

## **Motivating Impaired Lawyers to Obtain Assistance**

**by Mark E. Goidell**

In my column in the April 2016 edition of the *Nassau Lawyer*, I reported the alarming conclusions of the most comprehensive study ever conducted of alcoholism, substance abuse and mental health issues in the legal profession: “Attorneys experience problematic drinking that is hazardous, harmful, or otherwise consistent with alcohol use disorders at a rate much higher than other populations.... Depression, anxiety, and stress are also significant problems for this population...”<sup>1</sup> This study was the product of a joint collaboration between the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation.

The recommendations of the study include greater “investments in lawyer assistance programs and an increase in the availability of attorney-specific treatment. Greater education aimed at prevention is also indicated, along with public awareness campaigns within the profession designed to overcome the pervasive stigma surrounding substance use disorders and mental health concerns. The confidential nature of lawyer-assistance programs should be more widely publicized in an effort to overcome the privacy concerns that may create barriers between struggling attorneys and the help they need.”

Although there is a statute that imposes strict confidentiality on communications with and the affairs of a lawyer assistance program, impaired attorneys remain reluctant to seek assistance for alcoholism, substance abuse and mental illness. Typically, the fears of disclosure and/or getting through life without a drink or a drug are fatal to requesting help.

The statute and Rules of Professional Conduct provide incentives for the impaired attorney, but they have proven to be grossly insufficient by themselves. Motivation must also come from the life-saving encouragement of others. One mechanism for helping impaired attorneys is the adoption of the LAP Model Policy for law firms. The Model Policy fully complies with the governing statute and Rules of Professional Conduct while enhancing the goals of protecting clients and firms, maintaining the integrity of the profession, and providing early intervention and treatment to afflicted attorneys.

A brief review of the statute and applicable Rules of Professional Conduct is important to an understanding of the Model Policy.

The confidentiality of LAP services, and all communications with LAP, are strictly protected by Judiciary Law § 499, which provides a privilege coextensive with attorney-client communications:

The confidential relations and communications 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 committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privilege may be waived only by the person, firm or corporation which has furnished information to the committee.

(emphasis added).<sup>1</sup>

On the other hand, the Rules of Professional Conduct require the reporting of actually known “violations of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer...” RPC 8.3(a).

As noted by Professor Simon, this duty to report is limited. It arises “only if the misconduct arises to the level of ‘a violation’ of one or more Rules of Professional Conduct. For example, if another lawyer is an alcoholic or manic-depressive whose personal life seems to be in disarray, Rule 8.3(a) does not require a report unless the alcoholism or depression has led to a violation [of] the Rules of Professional Conduct. It may be a good idea to report an alcoholic or depressed lawyer to a lawyer assistance program (LAP), but Rule 8.3(a) does not require reporting to an LAP... Alcoholism, for example, is definitely a concern, but by itself not a violation of the Rules of Professional Conduct.”<sup>2</sup>

The attorney members of the LAP are exempt from the mandatory reporting requirements of Rule 8.3(a). Specifically, RPC 8.3(c)(2) creates an exception for “information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.”

In 2010, the Model Policy was approved by the Nassau County Bar Association Board of Directors, which encouraged law firms and legal departments to adopt the Model Policy and adapt it to their respective firm’s employment policies.<sup>3</sup>

The Model Policy balances the interests of a law firm in protecting its clients and its reputation with its professional and legal responsibilities to the profession and the individual impaired attorney. Additionally, it provides incentives to the impaired attorney who will not or cannot voluntarily seek assistance of his or her own volition. The Model Policy is designed to be used in conjunction with the firm’s leave policies in order to comply with the requirements of the Family Medical Leave Act, the Americans with Disabilities Act, and the New York State Human Rights Law.

The terms and conditions of the Model Policy are necessarily flexible and reserve the right to terminate attorneys for misconduct. On the other hand, it expressly affirms the policy of the firm to encourage assistance and treatment in order to preserve the firm’s most important and valuable assets – its professionals.

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<sup>1</sup> This author is of the opinion that the statute should be amended to also require the consent of the affected attorney in order for a waiver to be effective.

The Model Policy also simultaneously reaffirms the duties of the firm to report known and substantial violations of the Rules of Professional Conduct, as required by RPC 8.3(a), while strictly preserving the confidences of treatment and referral to a LAP.

A suggested “Return to Work Agreement” is included within the Model Policy. The LAP provides monitoring services, if requested, to attorneys who are assisted by referrals arising from the Model Policy.

The number of attorneys assisted by the LAP is a small fraction of those who are afflicted. Professor Simon bemoans this reality: “Unfortunately, in some places, including Long Island, the lawyer assistance programs are under-utilized.”<sup>4</sup> The Model Policy provides incentives to law firms to refer impaired attorneys and to individual attorneys to address their problems. The recent study published in the *Journal of Addiction Medicine* expressly identifies law firm employment as an exacerbating risk factor: “Attorneys working in private firms experience some of the highest levels of problematic alcohol use compared with other work environments, which may underscore a relationship between professional culture and drinking.”<sup>5</sup> Adoption and implementation of the Model Policy by law firms can make a significant contribution to a solution.

The Model Policy is available for review and download at the website of the Nassau County Bar Association ([www.nassaubar.org](http://www.nassaubar.org)). Additionally, firms that are interested can contact the LAP professional Director, Elizabeth Eckhardt, LCSW, PhD (cell: 516-512-2618; email: [eckhardt@nassaubar.org](mailto:eckhardt@nassaubar.org)), who is available to meet and discuss the implementation of the Model Policy.

Please remember that the LAP maintains a toll-free help line (888-408-6222) which receives calls every day, 24 hours per day, from attorneys seeking help and from others who request assistance and guidance for attorneys. All communications with LAP and its representatives are, of course, strictly confidential.

Let us know if we can be of assistance.

*Mark E. Goidell is an attorney in Garden City, New York and is the Chair of the Lawyer Assistance Committee of the Nassau County Bar Association.*

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<sup>1</sup> Patrick R Krill, et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 *Journal of Addiction Medicine* 46 (February 2016).

<sup>2</sup> Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at pp. 1831-31 (2015 ed.).

<sup>3</sup> See *Nassau Lawyer*, vol. 60, no. 3, p. 1 (November 2010)

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<sup>4</sup> Simon, *supra*. at p. 1851

<sup>5</sup> Krill, et al., *supra*.