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LESSONS FROM BEIJING . . .

How a Crisis Involving Substance Abuse Can Become an Opportunity

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The Chinese word for “crisis” consists of two characters: one represents danger, and the other represents opportunity. These two characters might also symbolize the possibilities that confront an individual who is battling alcoholism or substance abuse.

I have no specialized training in substance abuse; most attorneys don’t. However, with some guidance from the South Carolina Rules of Professional Conduct and the South Carolina Lawyers Assistance Program, there are opportunities for each of us to help colleagues confront the dangers – and overcome the challenges – that arise from substance abuse.

Before addressing the Rules of Professional Conduct, it is important to note that the impact of alcoholism and substance abuse can be devastating for any lawyer on a number of personal and professional levels. The destructive behavior that arises from substance abuse impacts not only the individual attorney but countless others as well, including clients, colleagues and families. The effects, although generally beyond the scope of this discussion, should not be minimized.

Rules of Professional Conduct¹

“If You Must Play, Decide on Three Things at the Start: the Rules of the Game, the Stakes and the Quitting Time.”

-- Chinese Proverb

Paragraph 7 of the Preamble to the Rules of Professional Conduct provides in part that “many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers.” Following in Paragraph 12 is this provision: “Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the professional and the public interest which it serves.”

Thus, as lawyers, we not only have a responsibility to follow our rules of professional conduct but also to assist our colleagues in doing so. There are a number of rules governing our professional conduct that may apply to or address scenarios involving substance abuse or alcoholism. However, this article will focus only on the rules that apply most often to these situations.

Individual Attorney’s Responsibility

“An Ant May Well Destroy a Whole Dam.”

-- Chinese Proverb

¹ The Rules of Professional Conduct for South Carolina attorneys are located within Rule 407 of the South Carolina Rules of Appellate Procedure. They also can be accessed at the following website: <http://www.sccourts.org/courtReg/index.cfm>

In 2004, the American Bar Association estimated that 15 to 18 percent of U.S. lawyers could be considered substance abusers or substance dependent. [“Addicted Lawyers Can Overcome Barriers to Recovery,” *Alive & Free* (July 26, 2004), <http://www.hazelden.org/web/public/has40726.page>.] The substances being used and abused include alcohol. The dangers facing attorneys regarding substance abuse are very real and can lead to one attorney destroying his practice, among other things.

There are two key rules that address the responsibility of the individual attorney who may be battling alcoholism or substance abuse: Rule 1.16(a)(2) and Rule 8.4. Under Rule 1.16(a)(2) of the South Carolina Rules of Professional Conduct:

A lawyer must not undertake or continue representation of a client when that lawyer suffers from a physical or mental condition that materially impairs the lawyer’s ability to represent the client.

Neither the comments to Rule 1.16 nor the definition of terms provided in Rule 1.0 define or otherwise offer guidance regarding the phrase “physical or mental condition.” Nevertheless, it is not difficult to envision scenarios in which alcohol or substance abuse leads to or, perhaps, is the result of, a physical or mental condition that would bring this rule into play. [See *e.g. In re Norton*, 622 S.E.2d 527, 528 (S.C. 2005).]

In fact, there is a direct correlation between depression and alcoholism, with up to 50 percent of alcoholics exhibiting symptoms of major depression during a given period of time. [<http://www.learn-about-alcoholism.com/depression-and-alcoholism.html>.] Of note, out of 103 occupations studied in 1990 by researchers at Johns Hopkins University, attorneys led the nation in the incidence of depression. [Eaton, “Occupations and Prevalence of Major Depressive Disorder,” 32 *Journal of Occupational Medicine* 1083 (1990).] Pursuant to the remainder of Rule 1.16(a)(2), the physical or mental condition

must “materially impair” the lawyer’s ability to represent the client. The phrase “materially impair” is not defined under the Rules.

