

# **Diminished Capacity of Professionals: Dealing with the Monsters We Pretend Do Not Exist**

## **Risk Management Perspective**

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### **Introduction**

- According to some Lawyer Assistance Programs, lawyers are nearly twice as likely to struggle with alcohol abuse, and three times as likely to suffer from depression when compared with other professionals in America. Further, we are all living and working longer than ever before. As the legal profession ages, lawyers, like the rest of the population, may suffer from cognitive decline. The Alzheimer Association reports that 5.7 million American are now living with the disease. Many of these problems, or their consequences, can be cured or addressed with early intervention or discovery. Colleagues may be in the best possible position to spot some of the potential early warning symptoms that other colleagues may be exhibiting from either substance abuse, depression or cognitive decline.

### **Case Study**

- An attorney in a small law firm was providing some assistance to one of the partners. The partner was representing multiple clients as plaintiffs in a civil action. The defendant corporation had extended significant offers to the firm's clients, including one client who had a motion for summary judgement pending against him. As trial approached, the corporate defendant withdrew all offers. The assisting attorney, while in the course of preparing a motion in limine, discovered that the file was not properly prepared for trial. Further investigation revealed that the partner had never extended the defense offers to the clients, and had failed to file a responsive pleading to the pending motion for summary judgment. It was too late to accept the settlement offers and a motion to continue the trial was denied. The firm reported the incident to its malpractice carrier, and provided notice to the clients, along with the recommendation to hire independent or other counsel. Independent counsel substituted into the case and was successful in continuing the trial. The firm ultimately discovered that the partner was suffering from an alcohol addiction. The partner is now receiving the assistance that he needs. The question is how was the partner able to hide his addiction for so long?

### **Indicators**

- Unfortunately, many attorneys who face substance abuse issues or experience cognitive decline are reluctant to seek help and/or may not understand that they need help. Further, attorneys are generally highly intelligent, strategic people who are very good at covering up mistakes and compensating. Therefore, it is important to recognize

potential signs and symptoms of addiction or cognitive decline that are impairing professional duties.

- Is the attorney consistently coming in late or unexpectedly failing to come into the office or missing meetings?
- Is the attorney missing deadlines?
- Is the attorney unprepared or uninformed when asked to discuss aspects of the file? Does he or she repeat things or seem unreasonably defensive or angry when asked to respond to questions.
- Are others in the office fielding calls from unhappy clients who claim the attorney is unresponsive or unprepared?

### **Risk management tips**

- It is very difficult to observe the aforementioned warning signs when attorneys work in silos. While these signs may seem obvious, colleagues will never observe these signs unless there is a framework developed wherein there is some level of interaction and oversight over each and every attorney. Everyone needs oversight. Junior (and sometimes senior) associates, paralegals or secretaries, who may assist on files may be too intimidated or inexperienced to second guess or report a partner even if they suspect that something is wrong.

Shared responsibility and an open door policy, however, can often mitigate or prevent errors and omissions caused by substance abuse, emotional issues or cognitive decline. Every partner in the firm should expect that his work will be reviewed by colleagues on a routine basis. Some firms schedule time for top to bottom file reviews. Other firms require a second set of eyes on filed motions and that two attorneys are held responsible for filing deadlines.

- All attorneys and staff should have access to a designated partner with whom to share concerns. There should also be an alternate partner if the designated partner turns out to be the problem. The selected attorney should be approachable, have a healthy dose of emotional intelligence, have a good relationship with the more junior members of the firm, and be willing to devote his or her time to these issues.
- The designated partner should also research how to address these issues and consider establishing a firm policy. Most states, including Illinois, have Lawyers Assistance Programs (LAP) that can assist in these situations. Most LAPs are free and confidential for an attorney seeking help with problems associated with diminished capacity or substance abuse.
- A weekly morning firm roundtable can also serve as a tool to spot substance abuse or cognitive impairment issues. An attorney who glosses over details, runs late, or who routinely misses meetings may possibly be struggling with substance abuse or cognitive issues. Moreover, the attorney could possibly be dealing with personal issues that are having an impact upon his professional duties.
- Lawyers that represent other practitioners should make it a habit of inquiring regarding whether they have started succession planning. A solo lawyer with an unexpected

medical emergency or decline in health could be jeopardizing his client's legal rights without such a plan. Solo attorneys should make certain that someone trusted knows how to access client trust accounts and operating accounts in an emergency in the attorneys absence. The diary system should be updated and transparent. All closed files should be clearly marked and there should be an updated list of all active clients with their contact information.

### **Ethical implications**

- Ethical rules compel lawyers to risk manage this issue. As not all jurisdictions have rules identical to the ABA Model Rules, it is always important to check your own jurisdiction's version of the ABA rule.
  - ✓ All lawyers have a duty to provide competent representation to clients. ABA Model Rule 1.1: Competence, reads "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Certainly a lawyer who is experiencing cognitive impairment or substance abuse or emotional issues will at some point risk violating the competency rule; the earlier the intervention, the better.

- ✓ ABA Model Rule 1.3: Diligence, requires that a lawyer act with "reasonable diligence and promptness in representing a client." Further, comment (5) to this rule provides as follows:

*To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).*

Too many, the majority according to some surveys, of solo lawyers have absolutely no succession plan, either for fear of exposing their clients to an associate or colleague, living in denial, or just lack of organization, motivation or time. Succession planning is imperative to provide clients with protection in the event of a sudden illness or injury as well as to start planning for the winding down of a practice.

- ✓ ABA Model Rule 1.16: Declining or Terminating Representation, requires a lawyer to decline to represent a client or withdraw from a matter if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."

While lawyers have an ethical duty to decline a representation if mentally or physically impaired, many simply do not follow this ethical rule. Consequently, it may fall to their peers to intervene under these circumstances.

- ✓ ABA Model Rule 5.1 Responsibilities of Partner or Supervisory Lawyer sets forth that "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".
- ✓ ABA Model Rule 8.3 Reporting Professional Misconduct, sets forth that "a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises substantial questions as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority". The Comments make an exception for information learned from clients and for information learned through an assistance program.

Cognitive, emotional and substance abuse problems do exist among lawyers. The worst approach is to pretend that they do not exist and ignore apparent problems. As both Model Rule 5.1 and Model Rule 8.3 make clear, lawyers have ethical duties relative to the conduct of other lawyers. Errors in handling client matters or neglect of such matters should be reported to the firm's leadership or another partner. Report possible claims to the firm's malpractice carrier and establish a plan to inform the clients of any material issues.

It is also important to try to obtain some assistance for the attorney, whether through the firm's health insurer or the state's Lawyers' Assistance Program. Ignoring the problem can only lead to harm to the firm's clients, to the firm and to the lawyer.