

APPENDIX W

INTERRUPTION OF A PRACTICE DUE TO A LAWYER'S ALCOHOLISM OR OTHER DRUG ADDICTION

The professional continuity of a law practice, whether it be the practice of a sole practitioner or a law partnership, can be interrupted by an attorney's alcoholism or drug addiction and/or subsequent treatment for the same. Anecdotal evidence suggests that perhaps as high as eighteen percent of lawyers may find themselves faced with personal issues of alcoholism or drug abuse sometime during their careers and that more than fifty percent of serious cases of attorney misconduct have alcoholism or drug addiction at their root.

In 1977 the New York State Bar Association formed the Committee on Lawyer Alcoholism and Drug Addiction in an effort to address this serious problem head on. Since that time, eleven local bar association committees have been formed to assist statewide efforts in the identification and treatment of members of the bar so afflicted. Most of the bar associations which have formal programs also provide resources and referrals for problems related to mental illness, particularly depression. A list of the bar associations having such committees, as well as contact phone numbers for each, can be found at the end of this exhibit.

In 2001, the New York State Court of Appeals created the Lawyers Assistance Trust. The Trust provides statewide leadership and financial assistance to programs for treatment and prevention of alcohol and substance dependency in the legal community. Its goals include encouragement of the development of new Lawyers Assistance programs to educate lawyers, judges and their staffs about alcoholism and substance abuse and their effect on the legal profession, support of existing programs and sponsorship of research in the field. The Trust is funded through attorney registration fees.

In 1992, the New York State Legislature passed section 499 of the Judiciary Law which provides that the confidential relations and communication between a member or authorized agent of a Lawyer Assistance Committee sponsored by a State or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents, shall be deemed to be privileged under the same basis as those provided by law between an attorney and client, and that such privilege may be waived only by the person, firm or corporation which has furnished information to the committee. In addition, the law provides that any person, firm or corporation in good faith providing information to, or in any other way participating in the affairs of a Lawyer Assistance Committee shall be immune from civil liability that might otherwise result by reason of such conduct.

Related to the provisions of Judiciary Law section 499 is DR 1-103(A) of the New York Lawyers Code of Professional Responsibility which provides that: "A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 that raises a substantial question as to another's lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." Thus, the statute and the Code provide members and agents of Lawyers Assistance Committees with highly valuable tools in assisting persons who contact the Committees either on their own or on behalf of another person. Any referring person knows that unless he or she agrees, the matters discussed with Committee representatives may not be disclosed to anyone who is not a committee member or one of its agents and are strictly confidential.

Concern about alcoholism or other drug addiction within a law firm creates a tension between the responsibility to protect clients' rights, the firm's reputation and a lawyer's wellness on the one hand and the fear of violating a colleague's rights under the Americans Under Disabilities Act, standards relating to confidentiality and fear of destruction of personal relationships on the other.

An excellent article by Paula A. Barran, Esq., a lawyer in the Oregon law firm of Barran Leibman LLP, follows this exhibit and clearly sets forth: (1) the importance of defining the relationship of a lawyer within the firm, (2) the principal employment and disability laws involved, (3) a summary of signs of substance abuse and related impairment, (4) methods of obtaining and protecting medical information, (5) suggestions for covering the ongoing work of an impaired attorney and what to tell clients, (6) suggestions regarding payment for the cost of treatment, and (7) a proposed "last chance" agreement to be considered by the impaired attorney and members of his/her firm. Ms. Barran also addresses important issues relating to re-entry of the attorney after treatment and dealing with resentment and mistrust among colleagues within the firm as a result of the lawyer's impairment.

It is the sincere hope of the NYSBA Committee on Professional Continuity that the article by Ms. Barran will provide insight and guidance to co-workers and friends of an impaired lawyer in their efforts to assist in the rehabilitation of the lawyer while protecting the rights of the lawyer's clients.

Bar Association Resources

Lawyers Assistance Trust
*Barbara F. Smith, Executive
Director*
518-285-4545

Bar Association of Erie County
Lawyers Helping Lawyers Committee
Kathie S. Bifaro, Contact Person
716-852-8687

New York State Bar Association
Lawyer Assistance Program
800-255-0569

Monroe County Bar Association
Lawyers Concerned for Lawyers Committee
John Crowe, Contact Person
585-234-1950

The Association of the Bar
of the City of New York
*Eileen Travis, Director of the Lawyer
Assistance Program*
212-302-5787

Nassau County Bar Association
Lawyer Assistance Program Committee
Carol Hoffman, Esq., Contact Person
516-746-8000

Brooklyn (Kings County) Bar Association
Lawyers Helping Lawyers Committee
Sally Krauss, Contact Person
718-643-3700

New York County Lawyer's Association
Committee on Substance Abuse
Andy Bratton, Contact Person
212-401-0748

