

ETHICS: SUBSTANCE ABUSE & MENTAL HEALTH
ISSUES IN THE LEGAL PROFESSION

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NOTES

Ethics: Substance Abuse & Mental Health Issues in the Legal Profession

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Duty to report

- In addition to proactively addressing an impairment before clients are affected, the other lawyers in the firm need to evaluate whether the impaired lawyer has already committed misconduct that raises a substantial question as to her honesty, trustworthiness, or fitness to practice law. If so, Rule 8.3(a) requires them to report that misconduct, even if the firm has already taken steps to address the misconduct and prevent it from recurring in the future and even if the impairment has already been reported to Lawyers Helping Lawyers

Scope of lawyer impairment problem

- Lawyers are far more susceptible to substance abuse than gen'l population.
- 2014-15 ABA and Hazelden Betty Ford Study surveyed 12, 825 lawyers; results published in Jan-Feb 2016 *Journal of Addictive Medicine*:
 - 20.6% reported problems with use of alcohol
 - 28% reported suffering from depression
 - 19% say they struggle with anxiety
 - Lawyers 30 years and younger working in private law firms suffer higher level of stress than more experienced lawyers

Scope of lawyer impairment problem

- Substance Abuse and Mental Health Services Administration reports that only 6.4% of the general population abuse alcohol and only 6.6% experienced major depression.
- Thus, lawyers are *three times more likely* to have a substance abuse or mental health problem than the general population.



Why are lawyers at greater risk?

- Demands of law practice, difficult clients, shrinking revenue, increased competition, adversarial nature of certain types of practice (criminal, family), compassion fatigue or “burnout.”
- In January 2014 the Center for Disease Control and Prevention ranked lawyers “4th” behind dentists, pharmacists and physicians, in the incidence of suicide. CNN reported that suicide is the third leading cause of death among lawyers in contrast to the tenth leading cause for the general population!
- The aging legal profession presents increased risks of cognitive impairment and disability among practicing lawyers.

Why are lawyers at greater risk? Aging of the legal profession

- Lawyers are moving into an older demographic and postponing retirement.
- 35% (8,366) of all active members of the VSB (23,849) are 55 or older.
- 15% or 3,584 are 65 or older.
- Lawyers are living longer and working longer, some well past the time they should be retiring from practice.
- For years to come, the organized bar will be dealing with waves of senior lawyers who will continue to practice well beyond traditional retirement. An April 2014 report authored by NOBC, APRL and CoLAP estimates the legal profession is rapidly approaching reaching a milestone, where more than 50% of practicing lawyers will be older than 50.

Age-Related Dementia & Alzheimer's Disease

- Process starts at 60
- Starting at 65 risk doubles every 5 years
- CDCP says 25-50% of the population 85 or older exhibit signs of dementia.
- Impairment often not obvious until disease process is well-advanced.
- Prospects of treatment or recovery quite limited, if at all.

THE PUBLICATION

- The Prevalence Of Substance use and Other mental Health Concerns Among American Attorneys
- Authors: Krill, Patrick, Johnson, Ryan, Albert, Linda
- Journal of Addiction Medicine: January/February issue, 2016



ABA, Hazelden Betty Ford Study-2015

- 12,825 licensed employed attorneys & judges
- Males 53.4%
- Females 46.5%
- Transgender .1%
- Diversity of race
 - Asian 1.2%
 - Black/African American 2.5%
 - Caucasian/White 90.9%
 - Latino/Hispanic 2.6%
 - Native American .3%
 - Other .7%
 - Missing .5%

Professional Characteristics

	<i>n</i>	(%)
Total Sample:	12,825	(100)
Years in Field:		
0-10 years:	4,455	(34.8)
11-20 years:	2,905	(22.7)
21-30 years:	2,623	(20.5)
31-40 years:	2,204	(17.2)
41 or more years:	607	(4.7)
Work Environment:		
Private firm:	5,226	(40.9)
Sole practitioner, private practice:	2,678	(21.0)
In-house: government, public, or non-profit:	2,500	(19.6)
In-house: corporation or for-profit institution:	937	(7.3)
Judicial chambers:	750	(7.3)
Other law practice setting:	289	(2.3)
College or law school:	191	(1.5)
Other setting (not law practice):	144	(1.1)
Bar Administration or LAP:	55	(0.4)

