemicals, the lawyer will be subjected to random drug and alcohol screens to determine whether he or she is able to abstain from alcohol or chemical use on his or her own.
- (4) In the event that the lawyer produces a positive drug screen or breathalyzer, he or she will be required to attend a 28-day inpatient treatment program. Upon completion, the lawyer will be required to attend a minimum of four AA or NA meetings per week, effective immediately upon his or her release from inpatient treatment, and shall obtain a sponsor within one month.<sup>247</sup>

I propose the commentary to Rule 8.3(d) would address the following issues.

First, the state bar should fund the intervention/assistance program and each county should have its own program. Each program will consist of a panel of counselors and lawyers with long-term recovery who will hear the evidence and decide whether to move forward with intervention. The State bar will be responsible for assembling the panel and members can volunteer to satisfy required pro-bono hours or apply for paid positions. Non-lawyer counselors will be hired and paid an hourly rate.

---

<sup>246</sup> Anker, *supra* note 64.

<sup>247</sup> See, e.g., MORGAN & ROTUNDA, *supra* note 15, at 132-33.

Second, the confidential hearing is informal and typical evidentiary and procedural rules should not apply aside from the fact that the evidence must be relevant to the referred lawyer's alleged alcoholism or chemical dependency. If necessary, random screens and breathalyzers will be confidentially administered by members of the panel to verify whether the lawyer has been successful in abstaining from alcohol or chemicals. A lawyer who refuses to comply with the screening process will waive the confidentiality of the process and his co-workers and family will be notified. The lawyer's family and co-workers will be urged to participate in a large-scale intervention seeking his compliance with recovery.

### **B. The Amendment's Effects**

One of the many old adages originating within the fellowship of Alcoholics Anonymous is that "one person can't keep another person sober."<sup>248</sup> The model designed above appears on the surface to contradict this old, and more often than not, accurate principle. However, the amendment does not in fact force sobriety on the referred lawyer, but rather, gives him or her an opportunity, perhaps for the first time, to confront his or her overwhelming sense of denial. If and when this happens, and the lawyer is able to view his or her true reflection in the mirror and reckon that he or she is at a major crossroads, the lawyer may then embark on his or her journey toward sobriety. Furthermore, the proposal, if implemented, represents a necessary and overdue nation-wide offensive against alcoholism and chemical dependency in the legal profession. As such, this proposal to amend the Model Rules, to include an intervention and/or impaired lawyer assistance program, would serve as a nationally formulated measure attempting to prevent alcohol and substance-abuse related misconduct arising from impaired attorneys from occurring.

A simple reading of the proposed amendment to the Model Rules, without an intimate knowledge of the disease of addiction, may appear to be simply an attempt to curb the number of professional misconducts arising out of the impaired lawyer's choices and decisions. However, incorporating the process described above on a national level would do far more for the clients, the profession, and the community as a whole than merely prevent blatant injuries to the public and the profession. Realistically, the most serious injuries as described in *Kersey*, *Johnson*, *Driscoll*, and other cases like them,

---

<sup>248</sup> HAMILTON, B., 12 STEP SPONSORSHIP: HOW IT WORKS 10 (1996).

compose a small percentage of alcoholism and chemical dependency's overall effect on the legal profession.<sup>249</sup> Implementation of the proposed solution would also apply to the vast majority of addicted attorneys who will procrastinate through their careers, actively drinking or using, and never encounter a disciplinary proceeding or other career or life changing obstacle.<sup>250</sup> These addicted attorneys, handicapped by alcohol and sometimes drugs, often fall short of their potential and can deprive the public of the indispensable services to which it is entitled.<sup>251</sup> The proposed amendment will bring many of these attorneys to the surface and, if implemented, the Model Rules will hopefully take a giant leap toward achieving its goal of successfully protecting the interests of the public.

### C. Similar Solutions in Other Professions

By comparison, the medical profession has a similar obligation to ensure that its members are able to provide safe and effective care.<sup>252</sup> This obligation is discharged by:

promoting health and wellness among physicians; supporting peers in identifying physicians in need of help; intervening promptly when the health or wellness of a colleague appears to have become compromised, including the offer of encouragement, coverage or referral to a physician health program; establishing physician health programs that provide a supportive environment to maintain and restore health and wellness; establishing mechanisms to assure that impaired physicians promptly cease practice; assisting recovered colleagues when they resume patient care; reporting impaired physicians who continue to practice, despite reasonable offers of assistance, to appropriate bodies as required by law and/or ethical obligations.<sup>253</sup>

Like the legal profession, the medical profession is self-regulating and abides by a similar set of ethical guidelines as the legal profession.<sup>254</sup> The AMA's Code of Medical Ethics has served as a

---

<sup>249</sup> See Legal Prof'l Assistance, *Drug and Alcohol Abuse & Addiction in the Legal Profession* 1, 7, available at [www.benchmarkinstitute.org/t\\_by\\_mcle/sa.pdf](http://www.benchmarkinstitute.org/t_by_mcle/sa.pdf).