Rule 8.4 of the Rules of Professional Conduct provides in relevant part as follows:

It is professional misconduct for a lawyer to: (a) violate . . . the Rules of Professional Conduct; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; [or] (c) commit a criminal act involving moral turpitude

Generally speaking, the use or even abuse of alcohol is not a crime, though there are some exceptions. But the use or abuse of some other substances, such as marijuana, or the misuse of controlled substances is a crime. Additionally, alcohol or substance abuse can release inhibitions that control activity, which may in turn lead to other crimes. Ultimately, however, under our rules, the question becomes whether the crime at issue involves moral turpitude or reflects adversely on the individual’s honesty, trustworthiness or fitness as a lawyer in other respects.

With these rules in mind, consider the example of a young attorney who is overwhelmed by the responsibilities of practicing law. To help her deal with her anxieties, she begins drinking wine more frequently and occasionally smokes marijuana or takes a few prescription painkillers from a friend to help her unwind each night. Has she violated Rule 1.16(a)(2) or Rule 8.4? Now add this to the equation: A few moments before her last appointed Department of Social Services case, she smoked some marijuana to calm her nerves. Has she violated any rules at this point? What if she is a solo practitioner who begins borrowing money from a client trust account to pay for her “habit”?

Perhaps the more important issue in these scenarios, however, is what should be done about the young attorney’s behavior. Specifically, if no one is aware of or discovers

the behavior, is there anything that can be done? Although this attorney has a responsibility to follow the Rules of Professional Conduct, the likelihood of her acknowledging or even recognizing a violation of the rules is minimal at best. It is under these scenarios that our obligations, as fellow members of the bar, arise.

Responsibilities of Other Attorneys in a Firm

“If You Want One Year of Prosperity, Grow Grain. If You Want 10 Years of Prosperity, Grow Trees. If You Want 100 Years of Prosperity, Grow People.”

-- Chinese Proverb

Let us assume for now that the young attorney above works as an associate in your office. To that end, our Rules of Professional Conduct identify the responsibilities we have to the lawyers in our firm. Specifically, Rule 5.1 of the South Carolina Rules of Professional Conduct provides as follows:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if: . . . (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action [to avoid the consequences].

Most lawyers are aware of their responsibilities for attorneys they are supervising.

However, many are surprised to learn of their firm’s responsibility to “make reasonable

efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” The comments to the Rules do not define or otherwise provide examples of what might constitute such reasonable efforts, though Rule 1.0 defines “reasonable” as the conduct of a reasonably prudent and competent lawyer.”

With this rule in mind, reconsider the scenario with the young associate described above. Assume she missed several important deadlines and a status conference in a large case she was second-chairing with a partner in your office. Assume further that she was counseled by the partner with whom she was working. After some discussion, the partner encouraged the associate to seek some counseling, during which she was diagnosed with depression. The associate started regular counseling sessions and, while being monitored by the partner, did not miss any other deadlines or appointments for several weeks. Two months later, however, the partner stopped monitoring the associate, who then missed a key filing deadline for a client to respond to a complaint. Opposing counsel was unwilling to consent to an extension of time.

Under the rules, the partner appears to have acted reasonably in counseling and monitoring the associate and, thus, arguably undertook reasonable efforts to ensure the associate’s conduct conformed to the Rules of Professional Conduct pursuant to Rule 5.1(b). However, did the partner undertake reasonable efforts to ensure the associate’s conformity with the Rules when she ceased monitoring the associate after two months? How about if the partner had monitored the associate for six months and the events still unfolded as they did?

More importantly, does the partner have any obligation to report the associate's behavior? Rule 8.3(a) provides as follows: "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 . . . fitness as a lawyer in other respects, shall inform the appropriate professional authority."

As an initial matter, comment 3 to Rule 8.3 acknowledges that "[i]f a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule [8.3] limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule."