Substance Abuse Findings

Summary Statistics for Alcohol Use Disorders Identification Test (AUDIT)

	AUDIT Statistics			Problematic Percentage*	P Value**
	n	M	SD		
Total Sample:	11,278	5.18	4.53	20.6%	
<i>Gender:</i>					
Male:	6,012	5.75	4.88	25.1%	<.001
Female:	5,217	4.52	4.00	15.5%	
<i>Age Category:</i>					
30 or younger:	1,393	6.43	4.56	31.9%	<.001
31-40:	2,877	5.84	4.86	25.1%	
41-50:	2,345	4.99	4.65	19.1%	
51-60:	2,548	4.63	4.38	16.2%	
61-70:	1,753	4.33	3.80	14.4%	
71 or older:	297	4.22	3.28	12.1%	
<i>Years in Field:</i>					
0-10 years:	3,995	6.08	4.78	28.1%	<.001
11-20 years:	2,523	5.02	4.66	19.2%	
21-30 years:	2,272	4.65	4.43	15.6%	
31-40 years:	1,938	4.39	3.87	15.0%	
41 or more years:	524	4.18	3.29	13.2%	

Summary Statistics for Alcohol Use Disorders Identification Test (AUDIT) (cont.)

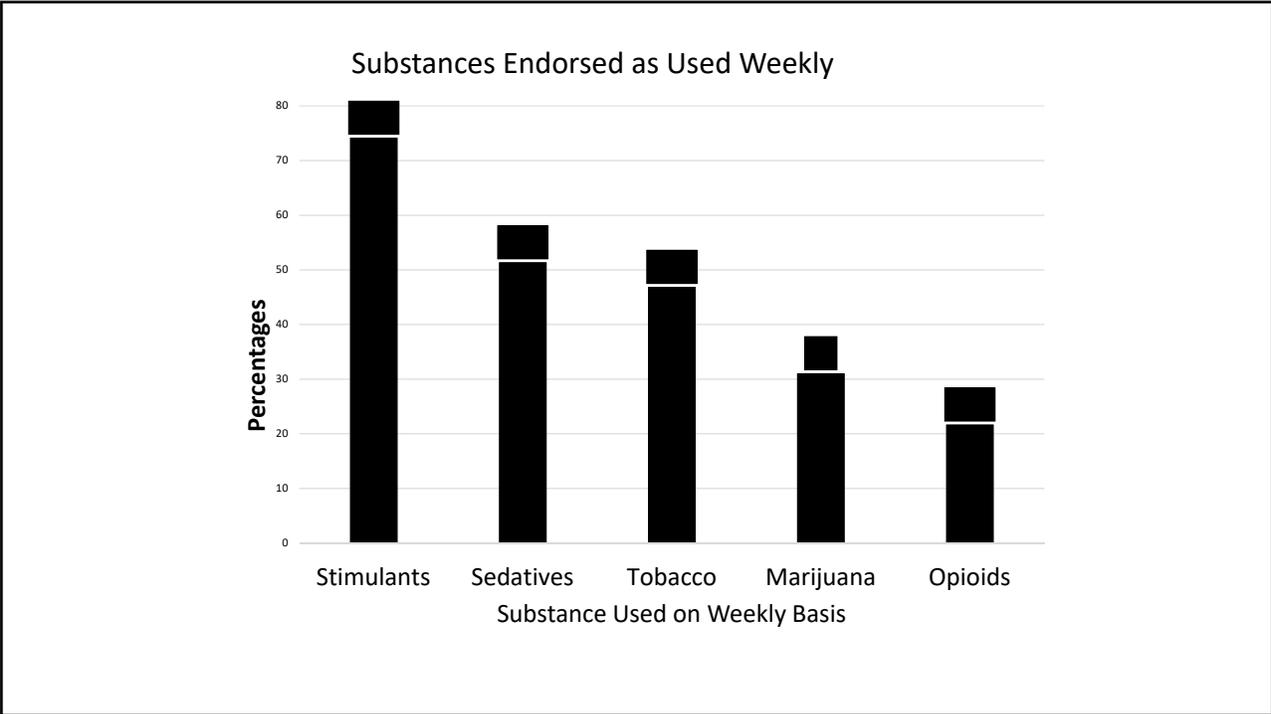
