



This model policy has been developed by the Alabama Lawyer Assistance Program Committee. It is recommended to law firms desiring to implement a policy concerning impairment of its attorneys when they are representing clients and when engaged in other activities that reflect upon the law firm. The specifics of this model policy reflect the Committee's view of "best practices" for such a policy.

MODEL LAW FIRM POLICY REGARDING IMPAIRMENT OF ATTORNEYS

PREAMBLE

The Firm has adopted this Policy to ensure that our attorneys maintain themselves in a mental condition appropriate to representation of the Firm's clients, and in accordance with the Rules of Disciplinary Procedure of the Alabama State Bar. The Firm also expects its attorneys to conduct themselves at all times in a manner that reflects favorably on the Firm and that does not bring the lawyer, or vicariously the Firm, into disrepute.

The following provisions of the Alabama Rules of Professional Conduct inform and guide this Policy. It is essential that each of our attorneys be cognizant of and comply with them.

- (a) Rule 1.1: Competence. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." While this requirement involves competence in the broadest sense, this Firm recognizes that mental capacity and functionality are essential to compliance with ARPC Rule 1.1.
- (b) Rule 1.16(a): Impairment. "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules Of Professional Conduct or other law; [or] (2) the lawyer's *physical or mental condition materially impairs the lawyer's ability to represent the client.*" The Firm is of the opinion that "violation" of ARPC would include "conduct that adversely reflects on [a lawyer's] fitness to practice law," under ARPC Rule 8.4(d):
- (c) Rule 8.4: Professional Misconduct. "It is professional misconduct for a lawyer to: ... (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or *fitness as a lawyer* in other respects; ... [or] (g) engage in *any other conduct that adversely reflects on his fitness to practice law.*" The commentary to this Rule notes: "A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation."
- (d) Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer.
 - "(a) A partner 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*: (1) the lawyer orders or, with knowledge of the specific conduct, *ratifies* the conduct involved; or (2) the lawyer is a partner 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*.¹

- (e) Rule 8.3: Reporting Professional Misconduct. (a) "A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." The Comment to Rule 8.3 notes: "An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."

VIOLATIONS OF THIS POLICY WILL NOT BE TOLERATED. This Policy is intended to promote professional responsibility and high quality legal work for our clients, and to minimize risks to the Firm and the impact of improper conduct. All of the Firm's attorneys shall be subject to sanctions by the Firm for violations, which may include monetary penalties, indemnity of the Firm against monetary consequences of an attorney's improper conduct, termination of employment or expulsion from the Firm, and any other actions deemed appropriate by the Executive Committee. As a condition to continued employment and/or membership, the Firm may require work restrictions and ameliorative action deemed appropriate by the Executive Committee.

POLICY

1. Prohibition on Practice When Impaired. Firm attorneys shall not practice law or provide legal services for a client while mentally impaired. "Impairment" is a mental condition that materially and adversely affects the attorney's judgment, memory or reactions, or the attorney's ability to perform legal services to the customary and highest standard expected by the Firm. Examples of impairment include, *inter alia*:
 - a. Being under the influence of alcohol, drugs or any mood-altering substance to the extent that it results in a noticeable impairment of judgment, memory or reaction. Such influence may occur at levels significantly below those required for violations of traffic any similar laws. Such influence also includes the states of withdrawal following use of such substances, including a hangover.
 - b. A lawyer shall be considered impaired if the lawyer is consuming alcohol, drugs or any mood-altering substance when the lawyer has been diagnosed, or may reasonably be expected to be diagnosed, with chemical dependency disorder recognized by prevailing psychiatric professional standards. Persons with a chemical dependency

¹ The official commentary to ARPC Rule 5.1, cautions that "[A] lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules."

disorder will not be considered to be impaired if they are abstinent from alcohol, drugs or any mood-altering substance (except as prescribed by a physician) and are participating in a recovery program supportive of continued abstinence.

