

## **Lawyer impairment should not be overlooked**

By Emily Eichenhorn

Experts opine that lawyers suffer from alcoholism, chemical dependency, depression and other psychological problems at higher rates than the general population. Various reasons are offered for this phenomenon, including the fact that lawyers frequently work with little or no supervision in highly stressful jobs. Sole practitioners, or lawyers working in slimly staffed satellite offices, often function in near isolation from colleagues. And all lawyers regularly take responsibility for the problems of others while also dealing with their own lives and concerns.

Lawyer impairment can be costly, not only for the affected lawyer, but for colleagues and clients as well. Addiction and mental illness can affect a person's mental agility, physical stamina and empathy for others – all important attributes for competent legal service. Nevertheless, the issue is frequently ignored in discussions of risk management, perhaps because it is uncomfortable and seems overwhelming. The wiser course of action, for the welfare of your colleagues, your firm, your clients and yourself, is to accept the possibility that this issue will arise and be prepared to handle the situation if it does.

One of the biggest challenges in trying to manage the risks raised by lawyer impairment is that, frequently, the problem goes undetected for a long time. As a result, a firm's first "warning" of the problem may be the discovery of serious malpractice that has already occurred. Thus, risk management may focus more on "triage" of the emergent situation than anything else. This does not mean that there can be no preventive risk management, however.

Periodic peer review of legal services, as well as regular review of lawyers' progress toward marketing goals, billing and recovery goals or other standards, is processes that can promote interaction among lawyers in a firm and raise the likelihood that impairment will be discovered and effectively addressed. Firms also can help ease isolation by making an effort to personally connect with lawyers in satellite offices on a regular basis through firm meetings, social gatherings or both. Mentoring programs help maintain face-to-face contact between lawyers in larger firms so that any individual is less likely to get lost in the shuffle. Sole practitioners can look to share office space or participate in professional organizations to maintain contact with other professionals and build a base of support. And all lawyers should make sure that younger, less-experienced attorneys are provided adequate supervision to help avoid problems that may come from being overwhelmed or overstressed by the job.

If impairment is found to be an issue in your firm, there are two primary concerns in dealing with the risks it presents. First is concern for the health

and well-being of the affected lawyer. Second is management of any malpractice problems the impairment may have created.

### **Dealing with the Lawyer**

if you suspect that a lawyer is suffering from mental illness or substance abuse, intervention is extremely important for that person's own health. Treatment, even when compelled, is frequently effective. It is important to remember that diagnosis and treatment should be left to professionals. Your actions should focus on making treatment resources available and convincing the lawyer to seek assistance.

While you can share information to support needed intervention, you should act to protect the affected lawyer's privacy to the fullest extent you can. If possible, confer with the affected lawyer about what information may be revealed and to whom. Persons who have a right or need to know of the lawyer's condition may include his partners or common shareholders, and courts in some instances. Associates, staff and clients rarely will require detailed information. To the extent that a client must be told of the transition to another attorney in the firm, a simple statement that the lawyer has taken "an extended medical leave," or that he "needed to take time off for personal reasons" ought to be sufficient in most instances. If a court requires details in a motion or other argument, try to be as circumspect as possible, and seek confidentiality agreements and in camera review.

A firm's ability to take certain action with respect to the impaired lawyer may be restricted by the firm's organizational structure or various contractual obligations. Firms organized as corporations may be subject to the Americans with Disabilities Act (ADA) or other employment discrimination laws. Review partnership or shareholder agreements or employment contracts and establish the full range of options available. Consider amending any documents now to avoid problems or confusion in the future. And recognize that, while organizational obligations may restrict some permanent solutions, they should not prevent you from taking immediate action to intervene on behalf of the lawyer's health and personal safety, or that of those the lawyer works with.

In many instances, an impaired lawyer may wish to return to work, and you may be required, by law or partnership agreement, to allow it. If this happens, understand that even if a lawyer successfully completes a treatment program and is given medical clearance to return to work, he may not have the same capacity as he did earlier. Expect a period of adjustment that may require a smaller caseload. Monitor the lawyer's work product, legal skills and client interactions very carefully after her return until both the lawyer and the firm are comfortable with the work situation. In such cases, a formal return-to-work agreement may be in order. Professional "last-chance" agreements can place the lawyer on notice that certain types of conduct will not be tolerated and can lead to dismissal. Such contracts are seen as particularly suitable in many addiction situations

because they provide job-related motivation to stay sober. They also generally have been found to be acceptable accommodations for disability. The document need not be complicated, but it should be specific and comprehensive. It can be used when the impairment is first discovered as a way of "forcing" the lawyer into initial treatment or as a way to define the lawyer's re-entry into the workforce.

### **Dealing with Malpractice**

Quick action in dealing with the lawyer's work files is as important to controlling professional liability losses as intervention is to the lawyer's health.

The first order of business is to determine immediately what files the lawyer currently is responsible for and where each matter stands. Designate one person to oversee the process, through whom all decisions and communications must flow. In this way you have a better chance of keeping track of all of the files; you are better able to present consistent information to courts, clients and co-workers and you are less likely to have something slip through the cracks.

Make a thorough search of every file, reviewing every piece of paper. For each matter, determine the last completed action and move forward from there. Examine everything in the lawyer's office: calendars, case management systems, computer files, billing records, time sheets and the piles on the desk and the floor. Check the lawyer's home as well. Leave no stone unturned, no drawer unopened. Stories are now legend of firms discovering file drawers filled with literally years of neglected files.

Reassign every pending file to another attorney. Even if you anticipate that the impaired attorney may return to work relatively soon or if it appears that there is no need for any immediate action on a particular file, give it to someone else. The firm needs to exercise complete control over all of the work at this point. If appropriate, the matter can be returned to the impaired lawyer at a later time. After you have gotten a handle on and reassigned all open files, review any files that the lawyer has closed in the last year or two. Clarify that all necessary work was in fact completed and handled properly. If necessary, reopen the matters and assign lawyers to clean up anything left undone.

As soon as possible after you have confronted the situation, contact your professional liability insurer for guidance as to how to proceed should you discover malpractice or the basis for potential claims. The insurer can help you sort through your disclosure obligations and, with assistance from claims counsel, determine the best strategy for dealing with clients and the courts. In some circumstances, the insurer may provide counsel to handle some of the open files in an attempt to mitigate any further damage.

Lawyers impaired by addiction or mental illness pose a risk to themselves, their colleagues and their clients. The connection between lawyer impairment

and professional liability is easy to discern but rarely addressed in most firms' risk management plans. Lawyers and firms should confront the discomfort and notions of propriety, privacy and fear associated with this issue — and prepare for the possibility so that they can best protect themselves and their clients.

**ABOUT The AUTHOR**

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