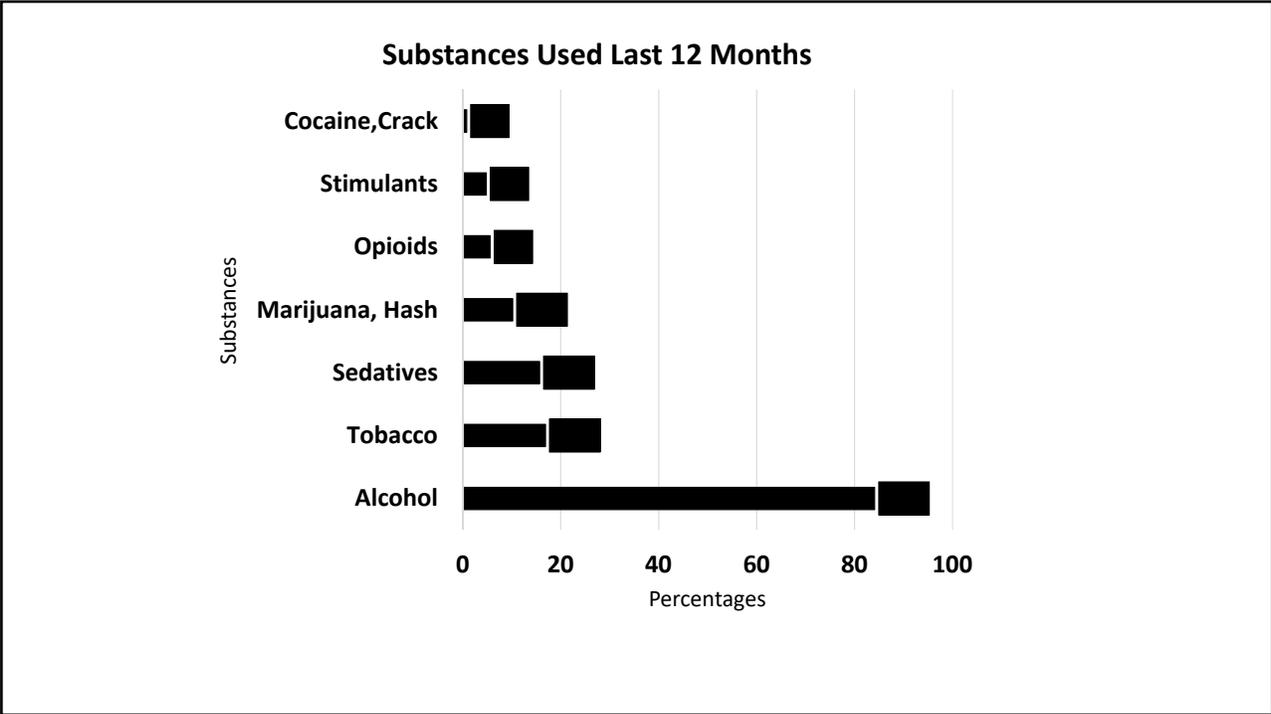
<i>Work Environment:</i>	Private firm:	4,712	5.57	4.59	23.4%	
	Sole practitioner, private practice:	2,262	4.94	4.72	19.0%	
	In-house: government, public, or non-profit:	2,198	4.94	4.45	19.2%	
	In-house: corporation or for-profit institution:	828	4.91	4.15	17.8%	<.001
	Judicial chambers:	653	4.46	3.83	16.1%	
	College or law school:	163	4.90	4.66	17.2%	
	Bar Administration or LAP:	50	5.32	4.62	24.0%	
<i>Firm Position:</i>	Clerk or paralegal:	115	5.05	4.13	16.5%	
	Junior associate:	964	6.42	4.57	31.1%	
	Senior associate:	938	5.89	5.05	26.1%	<.001
	Junior partner:	552	5.76	4.85	23.6%	
	Managing partner:	671	5.22	4.53	21.0%	
	Senior partner:	1,159	4.99	4.26	18.5%	

* The AUDIT cutoff for hazardous, harmful, or potential alcohol dependence was set at a score of 8