Under Rule 1.0, "knowingly," "known" or "knows" denotes actual knowledge of the fact in question and further provides that a person's knowledge may be inferred from circumstances. And, according to comment 3, the word "substantial" refers to the seriousness of the possible offense and not to the quantum of evidence of which the lawyer is aware.

Nevertheless, even with the assistance of these guidelines and definitions, under the scenario given, we do not have enough information to assess whether the associate has actually violated any rules of professional conduct, particularly because we do not know why she may have missed the filing deadline. Accordingly, while there may be client and other obligations arising under this scenario, there does not appear to be any reporting obligation.

General Responsibilities of Other Attorneys

“He Who Asks is a Fool for Five Minutes, But He Who Does Not Ask Remains a Fool Forever.”

-- Chinese Proverb

However, return to the example first given above regarding the young associate. Suppose you do not practice with the young attorney. Instead, at a lunch meeting she has requested, she shares the information about having smoked marijuana before a hearing and confides to you that she believes she has a substance abuse problem. Or, perhaps, as she drinks her third glass of wine at lunch, you begin to suspect she may have a substance abuse problem. At that point, one may query whether an obligation to report the attorney arises under Rule 8.3.

Notwithstanding any analysis of whether you actually “know” a rule violation has occurred with respect to the young attorney, she is approaching you in confidence and, in fact, appears to be asking for help. In this instance, it is important to note that Rule 8.3(c) does not require disclosure of information otherwise protected by Rule 1.6, which is generally information protected by the attorney-client privilege. The comments to Rule 8.3 clearly state that the duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question.

Instead, the discussion with the young attorney affords you an opportunity to encourage her to get help, including from a lawyer assistance program. As colleagues in this profession, we can and should encourage each other to seek out the available resources where appropriate. Lawyers do not need to wait, however, until a violation of the Rules of Professional Conduct occurs or a colleague confides his or her concerns. There are often signs that a lawyer is in need of assistance. While few, if any, of us are

trained to diagnose alcoholism or substance abuse, there are some signs that may trigger concern. The symptoms of alcoholism or substance abuse can include:²

- Feeling depressed, sad or anxious during most of the day
- Neglecting the family and losing interest in activities
- Changes in weight
- Changes in sleep patterns
- Feeling less energy
- Financial difficulties
- A general increase in health problems
- Feelings of worthlessness and guilt
- Isolation from friends and family
- Reduced ability or inability to concentrate

There are no obligations under the Rules of Professional conduct requiring us to encourage participation in a lawyer assistance program. However, “The Rules [of Professional Conduct] do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.” [Paragraph 3 of the Scope of the Rules of Professional Conduct.] If you begin to suspect you or a colleague may have a problem with substance abuse, it is important to recognize that the problem is not something that will solve itself over time; instead, it may get progressively

² Sources: www.mayoclinic.com/health/alcoholism/DS00340/DSECTION=symptoms
A Lawyer’s Guide to Healing: Solutions for Addiction and Depression, by Don Carroll (Hazelden 2006)

worse. There are resources to help you individually or to assist you in directing a colleague toward help.

Lawyer Assistance Programs and Resources³

“To Know the Road Ahead, Ask Those Coming Back.”

-- Chinese Proverb

Regardless of one’s views on any moral or ethical obligation we may have to each other as members of the profession, alcohol and substance abuse have very real, practical impacts that our profession as a whole should consider. For example, the director of the Oregon Bar concluded several years ago that “[t]he costs to the bar in lost dollars because of malpractice claims and discipline claims, and in the loss of favorable public opinion and reputation because of ethical violations, are far too high.” Therefore, “it is important that state bar organizations . . . develop approaches to alcohol and chemical dependency problems that take advantage of the benefits [lawyer] assistance programs offer.” [Zarov and Fishleder, “New Study Shows Recovery Saves Dollars,” *Highlights of the American Bar Association Commission on Lawyer Assistance Programs*, Spring 2002; www.wisbar.org/AM/Template.cfm?Section=Substance_abuse_and_gambling.]