<sup>250</sup> See *id.*

<sup>251</sup> *Id.*

<sup>252</sup> AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MED. ETHICS OF THE AMA Op. 9.0305 (Am. Med. Ass'n 2014).

<sup>253</sup> *Id.*

<sup>254</sup> See AMA Council on Ethical & Judicial Affairs, *Code of Med. Ethics The Principles* (2001), available at [http://www.utcomchatt.org/docs/AMA\\_Code\\_of\\_Medical\\_Ethics.pdf/](http://www.utcomchatt.org/docs/AMA_Code_of_Medical_Ethics.pdf/).

model set of ethical rules governing the self-regulated medical profession for over 160 years.<sup>255</sup> Similar to the Model Rules of Professional Conduct in the legal profession, the Code of Medical Ethics strives to provide safe and effective service to the public.<sup>256</sup>

The Code of Medical Ethics directly addresses substance abuse in Opinion 8.15.<sup>257</sup> The rule occupies its own section of the code and plainly states “[i]t is unethical for a physician to practice medicine while under the influence of a controlled substance, alcohol, or other chemical agents which impair the ability to practice medicine.”<sup>258</sup> Further, Opinion 9.0305 requires practicing physicians to maintain the requisite health and wellness to ensure they perform to their potential.<sup>259</sup> The opinion states that a physician whose physical or mental health has deteriorated to such an extent that he cannot safely and effectively perform is considered impaired.<sup>260</sup> A physician is obligated, as per Opinion 9.031, to timely intervene when he is aware that a practicing physician is impaired.<sup>261</sup> The intervening physician is responsible for ensuring that the impaired physician immediately cease practicing medicine and seek assistance or treatment.<sup>262</sup> If, after such an intervention, the impaired physician refuses to comply, the intervening physician is obligated to report the impaired physician to the licensing authority.<sup>263</sup> The reporting process illustrated in Opinion 9.031 is to remain confidential until the resolution of the matter.<sup>264</sup>

The American Dental Association (ADA) also has a similar set of guidelines.<sup>265</sup> The ADA’s Principles of Ethics and Professional Conduct confronts the issue of alcohol and substance abuse in the

---

<sup>255</sup> HISTORY OF AMA ETHICS, <http://www.ama-assn.org/ama/pub/about-ama/our-history/history-ama-ethics.page?> (last visited Dec. 15, 2014).

<sup>256</sup> *Code of Med. Ethics The Principles*, *supra* note 254.

<sup>257</sup> AMA COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, *supra* note 252, at Op. 8.15.

<sup>258</sup> *Id.*

<sup>259</sup> *Code of Med. Ethics The Principles*, *supra* note 254.

<sup>260</sup> *Id.*

<sup>261</sup> AMA COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, *supra* note 252, at Op. 9.031.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> See AM. DENTAL ASS’N, *ADA Principles of Ethics and Code of Professional Responsibility*, (2005), available at <http://ethics.iit.edu/ecodes/node/4755>.

dental profession in a manner similar to the AMA.<sup>266</sup> Rule 2.D, “Personal Impairment,” reads as follows:

It is unethical for a dentist to practice while abusing controlled substances, alcohol or other chemical agents which impair the ability to practice. All dentists have an ethical obligation to urge chemically impaired colleagues to seek treatment. Dentists with first-hand knowledge that a colleague is practicing dentistry when so impaired have an ethical responsibility to report such evidence to the professional assistance committee of a dental society.<sup>267</sup>

This rule appears to ensure that individual dentists adhere to the dental profession’s commitment to provide the public with high standards of ethical conduct.<sup>268</sup>

A third example of a profession that incorporates a nationwide ethical code identifying the issue of addiction lies within the field of social work.<sup>269</sup> The National Association of Social Workers abides by an ethical code that references impairment in two different standards.<sup>270</sup> Standard 2.09 states that a social worker who has direct knowledge that a colleague’s substance abuse is interfering with his/her practice should assist in taking remedial action.<sup>271</sup> This standard further elaborates that a social worker, who believes a colleague’s impairment is detrimentally affecting his work, should report the issue to the appropriate licensing or regulatory body if the impaired social worker does not take the suggested remedial action.<sup>272</sup> Standard 4.05 of the ethical code governing social work speaks not of a duty to assist and report as 2.09 does, but rather requires social workers who find themselves impaired due to substance abuse or similar personal problems to seek treatment and refrain from practice to protect clients and others from harm.<sup>273</sup>

All of these professions that provide public services have addressed the issue of addiction within its respective field and have adopted rules similar to the one I have proposed. Particularly

---

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at R. 2.D.

<sup>268</sup> *Id.*

<sup>269</sup> See NAT’L ASS’N OF SOCIAL WORKERS, CODE OF ETHICS OF THE NASW (NASW press 1996), available at <http://socialworkers.org/pubs/code/code.asp>.

<sup>270</sup> *Id.* §§ 2.09, 4.05.