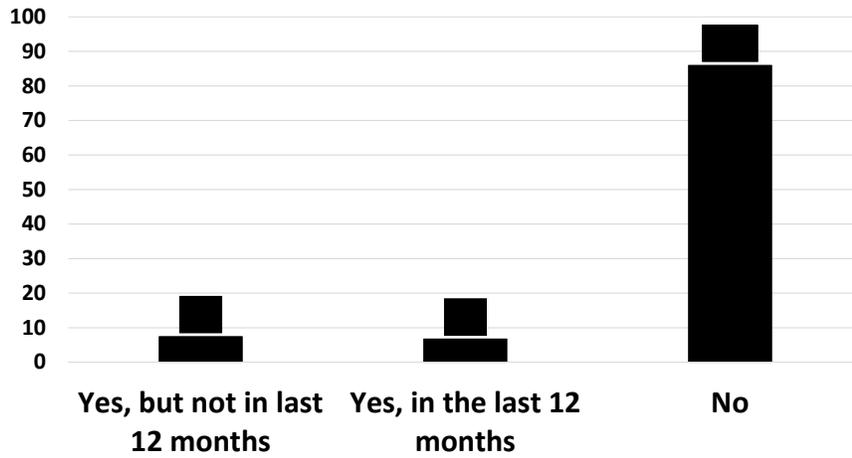
**Comparisons were analyzed using Mann-Whitney U tests and Kruskal-Wallis tests

Self Reporting - Concerns

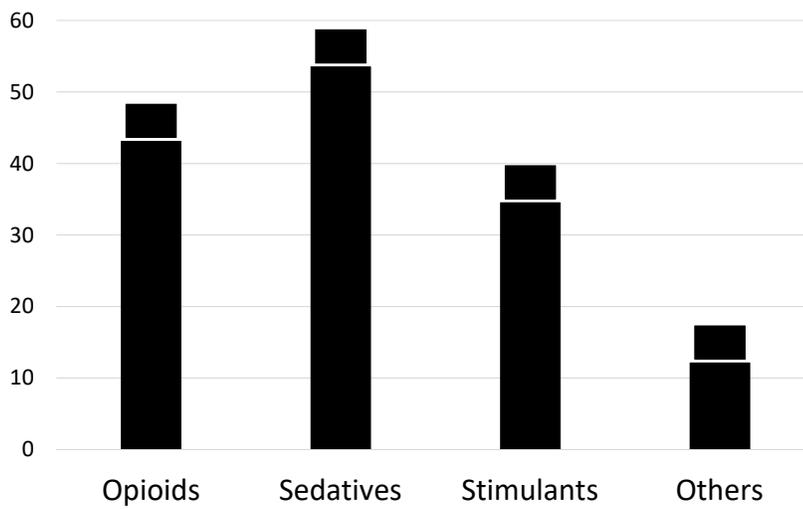
- 22.6% felt their use of alcohol or substances was a problem sometime during their lives
- 27.6% reported problematic use prior to law school
- 14.2% reported problematic use started during law school
- **47.7 % reported problematic use started within the first 15 years following law school**
- 14.5% reported problematic use started more than 15 years after law school.



Prescription medicine used without a prescription



Drugs used without a prescription: all time frames



MENTAL HEALTH FINDINGS



Depression, Anxiety and Stress Scale = DASS-21

- Depression 28%
- ***Males higher levels of depression than females***
 - ***Same inverse relationship***
 - Rates decreases as age increased
 - Junior positions = higher rates

ANXIETY/STRESS

- Anxiety 19%
 - *Females higher than males*
- Stress 23%
- Higher scores on Audit correlated with higher scores on the DASS
- DASS scores decreased as age and years in the field increased-similar to Audit

Self-reporting of mental health concerns

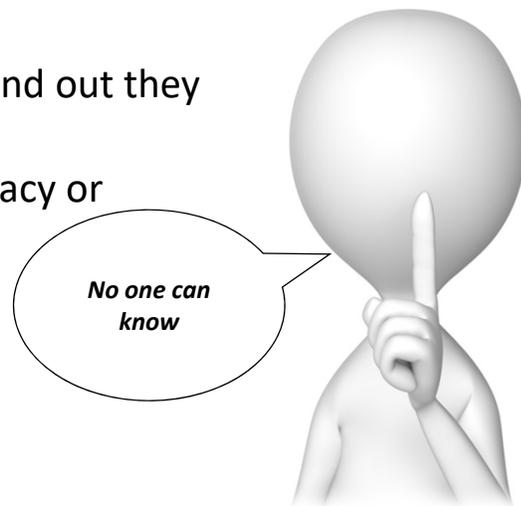
- Anxiety 61%
- Depression 45.7%
- Social Anxiety 16.1%
- ADHD 16.1%
- Panic Disorder 8.0%
- Bipolar Disorder 2.4%

