

**Bay Area MCLE Conference
Tuesday, November 19, 2024
4:30 PM to 5:30 PM**

Substance Abuse in the Legal Profession: Prevention, Detection, and Treatment

1. Addiction – General Discussion

1.1 Magnitude of the Problem

The American Medical Association defines alcoholism and all other types of addiction as a *disease*. In a “perspectives” article in the journal of the American Medical Association, Brian Vastag wrote, “The brain changes during addiction.” Mr. Vastag explained that all drugs of abuse activated a pleasure pathway in the brain, the “dopamine reward circuit.” Eventually, he wrote “the dopamine circuit becomes blunted; with tolerance, a drug simply pushes the circuit back to normal, boosting the user out of depression but no longer propelling him or her toward euphoria.” With repeated use, a new state of “normal” is created, requiring continued use to feel normal. The changes in the brain, though not permanent, can be long lasting. Whether the addiction is to alcohol, illegal drugs or prescription medication, addiction is addiction, no matter what substance is being abused. An earlier view, remarkably accurate for its time, was that alcoholism is an allergy of the body coupled with an obsession of the mind. Either way, it is a problem over which the abuser has very little control.

Under any characterization, substance abuse is a serious and widespread public health problem:

- 18 million Americans are estimated to have problems with alcohol,
- 5 – 6 million people in the U.S. have problems related to drug use,
- Alcohol and drug abuse cost the American economy an estimated \$276 Billion each year in lost production, health care expenditures, crime, accidents and other factors,
- Untreated alcoholism and addiction are more costly public health problems than heart disease, diabetes, cancer and AIDS - - - combined!¹

The problem is no longer confined to alcohol and illegal drugs. Increasingly, people are innocently becoming addicted to widely prescribed stimulants, tranquilizers and painkillers. An April 9, 2001 issue of Newsweek has an excellent cover article on painkillers. Vicodin is one of

¹ Substance Abuse: The Nation’s Number One Health Problem; Institute for Public Health Policy, Brandeis University (Initially published in 1994 and updated 2001)

the most widely prescribed and highly addictive painkillers. Codeine, Darvon, percodan, and the latest potent painkiller, OxyContin, are also highly addictive and being abused.

The harsh reality is that substance abuse is still present in alarming proportions, and it generates an enormous range of medical, social and criminal problems.

Statistically, the impact of substance abuse on health should, by itself, be enough to force most alcoholics and drug users to seek assistance. Drugs and alcohol are involved in **35%** of psychiatric admissions, **20%** of hospital admissions, account for **75%** of trauma victims and **80%** of the prison population, according to studies cited by the Betty Ford Professional Recovery Program.

Physically, alcoholics lose their health or their lives to a large range of devastating diseases, including:

- liver disease
- gastrointestinal bleeding
- anemia,
- pancreatitis,
- throat cancer,
- neurological disorders,
- injuries incurred from auto accidents or fights
- alcohol poisoning
- Suicide

Alcoholics have a reduced life expectancy: for men it is 48; for women it is 52, although longer life expectancy is probably a result of later onset of abuse. In fact, because of their smaller size and genetic differences, women succumb faster than men.

1.2 Addiction – Specifics within the Legal Profession

Substance abuse has always been identified with the legal profession. The stereotype of the “old drunken trial lawyer” has existed since the 18th century. Unfortunately, recent studies have confirmed a larger problem in the legal community than elsewhere.

While it is estimated that approximately **8- 10%** of the general population suffers from the disease of chemical dependency, according to the American Bar Association, the corresponding estimate for lawyers is nearly double, between **15-18%**. Most lawyers experiences extraordinary amounts of **STRESS** each day, resulting from long hours, deadlines, dealing with difficult clients, judges, and colleagues. Over time, these elements of stress take their toll, often resulting in a diminished or neglected family or social life. Substances are often

used to relieve stress and can eventually become habitual. In a study done in 1990 by John Hopkins Medical School, lawyers were found to have the highest rate of clinical depression of all professions surveyed. Substance abuse often develops as an attempt to self-medicate the underlying mental health issue.

Roadblocks to recovery in the legal community include the outdated, but deeply ingrained, notion that addiction is a sign of weakness or moral failing. Lawyers and judges are held in high regard and usually maintain outside appearances. They are held to a higher standard of conduct. They are accustomed to being in control, and giving advice rather than receiving it. They are often more likely to intellectualize the problem and are fearful of disclosure, loss of respect of colleagues, loss of clients, loss of job, loss of license. But these very roadblocks are also great motivators for addressing the problem, particularly loss of family, job and/or license. In approximately **50-70%** of cases in which lawyers face **disciplinary charges**, alcoholism and/or addiction is involved.

1.3 Substance Abuse, Addiction and the Workplace

As extensively outlined in Alcohol and the Workplace, an article by Karen Clopton in the July 2001 issue of the California Bar Journal, alcoholism is a covered disability under the *Americans with Disabilities Act (ADA)*, the *California Fair Employment and Housing Act (FEHA)*, and federally, under those governed by Sections 501,503 and 504 of the *Rehabilitation Act* 29USCA s2612 (a)(1)(D). Under the *Family Medical Leave Act (FMLA)*, it is also deemed a serious health condition.