<sup>271</sup> *Id.* § 2.09.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* § 4.05.

noteworthy is the fact that social work, a developmentally more recent occupation with a less intricate ethical code than the legal profession, has taken the initiative against chemical dependency in two separate sections of its rulebook.<sup>274</sup> Thus, my proposal seems to be a timely, necessary, and appropriate one.

#### D. Foreseeable Opposition

To be sure, there will likely be opposition to the proposed insertion of a reporting and intervention procedure in the Model Rules. Opponents will contend that the amendment conflicts with the self-regulating government upon which the legal profession stands.<sup>275</sup> Moreover, many may take the firm position that the inherent stress and pressure of the profession is not for everyone, and those who self-medicate with alcohol or drugs have no place in the field.<sup>276</sup> Lastly, it is probable that many lawyers will cringe at the idea of bearing the burden to report fellow attorneys to any kind of panel, board, or committee, regardless of whether it is one established to protect the public, the profession, and/or the chemically dependent attorney.<sup>277</sup> Although all of these potential counterarguments may be concrete and legitimate, each one slightly misses the issue. The protection of the public, a concept that the legal profession often appears to lose sight of, is the paramount concern of the Model Rules.<sup>278</sup> The fiduciary relationship between lawyer and client, founded on the grounds of agency, caters to the client's best interests.<sup>279</sup> Therefore, as a result, it can be said that attorneys who object to the proposed change in the current law that strives to regain focus on the interests of the public, are doing so on self-serving grounds, thus neglecting their fiduciary obligations.

Society frequently loses sight of old traditions with the passage of time, and some vanish entirely. There are, however, traditions that

---

<sup>274</sup> NAT'L ASS'N OF SOCIAL WORKERS, CODE OF ETHICS OF THE NASW (NASW press 1996), available at <http://socialworkers.org/pubs/code/code.asp>.

<sup>275</sup> MORGAN & ROTUNDA, *supra* note 15, at 4.

<sup>276</sup> See Janine C. Ogando, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEGAL ETHICS 459 (1991) (arguing that an attorney with incompetence caused by alcohol or drugs should be subject to harsher sanctions, including disbarment, until a judicial finding of competence).

<sup>277</sup> Bloom & Wallinger, *supra* note 7, at 1428. A duty to disclose another's ethical failings comports with "Gestapo" tactics and is "un-American." *Id.*

<sup>278</sup> MORGAN & ROTUNDA, *supra* note 15, at 5.

<sup>279</sup> RESTATEMENT (SECOND) OF AGENCY §1.01.

have resiliently withstood wars, famine, and the ultimate test of time. The fiduciary relationship, a vital component of our nation's legal profession, is one such tradition that the legal profession should not allow to fade away. Justice Cardozo eloquently emphasized this viewpoint in 1928:

Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone but the punctilio of an honor the most sensitive is then the standard of behavior. As to this, there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.<sup>280</sup>

The prevalence of chemical dependency among practicing attorneys has detrimentally impacted fiduciary relationships in the legal field and has caused the profession to veer significantly from the "punctilio of an honor"<sup>281</sup> standard of the fiduciary obligation eloquently coined by Justice Cardozo.<sup>282</sup> To restore the relationship, and to successfully and effectively protect the public, the issue of addiction within the legal profession should be promptly addressed on a national level before further, and perhaps irreversible, harm is done.

## V. CONCLUSION

The current remedial mechanisms which address professional misconducts arising from alcoholically or chemically-impaired attorneys have proven themselves futile and inefficient.<sup>283</sup> Although over the past twenty years, some states have taken independent initiatives to adequately protect the public and the profession from the dilemma,<sup>284</sup> the legal profession as a national entity has been in denial.

---

<sup>280</sup> *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (citing *Wendt v. Fischer*, 243 N.Y. 439, 444 (1926)).

<sup>281</sup> *Id.*

<sup>282</sup> *See, e.g., In Re Slenker*, 424 N.E.2d 1005 (Ind. 1981); *see also* La. State Bar Ass'n v. Dumaine, 550 So.2d 1197 (La. 1989).

<sup>283</sup> *See* Part III.

<sup>284</sup> *See, e.g.,* LAWYER ASSISTANCE PROGRAM OF THE STATE BAR OF CA, *supra* note 244.

The willfully blind approach, spearheaded by the Model Rules, to the nationwide epidemic of ethical violations committed by addicted attorneys has allowed the issue to whirlwind out of control. The Model Rules should be amended to stop the insanity<sup>285</sup> and put the “plug in the jug”<sup>286</sup> on a profession-wide level.

---

<sup>285</sup> NARCOTICS ANONYMOUS, *supra* note 28, at 11.

<sup>286</sup> KLAUS MAKELA ET. AL., ALCOHOLICS ANONYMOUS AS A MUTUAL-HELP MOVEMENT: A STUDY IN EIGHT SOCIETIES 121-22 (1996). An expression frequently used in AA meetings referring to an alcoholic who ceases to drink. *Keeping* the plug in the jug often poses the biggest challenge to alcoholics and addicts alike.