Suicidal thoughts and self-harm

- 11.5% reported suicidal thoughts during their career
- 2.9% reported self injurious behaviors
- 0.7% reported at least one suicide attempt

Help seeking behaviors - two common barriers

- Not wanting others to find out they needed help - stigma
- Concerns regarding privacy or confidentiality



Signs and symptoms of impairment - **Personal:**

- Gradual deterioration of personal appearance, hygiene, health;
- loses control at social gatherings;
- poor financial management;
- failure to make tax filings and payments on a timely basis;
- pattern of family crisis or marital infidelity;
- withdrawal from friends and associates;
- pattern of mood swings or unpredictable emotional reactions
- DUI, especially if there are 2 or more;
- open container violations;
- controlled substance charges;
- disorderly conduct;
- domestic violence;

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Signs and symptoms of impairment - **Professional:**

- client neglect,
- unreturned phone calls,
- late for depositions or court hearings or failure to keep them,
- canceled appointments,
- numerous "sick" days,
- routine late or complete failure to return to office,
- missed deadlines,
- decline in quality of work,
- "unusual" procrastination,
- inability to get along with fellow lawyers and other staff,
- client complaints about performance, accessibility, communication,
- appear under the influence or smell of alcohol in the office, or in court or depositions,
- ethical violations

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Hypotheticals

- James practices in a mid-sized law firm in a large metropolitan area. One day, a junior associate informs James that Bill, a senior associate, has a serious cocaine and alcohol problem. The information is credible, detailed, and alarming; it also points to the potential for trust fund violations or other misconduct associated with substance use. James has also received calls from several clients complaining that Bill has missed appointments, appeared in court late, disheveled and smelling like alcohol, and has failed to return phone calls. Another client complains that Bill missed a filing deadline and placed the client in default. James has observed that Bill has problems remembering instructions, has difficulty completing familiar tasks, is challenged in problem solving at meetings, and experiences changes in mood and personality. When James confronts Bill about these issues, Bill denies having any substance abuse problems, attributes his work performance to stress caused by marital discord, and promises to improve.

Hypotheticals

- George is a sixty-year old partner in a small, two lawyer firm. He has been honored many times for his lifelong dedication to family law and his expertise in domestic violence protective order cases. He has suffered a number of medical issues in the past several years and has been advised by his doctor to slow down, but George loves the pressure and excitement of being in the courtroom regularly. Recently, Rachelle, his long-time law partner, has noticed some lapses of memory and confusion that are not at all typical for George. He has started to forget her name, calling her Mary (his ex-wife's name), and mixing up details of the many cases he is currently handling. Rachelle is on very friendly terms with the J&DR court clerk, and has heard that George's behavior in court is increasingly erratic and sometimes just plain odd. Rachelle sees some other signs of what she thinks might be dementia in George, but hesitates to "diagnose" him and ruin his reputation as an extraordinarily dedicated attorney. Maybe he will decide to retire before things get any worse, she hopes.

Va. Legal Ethics Op. 1866

- Adopted by the Supreme Court of Virginia, December 15, 2016.
- Addresses the duties of Supervising Lawyers and Partners in a law firm upon discovering a lawyer in the firm may be impaired.
- Duty to take remedial measures if a supervisor or partner reasonably believes that a lawyer under their supervision may be suffering from a significant impairment that poses a risk to clients or the general public.
- The anchor for this opinion is Rule 5.1 of the Virginia Rules of Professional Conduct.

LEO 1866 & Rule 5.1

- Rule 5.1(a): Partners and managers in a law firm have a duty to have in place measures to ensure that lawyers practicing in the firm comply with the RPC.
- Rule 5.1(b): Supervising attorney must make reasonable efforts to ensure that a lawyer under his/her supervision complies with the RPC.
- Rule 5.1(c): A supervising attorney will be responsible for the subordinate attorney's violation of the RPC, if the supervising attorney directed or ordered the specific conduct; or knew of the specific conduct at a time when its consequences could have been prevented or mitigated, but failed to take remedial action.

LEO 1886

- The RPC does not explicitly impose any ethical duty for supervising lawyers or partners in a firm to address impairment issues.
- However, Rule 5.1 does require the supervising attorneys and partners to establish appropriate preventative practices and procedures to ensure that *all* lawyers under their supervision comply with the RPC; and make reasonable efforts to ensure that a lawyer under their supervision is acting in compliance with the RPC.
- This means taking reasonable steps to ensure that the impaired lawyer does not breach ethical duties owed to clients of the firm.