Queens County Bar Association
Committee on Alcohol and Substance Abuse
David Dorfman, Contact Person
917-256-0355

Oneida County Bar Association
Lawyer Assistance Committee
Tim Foley, Contact Person
315-733-7549

Schenectady County Bar Association
Lawyer Assistance Program Committee
Vincent Reilly, Contact Person
518-388-4350

Onondaga County Bar Association
Lawyer to Lawyer Committee
Ken Ackerman, Contact Person
315-233-8203
Noreen Shea, Contact Person
315-476-3101

Suffolk County Bar Association
Committee on Alcohol and Substance Abuse
Richard Reid, Contact Person
631-697-2499

Westchester County Bar Association
Committee on Alcohol and Substance Abuse
John Keegan, Jr., Contact Person
914-949-7227

Impaired Attorneys: The Firm As Employer

Paula A. Barran

Barran Liebman LLP
601 SW Second Avenue, Suite 2300
Portland, Oregon 97204-3159
Phone: (503) 228-0500
Fax: (503) 274-1212
www.barran.com

INTRODUCTION

Dealing with the disease is hard enough, but law firms confronting professional impairment have additional problems. Practice within a firm is carried out in the context of loosely structured professional relationships with ill-defined hierarchies, and except in their early years of practice, lawyers work with little or no supervision. There are few objective measures of work product; “good” is subjective. Firms are structured with a lot of thought to the professional and economic parts of life – defining what kind of practice (full service boutique, something else), size (small, medium, supersized), and how to pay the partners. But little thought is given to establishing disciplinary procedures. There may not even be someone in charge with authority to discipline.

Toss in the idea of collegiality, which is one of those important rules of the road that help organizations endure. But collegiality, so important when you’re having a fight about money, is a barrier to the kind of confrontation that impairment may require. It isn’t my job, my role, or even my right to challenge my colleague about the problem. Professional lives are stressful enough. It is not difficult to find excuses for inappropriate conduct or lawyer negligence. There but for fortune . . . And if I do, am I possibly pushing the firm into the murky area of professional liability for malpractice. It isn’t surprising that lawyers circle their wagons.

All of these behaviors can be downright enabling.

The consequences of ignoring impairment include malpractice, loss of client confidence, and even the departures of qualified staff and colleagues. These can be dire. But there are equally dire consequences to blundering into a problem, ignoring laws and violating confidences and privacy. There are some rules.

DEFINING THE RELATIONSHIP

You cannot make proper decisions about how to confront and manage impairment until you understand the nature of the relationship between the lawyer and the organization (which, for want of a better term, is probably “the firm”). If the relationship is employer-employee, there will be extensive regulation to worry about. If the relationship is that of independent contractor, there will be little regulation. If the relationship is that of partner to the firm, or partner to other partners, the principal concerns will be fiduciary duty and the partnership agreement. All that means a necessary first task is to define the relationship, because the nature of the relationship sets the rules.

Defining the relationship used to be easy. There were employees, and there were partners. In an unusual case there might be a sole proprietor or an independent contractor. Today there are new organizational forms, and lawyers generally make their selection of firm structure for tax advantages. Whether or not the form might require partners to become employees is rarely an important consideration, except where mandatory retirement rules are big issues (and then, employer-employee form is a real problem). Whether the organizational form requires something more than pro forma shareholder meetings is also rarely a consideration. A law firm now can be a general partnership, a limited partnership, a limited liability partnership, a limited liability corporation, and the people who work in the firm can be general partners, limited partners, shareholders, employees, employers, and can have a bewildering combination of attributes that defies pigeonholing.

On April 22, 2003, the U.S. Supreme Court issued its decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 123 S.Ct. 1673 (2003). The opinion outlines the mode of analyzing a lawyer’s relationship to the firm to decide an important question or two. Employer or employee? Owner or worker? Partner? Knowing the status of the lawyer is critical for application of a host of federal and state labor and employ-

ment laws, so *Clackamas Gastroenterology* provides important advice. At issue in the case was whether the medical clinic, which was set up as a professional corporation, was covered by the federal Americans With Disabilities Act, 42 U.S.C. § 12101 et seq. That law is inapplicable to very small businesses; it does not cover an employer unless the employer's work force includes 15 or more employees over certain defined times.

The question arose because this clinic had four employee physicians who were actively engaged in the medical practice as shareholders and directors. Because the clinic was set up as a professional corporation, the physicians were formally shareholders who had employment contracts with the clinic and so were nominally employees. That very status made an easy and attractive argument for the terminated employee who wished to sue under federal law. She contended that the physicians could not have it both ways, that they could not establish a corporate status to reap tax advantages and limit civil liability, and yet at the same time claim the physician shareholders were partners for purposes of employment law. If the court counted the shareholders as employees, the clinic met the threshold for application of federal law.