There are a number of lawyer assistance programs available to help attorneys battling alcoholism or substance abuse. And in South Carolina, our Rules of Professional Conduct are designed to encourage lawyers to use the resources when necessary. Specifically, Rule 8.3(d) provides that:

Inquiries or information received by the South Carolina Bar Lawyers Helping Lawyers Committee or an equivalent county bar association

³For a list of attorney assistance programs in each state, go to:
<http://www.abanet.org/legalservices/colap/lapdirectory.html>

committee regarding the need for treatment for alcohol, drug abuse or depression, or by the South Carolina Bar law office management assistance program or an equivalent county bar association program regarding a lawyer seeking program assistance, shall not be disclosed to the disciplinary authority without written permission of the lawyer receiving assistance. Any such inquiry or information shall enjoy the same confidence as information protected by the attorney-client privilege under applicable law.

Comment 5 to Rule 8.3(c) notes that “without such an exception [to reporting requirements], lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

Support services and programs include:

Lawyers Helping Lawyers (LHL)

www.scbars.org/member_resources/lawyers_helping_lawyers/lhl_members
1-866-545-9590

Lawyers Helping Lawyers provides programs and services to assist members of the legal profession in South Carolina who suffer from problems of substance abuse or depression that affect their professional and/or personal life. Members of the Lawyers Helping Lawyers Committee comprise a support network of recovering judges and lawyers who assist in carrying the recovery message.

LHL is a program of the South Carolina Bar that assists legal professionals with alcohol and drug problems and/or depression problems, providing referral services, peer support and monitoring services. In addition, LHL sponsors preventative services that include educational outreach; mailings and literature distribution; display ads in the various periodicals and media; and presentations to the judiciary, the University of South Carolina School of Law and various Bar groups. LHL also provides sponsorship of and curriculum for continuing legal education programs.

Pursuant to Rule 8.3(c) of the Rules of Professional Conduct, all inquiries, questions and conferences are privileged and held in the strictest confidence between the program and the lawyer.

Life Focus Counseling Services:
1-866-726-5252

Life Focus Counseling Services provides up to five free hours of intervention counseling for attorneys experiencing emotional or stress-related issues. The service is completely anonymous. Bar members can call to be referred to a counselor in their area, 24 hours a day.

Other Resources

There are two books that may be helpful resources: *A Lawyer's Guide to Healing: Solutions for Addiction and Depression*, by Don Carroll (Hazelden 2006); and *LawyerLife: Finding a Life and a Higher Calling in the Practice of Law*, by Carl Horn, III (ABA Publishing 2003). There are also a number of non-Bar related self-help fellowships and mental health resources, including:

- Alcoholics Anonymous: www.aa.org;
- Emotions Anonymous: www.emotionsanonymous.org
- Co-Dependents Anonymous: www.codependents.org
- Cocaine Anonymous: www.ca.org
- Gamblers Anonymous: www.gamblersanonymous.org
- Narcotics Anonymous: www.na.org
- Anxiety: www.adaa.org
- Depression: www.menanddepression.nimh.nih.gov

- Post-partum Depression: www.intellihealth.com
- Mayo Clinic: www.mayoclinic.com
- National Institute of Mental Health: www.nimh.nih.gov

Conclusion

“A Gem Cannot Be Polished Without Friction, Nor a Man Perfected Without Trials.”

-- Chinese Proverb

At some point in our careers, we will all face challenges and struggles – many of which, if not dealt with appropriately, present a variety of dangers to ourselves, our families and friends and our profession. However, there are numerous opportunities for all of us to learn from challenges, including our own and those of others. Guidelines exist that identify actions we can take to help fellow attorneys recognize, avoid and overcome the dangers of alcohol and substance abuse and prevent it from becoming a personal and professional crisis. As colleagues and friends, we have the obligation to do what we can to assist those who need our support and encouragement.