LEO 1886

- A lawyer's impairment does not excuse the impaired lawyer's failure to comply with the RPC nor will it operate as a defense to a charge of misconduct.
- A lawyer's impairment may be considered as a mitigating factor for purposes of a disciplinary sanction but only if the Respondent attorney can establish by competent medical proof that the impairment was the cause for the misconduct.
- Supervisors and partners in a law firm may have some flexibility in regard to remedial measures depending on the nature, severity of the lawyer's impairment and prognosis for recovery.

LEO 1886

- A lawyer who is a supervisor or partner in law firm who reasonably believes that a lawyer under his supervisory authority may be suffering from a significant impairment owes a duty to confront that lawyer to encourage the lawyer to seek an evaluation, assessment or treatment.
- The firm may need a mental health practitioner or other professional to perform an evaluation or assessment or advise the firm on how to address the situation of an impaired lawyer.
- Depending upon the evaluation, assessment or treatment, the firm may have to take other steps to protect their clients' interests. Such steps might include, i.e., reducing the impaired lawyer's workload, direct supervision and review of the impaired lawyer's work, placing the lawyer in a support rather than primary role or other steps limiting or restricting the impaired lawyer's responsibility for client matters.

LEO 1886

- For client protection, the firm should have in place an enforceable policy that would require, and a supervising attorney or partner should insist, that the impaired lawyer seek appropriate counselling, treatment, therapy or assistance as a condition of continued employment at the firm or undertaking to work on any client matters.
- The firm policy might also require a monitoring contract and waiver of confidentiality so that the firm can keep abreast of the impaired lawyer's treatment and recovery.
- The firm may contact Lawyers Helping Lawyers to seek assistance, initiate an intervention and obtain an initial evaluation of the lawyer's condition and referral to an appropriate mental health provider for therapy and treatment.

Lawyers Helping Lawyers

- Lawyers Helping Lawyers (“LHL”) an independent, non-disciplinary and non-profit organization assisting legal professionals and their families since 1985 deal with depression, addiction and cognitive impairment. LHL can assist law firms dealing with an impaired lawyer through a confidential environment by planning and implementing intervention, providing a free clinical evaluation, referral to appropriate medical and mental health care providers, peer support and group counseling, establishing contracts to monitor and report recovery and rehabilitation and assist and identify financial resources for treatment. LHL is not affiliated with the Virginia State Bar and does not share information with anyone except and unless the participating lawyer expressly consents in writing to share information with third parties.

LEO 1866

- A lawyer whose physical or mental health “materially impairs” his capacity to represent clients has a duty to refrain or withdraw from representation. Rule 1.16(a)(2). Unfortunately, the impaired lawyer may not be cognizant of the scope and nature of the impairment, and does not recognize the need to withdraw from the representation.
- The firm’s paramount obligation is to take steps to protect the interests of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer’s impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients. ABA Formal Op. 03-429

LEO 1886

- No Duty to report a lawyer to the VSB under Rule 8.3(a) solely because a lawyer suffers impairment and there has been no breach of ethical duty to client or other misconduct.
- Duty to report under requires reliable information that another lawyer has violated a RPC that raises a substantial question regarding the lawyer's honesty, integrity or fitness to practice law.

Being proactive . . .

- Aside from our moral and ethical "duty to care" for each other, proactive and preventative efforts to reach an impaired lawyer early, *before misconduct has occurred*, can help the firm keep valuable lawyers and reduce professional liability risks.
- If an evaluation or assessment discloses a substance abuse or impairment problem, with the lawyer's consent the firm's monitoring contract can require adherence to a professionally prescribed treatment plan, random drug and alcohol testing, regular counselling and meetings or other treatment regime

Duty to report

- In addition to proactively addressing an impairment before clients are affected, the other lawyers in the firm need to evaluate whether the impaired lawyer has already committed misconduct that raises a substantial question as to her honesty, trustworthiness, or fitness to practice law. If so, Rule 8.3(a) requires them to report that misconduct, even if the firm has already taken steps to address the misconduct and prevent it from recurring in the future and even if the impairment has already been reported to Lawyers Helping Lawyers

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