The Supreme Court recognized that "we are dealing with a new type of business entity that has no exact precedent in the common law" with state statutes permitting incorporation for the purpose of practicing a profession. In the past the learned professions were not permitted to organize as corporate entities. Since professional corporations are "relatively young participants in the market" with features that vary from state to state, there had been little, if any, true guidance on just how to define and evaluate the relationship of professionals to the organization. That is what the court set out to do in *Clackamas Gastroenterology*, noting that the resolution of any legal issue depends upon understanding whether the professional is an employee or an owner. That analysis, in turn, requires a thorough understanding of the details of how the professional interacts with the organization. Here are the necessary questions:

- Can the organization hire or fire the individual or set rules and regulations for the individual's work?
- Does the organization supervise the individual's work, and to what extent?
- Does the individual report to someone higher in the organization?
- To what extent is the individual able to influence the activities of the organization? Act like a boss? An owner?
- What is the nature of the parties' agreement as to status?
- Does the individual share in the profits, losses and liabilities of the organization?

An employer is the person or group of persons who owns and manages the enterprise, can hire and fire, can assign tasks and supervise performance and decide how the profits and losses of the business are to be distributed. The fact that such a person has a title (even shareholder or employee) does not determine whether that person is an employee or a proprietor. The Court emphasized that no one factor is controlling, that even the existence of a document called "employment agreement" does not lead inexorably to the conclusion that a party is an employee, and that the answer to the question of status "depends on all of the incidents of the relationship with no one factor being decisive." The test is all about the substance of the relationship, not what it looks like on its surface.

That means that if the lawyer in a professional corporation has a status functionally equivalent to partnership, the form of the organization does not control. In such a case, partnership law applies. If the lawyer has a status within the firm that permits him or her to influence decision-making and keep a share in profits, losses and liabilities, those factors point to something akin to a partner and partnership law applies. If, in contrast, the lawyer can be terminated or disciplined, works under set rules and regulations, reports to and is supervised by the firm, employment law probably applies because those factors point to employee status.

PARTNERSHIP

If the relationship is not employer-employee but a partnership relationship, the statutory protections do not apply but activities will be governed by the murkier provisions of the common law, including the fiduciary duties extended within partnerships, as well as common law privacy protections.

Theories arising out of the breach of fiduciary duty can be asserted if a partner is disciplined or expelled. Because most of the reported case law turns on the laws of individual states and the provisions of the partnership agreement, they are somewhat limited in precedential value. See, for example, *Cadwalader, Wickersham & Taft v. Beasley*, 728 So.2d 253 (1998) (applying New York partnership law that partners have no common law or statutory right to expel or dismiss another partner, but may provide in the partnership agreement for expulsion under prescribed conditions “which must be strictly applied”); *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (1998) (applying Texas law, holding that the relationship between partners is fiduciary in character and imposes an obligation of loyalty and utmost good faith, fairness and honesty, but concluding “a partnership exists solely because the partners choose to place personal confidence and trust in one another”); and see, *Heller v. Pillsbury, Madison & Sutro*, 50 Cal.App.4th 1367 (1996) (finding no breach of fiduciary duty in expulsion by executive committee of partner who behaved inappropriately where partnership agreement authorized executive committee to do so).

PRINCIPAL EMPLOYMENT LAWS

Assuming the impaired lawyer holds employee status (as compared to partnership status or something else), two sets of statutes are most important in that they regulate and define the manner in which the organization can confront and address the impaired lawyer.

The federal Americans With Disabilities Act, 42 U.S.C. § 12101 et seq., prohibits discrimination on the basis of disability, which is broadly defined to include a mental or physical condition which substantially limits a major life activity, the existence of a record of a disability, or the perception of a disability. The law also sets certain confidentiality standards and requires accommodation of protected disabilities, but also provides some level of freedom in addressing drug-related dependency. Alcohol-related dependencies fall into a different category altogether, something that firms must always remember in addressing issues under this law.

In addition to the federal law, virtually every state has a separate state statute providing similar, although not necessarily identical, protections. The potential for supplemental state regulation was recognized under federal law. 42 U.S.C. § 12201 provides: “Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.” In other words, federal and state law both apply and an employee is entitled to the benefit of the law which offers the greatest protection.

The second group of statutes that are important in addressing impairment of employees are those laws providing protected leave for serious health conditions. The federal law is the Family Medical Leave Act, 29 U.S.C. §§ 2601 et seq. This statute requires employers (those who employ 50 or more employees) to grant 12 weeks leave during any 12-month period for a variety of conditions, including the employee's own "serious health condition." This is another of those federal laws that establishes a level of protection as a floor, but permits greater protection in individual states. 29 U.S.C. § 2651 provides: "Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act."