- c. Having a mental illness, such as depression, bipolar disorder or dementia, to the extent that the symptoms of the illness result in a noticeable impairment of judgment, memory or reaction.
 - d. A medical condition, such as stroke or head trauma, that results in cognitive impairment impacting judgment, memory or reaction.
2. Health Care. The firm encourages all lawyers to have physical examinations and other appropriate health care checkups on a regular basis.
3. Obligation of Firm to Act. If the Firm becomes aware that any Firm attorney is impaired or at risk of becoming impaired, or has provided legal services when impaired, it will immediately take appropriate measures to aid the impaired lawyer and to protect our clients and the Firm.
4. Reporting of Behavior Evidencing Impairment. Any lawyer or any Firm employee who believes he or she has a reasonable basis for suspecting a firm lawyer may be impaired in his or her ability to practice law for any reason should immediately report his or her concerns to any of (i) the appropriate practice group leader or department head, (ii) the Firm's loss prevention partner, or (iii) to any member of the Firm's Executive Committee. All such communications will be treated as confidential to the extent feasible, consistent with the Firm's duty to protect its clients and comply with the Rules of Professional Conduct and other legal duties. Upon learning of a possible impairment situation, the Firm shall immediately investigate the circumstances and take whatever action is deemed necessary.
5. Retaliation Prohibited. Reports made in good faith under this policy will not result in any adverse action against the person making the report. No person who participates in good faith in investigating a report will be treated adversely because of that participation. Retaliation is a serious violation of this policy, and any concern about retaliation should be reported immediately. Any report of retaliation shall be investigated and appropriate action taken. Any person found to have retaliated against an individual for reporting a possible impairment or for participating in an investigation of such a report will be subject to appropriate disciplinary action.
6. Impaired Attorneys. Any lawyer who suspects that he or she is impaired or at risk of becoming impaired is encouraged to contact any of (i) the appropriate practice group leader or department head, (ii) the Firm's loss prevention partner, or (iii) to any member of the Firm's Executive Committee. The Firm has information regarding treatment options and facilities for various types of impairments, and, to the extent possible, will provide such information and other appropriate assistance on a confidential basis to the lawyer seeking assistance. Any such lawyer is also encouraged to use the programs described below.
 - a. Alabama Lawyer Assistance Program. The Alabama State Bar maintains the Alabama Lawyer Assistance Program (ALAP), which provides counseling and other forms of assistance for some types of lawyer impairment problems. Any lawyer who needs assistance with an impairment problem is encouraged to contact ALAP [at

(334) 834-7576 or on its 24-hour hotline (334) 224-6920] or a member of the Bar's ALAP Committee [information on the Bar's ALAP webpage]. All communications between a lawyer and ALAP, or an ALAP Committee member, are strictly confidential.

- b. *[If appropriate: Health Insurance Component. The Firm offers, as part of its employer sponsored health insurance, extended psychiatric benefits. Use of the designated care providers under this insurance program is strictly confidential and no identifying information about any patient is provided to the Firm. These benefits include counseling, treatment and other types of assistance for many impairment problems. Anyone concerned about substance or alcohol use or other mental impairment issues is encouraged to contact a designated care provider of this benefit, who are identified by our health insurance carrier.]*

7. Return to Work Agreements. If the Firm determines that a Firm attorney is impaired or at risk of becoming impaired, or has provided legal services when impaired, due to a chemical dependency disorder, one of the appropriate measures the Firm may take to aid the impaired lawyer and to protect our clients and the Firm may be a Return to Work Agreement with the attorney. The Agreement may be tailored to the specific situation; however, elements of such an Agreement shall include:

- a. Acknowledgement of the conduct and/or behavior subject to review.
- b. If appropriate, acknowledgement that the attorney's actions provide a basis for the termination of employment and/or association with the Firm, and that the agreement is a condition to withhold such action.
- c. Evaluation by a health care professional of the Firm's selection, and a commitment to continuing care of health care professionals, if recommended.
- d. A commitment to follow all recommendations of the evaluating professional for treatment or additional evaluation, including, without limitation, entry into a residential treatment program; and a commitment to follow all treatment recommendations of subsequent health care professionals monitoring care and approved by the Firm.
- e. The attorney's responsibility for all costs associated with the agreement.
- f. The Firm's receipt of regular progress reports during treatment and any recommended after-care program.
- g. Abstention from all mood-altering substances except as prescribed by a licensed physician who is aware of the attorney's history and who has reviewed the prescription in advance with the attorney's substance abuse counselors.
- h. Regular attendance at required or recommended 12-step programs.
- i. Periodic random drug and alcohol testing for 2 years.

ADDITIONAL PROVISIONS FOR CONSIDERATION:

8. Obligation of Attorneys to Report. All attorneys shall have the obligation to report any incident in which any Firm attorney has been arrested or charged with driving while under

the influence, public intoxication or similar alcohol/drug-related offenses. All attorneys shall have the obligation to report any incident in which any Firm attorney has been arrested or charged with any crime involving possession or sale of any illegal substance.

9. Reasonable Suspicion Testing. Testing for drugs and/or alcohol shall be required when it is believed that a Firm attorney is using or has used drugs or alcohol in violation of this Policy. Such belief shall be based upon specific, articulated facts and reasonable inferences as they appear to the Firms Executive Committee. An attorney may be disciplined for refusal to submit to or cooperate with such testing.