As is the case with disability protections, a number of states have passed their own laws establishing various periods of protected leave for a variety of conditions, and often applying the requirements to smaller employers. Once again, the leave laws must be evaluated on both a federal and state basis to determine what protection, if any, the employee is entitled to. The leave laws can be important for two reasons. First, they guarantee a protected leave from work for a set period of time. Second, they provide for some level of reinstatement or reemployment. The most protective of the laws require an employee to be returned after leave to the same position of employment with the same benefits, the same responsibilities, the same duties, and perhaps even the same client base.

DISABILITY PROTECTIONS

Title I of the ADA governs employment, regulates the conduct of employers, and places some limits on what employers can do in the employment, management, and terms and conditions of employment for employees who have disabilities. Because the definition of disability is so broad (any physical or mental condition which substantially limits a major life activity), substance abuse impairments meet, at least, the statutory definition. The potential protection of drug-related misconduct was a controversial issue during the debates over ADA; as a consequence, the statute provides only limited protections for drug-related activity.

The statute prohibits employers from making certain disability-related inquiries until there has been a conditional offer of employment. If you ask an applicant how much he or she drinks, you may be asking a medical question because the answer may be diagnostic. Ask whether the applicant has ever been treated for drug addiction and you may end up in ADA-land.⁴

Once a conditional offer of employment has been made, you are free to make those inquiries, and to make them as broadly as you like (provided they are made for every employee being considered for the same class of jobs). Once the employee is hired, however, the window of opportunity slams shut.

After employment has started, only limited disability-related inquiries may be made and they must be "consistent with business necessity." The restriction on disability-related inquiries during employment (where they are limited to inquiries consistent with business necessity) also limits the ability of employers to inquire into potential substance abuse problems. Before asking, you will always need to test yourself: is this an inquiry that is "consistent with business necessity"? Is it an inquiry that can be justified because the answer matters to the firm?

Because drug abuse (as compared to alcohol abuse) typically implicates illegal activity, the statute draws a marked distinction between abuse of drugs and abuse of alcohol.

4. The EEOC has a helpful guidance on permissible pre-employment inquiries at www.eeoc.gov.

“Drugs” are defined as controlled substances, with reference to the Federal Controlled Substances Act. The “illegal use of drugs” is unprotected; if use of drugs would be illegal under the Controlled Substances Act, it remains unprotected under the Americans with Disabilities Act. An exception exists under the law for drugs which are used under the supervision of a healthcare professional or as otherwise authorized by federal law.

There is an uneasy treatment of marijuana, which is authorized under the laws of some states for certain medical conditions, but remains illegal under federal law. Employers are generally free to follow the mandates of federal law, most state laws relating to the medical use of marijuana are limited in what they permit and generally excuse users from state criminal laws. Some employers want to ban it entirely. Other employers want to permit marijuana for recognized therapeutic purposes. Those are permissible legal choices up to a point; most firms don’t particularly want to be seen as flaunting federal law, so an uncomfortable “don’t ask don’t tell” attitude might be the result.

An employee who is “currently engaging in the illegal use of drugs” has no protection under federal law, as long as the employer acts on the basis of the illegal drug use. At issue, however, is whether the employee’s drug use is “current.” There is some circularity in the legal definition of “current” drug use. Current drug use is drug use that is current. It is a fact-based inquiry. An individual’s drug use is “current” if the facts suggest that ongoing drug use may continue to be a problem, even though the employee is not actively using, and even though the employee may not have drugs in his/her system at the time of the employer’s disciplinary decision.

The structure of the statute is intended to encourage rehabilitation. Employees who have used or are using illegal drugs can regain the protection of the statute through rehabilitation. The successful completion of a supervised rehabilitation program, together with ceasing the illegal use of drugs restores the protection of the law. Employees can achieve rehabilitation in other ways, including participating in a supervised rehabilitation program (as compared to completing the program) so long as the illegal use of drugs stops. The law also recognizes “being otherwise” rehabilitated. That can include, for example, participation in a 12-step program or voluntary activities, so long as the illegal use of drugs ceases and so long as there have been sufficient rehabilitative activities to make it reasonable to conclude that the illegal drug use has stopped.

Under the ADA, employers have a statutory right to control employee drug use including prohibiting the illegal use of drugs in the workplace, requiring employees to remain in compliance with other statutes such as the Drug Free Workplace Act, holding employees to the same qualification standards as non-users, complying with administrative requirements which may mandate drug testing in certain occupations, and requiring employees to submit to drug tests.

Some state statutes place limits on employer rights to conduct drug testing. Federal law is generally silent (except for those situations in which testing is mandatory — drivers, pipeline workers, train operators, coast guard, defense contractors).

Employers also have the right to prohibit alcohol use at the workplace, to require employees not to be under the influence of alcohol in connection with their work, to require employees to meet job and behavior standards regardless of alcoholism or alcohol-related conditions and to require compliance with federal standards such as Department of Transportation testing regulations.

The disparity in treatment between alcohol and illegal drugs creates employment-related issues. Although an employer can, in most circumstances, prohibit the illegal use of drugs even if off work (as long as there is some job-related connection), the same is not true with the use of alcohol.

Employers may require employees to submit to drug testing. It is not a medical examination according to federal law, and therefore can be administered without “cause” or suspicion of drug-related impairment. Alcohol tests are different and employers do not have the same right to test for alcohol. Any alcohol-related testing must be preceded by cause or suspicion of alcohol-related impairment. In the language of drug and alcohol testing, drug tests can be administered on a random basis under federal law; alcohol tests cannot be administered on a random basis.

SIGNS OF SUBSTANCE RELATED IMPAIRMENT

Substance abuse leads to behavior problems, performance problems, or both. However, all employers need to proceed cautiously because a performance problem or a behavioral problem is not necessarily linked to a drug-related dependency or alcohol problem. Other concerns, some of them protected disabilities, could also be the cause. For example, a performance problem could be caused by personal problems at home, concerns about serious health conditions of family members, mental impairments, clinical depression, stress, fatigue, burnout, or overwork, and a host of conditions or circumstances. Many of these are protected by various state and federal laws and it is far too easy for an employer to blunder in a situation and mishandle it by making assumptions about the cause of the problem.

A cautious approach would include some, perhaps all, of the following steps:

- Establish and maintain institutional standards so that behavioral and performance problems are identified at an early opportunity.
- Identify specific performance or behavioral problems such as erratic work hours, substandard performance, observations of intoxication or impairment, unacceptable or unprofessional behavior.
- Confront the lawyer with factual information and observations, and provide an opportunity for explanation or a request for assistance.
- If appropriate, request an evaluation by a healthcare professional to determine whether there is a medical problem and, if so, what course of treatment is recommended.
- Impose appropriate requirements, including a “last chance” or “return to work” agreement.

OBTAINING AND PROTECTING MEDICAL INFORMATION

Any time a firm requires a lawyer, employee or otherwise, to participate in a medical evaluation, any communication between the firm and the healthcare professional should be preceded by a specific written authorization. The law on the content of such an authorization varies from state to state, but typically an authorization should include the description of information which is to be used or disclosed, authorization to the healthcare professional, identification of the person to whom disclosure may be made, a description of the purpose for which disclosure is authorized, some expiration date, and obviously the lawyer/patient’s signature and date of authorization. It bears emphasis that any communication with a healthcare provider should remain strictly within the boundaries of the authorization. Repeat after me: I will not talk to doctors without a written authorization.

Regardless of whether the individual lawyer is an employee covered by the ADA or has a different status, any medical information should be retained in strictest confidence. The ADA requires medical records to be stored in separate locked cabinets and separated from personnel records, and limits the persons who may have access to those records. Even if that law does not apply, however, most states recognize a right of privacy to confidential medical information. That means, at a minimum, that the persons within the firm who are aware of the medical information or medical records must restrict dissemination absent the consent of the lawyer.

COVERING THE WORK

Client needs don't stop when a lawyer's practice is interrupted for treatment, and somebody needs to take care of those needs if there are to be any clients to come back to. Managing re-entry to the practice starts with planning to cover client needs during treatment. You may be doing this in crisis mode, but some time to plan will pay dividends.

- **What's pending?** Have somebody go through all pending matters and sort out the work so that you can identify immediate needs, near-term problems, and those matters that can wait. How you accomplish this will depend on what sort of system the lawyer uses. Check calendars, look through files, check documents on computers, and talk to clerical staff. Maybe the lawyer can prepare a list to start with, and if you're really lucky you may be able to get a briefing memo on major matters. And don't forget the invaluable assistance of the secretary or assistant who has been keeping the practice running. While you're at it, you might have some great ideas about reorganizing your own calendaring system; that can probably wait a few days, but don't lose track of the thought.
- **Who's going to do it?** Once you have a list, get matters reassigned as quickly as possible. Obvious deadline work is the place to start, but don't forget that large complicated matters need some advance warning too. It might be practical to get everything passed out in one awful meeting. Then everybody in the firm can feel terrible for an afternoon before they get down to work. While you're pondering reassignments, consider whether you may be able to reassign work in a way that will protect the practice for the lawyer. That maybe particularly important in organizations with a high degree of internal competition.
- **Should I get extensions?** Getting extensions sounds like it might solve some of the interim problems, but delaying the work may be a bad move. A month's worth of mail stacked up, clients clamoring for attention, and major messes to clean up aren't good for anybody. See if you can get the most critical work covered in the lawyer's absence.
- **What do I tell the clients?** In general, clients do not belong to that class of people who have a need or a right to know the nature of the problem. They do, however, have a right to know that their lawyer is not going to be around for a while and not going to be handling a particular matter, and they might have strong feelings about reassignment. Before you say anything to clients, see what the lawyer wants you to say. You might be able to agree on wording that communicates the need for the absence, without damaging the lawyer's client relationships in the bargain. If you can't reach some agreement, you still have to tell the clients something. Consider explaining that the lawyer is on leave or on medical leave. It is very good form to ask a client whether a particular reassignment is acceptable.

CONFIDENTIALITY

The staff may know a lot more than you want, but you still need to think about what you are going to announce internally. There isn't an easy answer for all categories, but there are some guidelines that can help work through the gray area between confidentiality and notice.

Philosophically, honesty is great. But substance abuse treatment is a confidential matter. Information about treatment should be shared only with consent or on a need to know basis. If there is an employment relationship, it may be the type of medical information protected by the law. Outside of an employment relationship, there may be civil privacy protections prohibiting the disclosure of private facts.

The first place to look for a resolution is the lawyer. Ask for input. You may be able to work out an acceptable internal statement, and you'll never know unless you ask. It may be, however, that the lawyer does not want to start treatment with a fanfare. If you can't agree on a statement, you may still need to notify personnel. If that happens to you, separate people into categories. You will have some who have a clear right to know (partners, for example). You will have others who have little or no right to know. And you will have others somewhere in between (the receptionist, the librarian, the mail room). Tailor your announcements accordingly, but remember to caution them not to gossip or contribute to the rumor mill. That is particularly important with the group that may be getting some detailed information. You don't want them spreading it around after you took such pains to tailor your own announcements. You might want to avoid notifying people in writing, unless you are using a prepared statement. Memos have a way of missing the shredder and finding the light of day someplace you didn't want them to be.

A caution is probably in order here. Lawyers entering treatment often do so having skated the surface of malpractice. As you assign out work, you may want to suggest the file be reviewed for errors or problems. That suggestion might require a bit of explanation. That category of person probably falls neatly into the "need to know" category, so don't worry too much about explaining what the problem is, as long as you follow up with the threat that they will get warts all over their bodies if they breach confidentiality. It usually works (the threats, not the warts). The final caution, to the extent that any notification is made, consider whether you want to make it orally rather than in writing. Confidential memoranda often are not, and may find their way into the hands of people who will spread the news.

WHO PAYS FOR ALL THIS?

The cost of treatment is normally the lawyer's responsibility, regardless of status. That does not mean that you are prohibited from contributing, paying the bill, or loaning money for treatment. Keep a few guidelines in mind as you consider expense issues, however.

- If you are going to pay this time, consider whether you are setting a precedent that you might feel compelled to follow with others. Would you have to? Perhaps, particularly if you are dealing with employees. If you pay a male's treatment costs, you should think twice before deciding not to pay a female's treatment costs. If you pay this year, how will you explain next year's decision not to pay?
- It is permissible to contribute to the cost of treatment in different ways depending on status. For example, you could choose to have the firm pay for a partner but not an employee.
- It is probably more common to loan money for treatment, and set up some repayment plan. If you elect to do so, you should consider having the lawyer sign a repayment agreement and a promissory note. Most states have laws about payroll deductions, so check your state before you draft an unenforceable payroll deduction agreement.

CAN WE VISIT OR SEND CARDS AND LETTERS?

Sure, unless the lawyer does not want to hear from you. Or unless you don't have authorization to share any information. Don't assume that well-intentioned contacts will be appreciated.

IS OUTPLACEMENT BETTER THAN REENTRY?

Don't automatically assume that reentry to the same practice is the best thing to do. It may not be. There may be situations in which the relationship is so fractured that treatment should be followed by outplacement into another job or career. That may be particularly appropriate if there is no work to return to.

Keep this in mind, however, when you are dealing with the lawyer who is an employee. If the organization is large enough to fall under the federal Family and Medical Leave Act, substance abuse treatment is medical care for a serious health condition, and employers are required to hold the job open. Your state may have equivalent state laws.

Partnership and shareholder agreements may also determine whether outplacement is a choice that can be imposed on the lawyer. If outplacement seems like a better idea, you might do well to involve the treatment counselors. You may unwittingly interfere with the treatment program by making a sudden unexpected change like telling the lawyer there may be no job to return to.

LAST CHANCE AGREEMENTS

In business, employers generally require employees returning from treatment to execute a "last chance agreement" or "return to work agreement." These agreements can be a constructive part of recovery. They provide job-related motivation and outline job-related responsibilities which relate to treatment and recovery. Although they vary from workplace to workplace, most include the following elements:

- Verification that the employee is participating in a treatment program (be careful not to require too much information);
- A commitment to remain drug and alcohol⁵ free;
- An acknowledgement that the lawyer is committed to adhere to requisite standards of behavior;
- Drug or alcohol testing if appropriate (be careful to avoid random alcohol testing for employees);
- A commitment to participate fully in recommended aftercare, 12-step meetings, or other therapy recommended by treatment counselors;
- An acknowledgement that a violation of the agreement, or its incorporated standards, will result in immediate termination; and
- Authorization to talk to treatment counselors to obtain information about compliance with treatment requirements, aftercare conditions, and to get advice about the return to work, all limited to a need to know basis and carefully drafted to protect medical privacy.

5. Before requiring a commitment to remain alcohol free, check with developing interpretations of the Americans with Disabilities Act. While current use of illegal drugs is not protected under the law, alcoholism is as long as it does not have a negative effect on the business operations. That may lead to a tension between the need to abstain from alcohol for purposes of treatment and recovery, and the employer's insufficient interest in monitoring off-the-job drinking habits. We don't yet know where the line lies.

“Last chance” or “return to work” agreements are appropriate for the lawyer too; however the type of agreement might vary with the lawyer’s status. Partners and shareholders who have ownership interests may work under agreements that spell out rights and responsibilities that leave little room for a mandatory extra agreement such as a last chance agreement. That may leave the firm with little leverage beyond a motion to expel the lawyer or break up the firm. But don’t overlook the value of negotiation too. You may be able to work out a perfectly satisfactory return to work agreement which protects organizational interests and, in exchange, offers practice-related assistance upon return.

THE WELCOME HOME

It is a good idea to designate a single person or a small group to be the lawyer’s designated contacts during treatment. That will ensure a more consistent flow of information about progress, prognosis, return dates and similar details. It will also help avoid a minor catastrophe upon return: the lawyer walks in, wholly unexpected, to find someone working at his/her desk, secretary reassigned, no clients, no work, and no friends. That doesn’t have to happen; the contact person can be responsible to see it doesn’t.

Organizations must give some thought to the lawyer’s return to the office:

- Check out the physical space and make sure you return it to pre-treatment condition (but ditch the bottles!).⁶
- Some kind of welcoming activity is appropriate, but take personalities and desires into account. Maybe a brief acknowledgement at a breakfast meeting is in order, maybe a card, or some other recognition. Treatment counselors are often very good sources to tap if you’re concerned about what’s appropriate.
- At least a week before the lawyer’s scheduled return, two work related things should be happening. First, the lawyers who were assigned the pending matters should prepare brief status reports on what was done in the lawyer’s absence. Second, the appropriate person (practice chair, managing partner, and supervisor) must give some thought to the work the lawyer will be doing upon return. Employees need assignments; partners or shareholders may need guidance. A visit with treatment counselors may help out here provided you have consent.
- Don’t neglect the other lawyers in the practice. Some of them will have a right and a need to have some information about the return. You will also need to manage their expectations about the return. Maybe the lawyer will return gung-ho, ready to dive into an intense three month project. More likely he/she will return to a wounded practice and some resentful colleagues.

BASIC LAWYER SKILLS

There may be a lot of surprises upon the lawyer’s return. Alcohol or drug use can mask many other problems, and may have contributed to a false impression of the lawyer’s skills. The lawyer may have forgotten — or never learned — good skills. That may include work skills — effective research, analysis, advocacy, effective oral and written presentation skills — and it may include “office” skills — billing practices, client relationships, office relationships. Be on the lookout for this problem. It can be corrected, but not if you don’t know about it.

6. Actually, if the organization’s culture respects the privacy of desks and offices, don’t go searching for bottles or drug paraphernalia. Let the lawyer or a sponsor take that project on.

WHAT HAPPENED TO THE PRACTICE?

You can bet the rent on this: you are welcoming back a lawyer with a sick practice. If you want reentry to work, you have to work on the practice. Every sick practice is sick in its own way, and there are no universal solutions.

- The returning lawyer is probably not able to do much alone. More likely he/she will be at a loss to know what happened to the practice, let alone how to fix it.
- Controlled assignments or responsibilities for six to twelve months may be needed, first to provide some work, then later to fill in gaps as the practice rebuilds.
- Most lawyers returning from treatment will benefit from practice building advice and some wise counsel — from a department head, knowledgeable peer, or even an outside consultant.
- Don't underestimate the value of jump starting. Early successes are very important motivators.
- Have a short-term and near-term practice development plan; give some thought to it before the lawyer returns, and make it a key point of discussion the first few days back on the job.
- Monitor progress against the plan, particularly during the first six months.

All this takes commitment, which raises another concern. Sick practices don't get that way overnight. More likely, others have carried their impaired colleague just a little too long.

RESENTMENT, MISTRUST AND THE OTHER UNHOLY EMOTIONS

Most lawyers do not analyze their own practices; but they often can't stop themselves from analyzing the practice of their colleague who has just returned from treatment. It isn't difficult to understand why the dominant emotion is resentment. One of their own has failed them. They may be cleaning up, mending shattered client relationships, worrying about staff complaints and rebuilding a tarnished firm reputation. They may be the ones giving up vacations and weekends to get the work done in the lawyer's absence. They may even be paying for treatment, in one way or another. They may be struggling with their own practices, but not getting the same care and attention the returning Prodigal Son is getting. They may be looking for a reason to believe the lawyer should go someplace else to make a fresh start.

Reentry to the same firm is not always the best choice, although it may sometimes be required because of a controlling statute. If you are looking for the greatest good for the greatest number of people, an honorable goal, you will understand that the interests of the group are at least as important as those of the returning lawyer (and there are usually more of them). Give this some time. The tension may fade, but it is unlikely you'll be able to predict whether it will. But don't count on time alone to make this work. The lawyer in an average organization knows very little about the complexities of drug and alcohol abuse. If you sense tension, it might be helpful to provide some education to the lawyers in the organization so they can understand more about addiction, and maybe learn something about repairing relationships themselves.

Regaining credibility is a critical task for the impaired lawyer. Remember that a part of credibility is what others see. If the senior or "important" lawyers in the firm wash their hands of the returning lawyer, everybody else will too. On the other hand, a little public attention from the right people can make the difference.

SAMPLE: TREATMENT AND RETURN TO WORK AGREEMENT

By signing this agreement I accept and agree to the following terms and conditions which will govern my continued employment with and my return to work with [firm].

I. TREATMENT

1. I acknowledge that my work performance and/or behavior have resulted in the need for intervention and have provided a basis for the termination of my employment (or: define nature of relationship) with the firm. As a consequence, and in order to avoid the termination of my employment (expulsion from the firm), I voluntarily accept the terms of this agreement.
2. I agree to submit to an immediate evaluation by a health care professional of the firm's selection.
3. I will follow all treatment recommendations of that professional including without limitation entry into a residential treatment program.
4. I understand that I am responsible for all costs associated with the treatment program to the extent they are not covered by insurance.
5. I will authorize regular progress reports to be made to the firm during treatment (tailor to specific consent).

II. RETURN TO WORK

1. Upon completion of the recommended treatment program I understand that the firm will return me to employment.
2. Upon my return, I will review all aftercare requirements and recommendations with my supervisor (on a need to know basis).
3. I understand and acknowledge that my return to work will be conditioned upon my strict compliance with the following:
 - (a) Strict compliance with the treatment recommendations made by the treatment professionals with whom I have been working. Upon completion of my treatment program, a summary of those recommendations will be prepared and attached as Exhibit A to this agreement, and I will re-execute it at that time (tailor consistent with medical authorization);
 - (b) Complete abstention from all mood-altering substances except in strict accordance with the written authorization of a licensed physician who has been advised in advance of my treatment for substance abuse and who has reviewed any such prescription in advance with my substance abuse counselors (tailor to address off-duty alcohol use);
 - (c) Regular attendance at required or recommended 12-step programs.
4. For a period of two years from the date of my return to work, I agree to submit to testing to detect the presence or use of drugs (or alcohol if appropriate), on any basis including random or unannounced, and at the times and on the terms that are communicated to me by [insert authorized person or entity]. I understand that at the conclusion of the two year period the company, in its sole discretion, may

extend the period during which I will submit to drug testing for an additional year.
(Use caution in defining alcohol testing to avoid ADA problems)

5. I understand and acknowledge that I continue to be bound by and must adhere to all standards of professionalism, behavior and performance that are required of attorneys with the firm as they may exist from time to time, including but not limited to those set out in the firm's policy and procedure manual.
6. This agreement does not guarantee my employment or compensation for any period of time, nor does it in any way alter my status [as an at will employee]. I understand and acknowledge that strict adherence to these terms and conditions are a requirement of my continued employment with the firm and that any violation of the terms of this agreement (including its incorporated standards) will result in my immediate termination.

By my signature below I confirm that I have reviewed and considered these terms and accept them voluntarily as a constructive part of my recovery. I also acknowledge that these terms are being provided to me as an alternate to the termination of my employment. I understand that I may withdraw my consent at any time during the term of this agreement, but acknowledge that withdrawing my consent is a voluntary termination of my employment (consent to my expulsion from the firm).

Signature # 1 (at the time of intervention):

Signature # 2 (upon return to work, and incorporating aftercare recommendations)