Not all substance abuse indicates an addiction. The difference between the substance abuser and one addicted to a substance is best described as follows. Once a person who is a substance abuser (a chronic heavy user or a periodic heavy user, one who on occasion after periods of abstinence, gets out of control for a period of time, rather than a habitual user) starts running into problems, legal, personal, professional, or medical, he/she can and will stop. If one has crossed the line into addiction, however, that person will no longer be able to predict or control their use on a consistent basis, and will continue to **ingest the substance in the face of problems**. It might here be noted that cocaine is the only substance that rats will take until they die. Once addiction has set in, a person loses **the power of choice**. Usually, a person will try to do controlled drinking or using, drinking only on weekends or switching drinks sometimes, the

method of control will work, but at other times, it won't. Those who have become addicted never know what the outcome will be once they start. They will find themselves getting into trouble even when they started out with the best of intentions. They frequently will then suffer feelings of remorse and demoralization, anger at themselves which can then be projected onto others, often as blame. *

This is because **the brain has undergone changes** that set up what is called the phenomenon of **craving**, which sets in after the first drink or hit or pill. It is an allergy of the body, an inability to metabolize the substance in the same way that a person without such an addiction can, similar to the diabetic's metabolism of sugar. The allergy of the body is accompanied by an obsession with getting and using the desired substance.

Increasingly, studies point out a **genetic predisposition** to the disease. This is particularly true from male parent to sons, and especially so if both parents themselves suffer from alcoholism/addiction. In studies of adopted children, children of alcoholics have a 2-4x greater chance of developing the disease themselves, even if raised in a non-alcoholic home. *Similarly, in studies of the brain, the brain waves of sons of alcoholics differ markedly from the brain waves of non-alcoholics, studied long before they had*

ingested alcohol. Alcoholism is a **chronic disease** and a **progressive** one. It will always get worse if untreated. There might be brief recovery, but without ongoing support, there is usually a **relapse**. It is a disease that tells you that there is no disease. This aspect, called **denial**, is a major hallmark of someone with a problem. Only 3 to 5% of those afflicted lose everything. Most have family, friends, jobs and function fairly well. However, *some* area of the addict or alcoholic's life will eventually suffer: family, social, financial, or professional

The Implications of the Disease

Personally: marriages, family life and other social relationships suffer

Professionally: over time, there is a great, adverse, effect on productivity:

- poor work performance
- absenteeism
- excessive sick days
- unexplained absences especially on Mondays and Fridays
- lateness
- long lunches
- frequent breaks

- not returning from lunch
- neglect of appearance: smell of alcohol, bloodshot eyes or dilated pupils
- irritability
- argumentativeness
- insubordination
- missed deadlines, court appearances or late filings
- misuse of client funds
- complaints by colleagues, client etc.,

Symptoms of Dependency:

- 1) Tolerance, needing more of the substance to produce the desired effect;
- 2) A variety of withdrawal symptoms, which are treated with repeated use of the substance;
- 3) Increased use, drinking or using more than planned;
- 4) Craving, an overwhelming desire to use the substance;
- 5) Continued use in spite of problems;
- 6) Much time spent procuring, hiding and obsessing about getting or using the substance;
- 7) Repeated failed attempts to control use;
- 8) Isolation, loss of interest and abandonment of many social activities.

Three of these symptoms over a 12 month period indicate a problem.

Symptoms of abuse:

- 1) Failure to fulfill home or workplace responsibilities.
- 2) Physically dangerous use, e.g., driving under the influence.
- 3) Legal problems;
- 4) Continued use in the face of legal and/or personal consequences.

One or more of these symptoms over a 12-month period indicates substance abuse.

Treatment and Assistance

The best prognosis involves a person's honesty in admitting there is a problem, their willingness to seek or accept help, a supportive family and work environment, and continued contact with a support network. A person may be able to address the problem on his/her own with participation in a twelve-step program. These include **AA, NA, CA, MA** etc. **The Other Bar** is a non-profit, free assessment and referral service available without cost to lawyers, judges, and law students, active or retired who need assistance with substance abuse. It is meant

to be a bridge to a recovery meeting, but also has its own support meetings throughout the state. **(800-222-0767; www.otherbar.org)** The Other Bar also offers educational and prevention programs and is an MCLE provider. Consultants throughout the state can bring a panel to a law firm, law school, corporation, the judiciary etc. It operates a 24hr/7day support hotline **(800-222-0767)**.

Sometimes, a combination of counseling, out-patient treatment and attendance at a support network will be sufficient. At other times, residential treatment is the best approach to treatment, coupled always with follow-up in an ongoing support meeting. If there is family involved, it is important that the family be treated as well. It is a disease that affects the whole family. They need to learn how to be supportive in a detached rather than an enabling way. The addict/alcoholic needs to face consequences. **Interventions**, done with the guidance of a trained interventionist, can often be used to successfully persuade the substance abuser that he or she needs treatment.

Professionals have been found to have a higher success rate in recovery when they recover with other professionals. They are likely to be less guarded in sharing their problem with others in their profession, who share common experiences and work environment. The shame and denial that often accompany addiction are more easily penetrated.

The Lawyer Assistance Program

For attorneys facing mental health disabilities, which may or may not be accompanied by substance abuse and for attorneys with discipline issues, there is the Lawyer Assistance Program (SB479) which became effective January 1, 2001. **(866-436-6644)**

This is a more structured program than the assistance provided by the Other Bar. It may require up to a 5 year commitment, an expenditure of funds for which financial aid may be available, random testing and meetings facilitated by a therapist. For the attorney facing discipline or experiencing mental health issues, this program is especially beneficial.

Conclusion

Substance abuse affects the legal profession more so than the general population. It is a threat to the public, can be fatal to the one impaired, and has disastrous consequences to those in close personal or professional relationships with the one impaired. If you or anyone you know, personally or professionally, needs help, there is help and hope. Get help for yourself. Attend

Alanon meetings and learn how to take care of yourself and not enable the substance abuser. Enlist the assistance of the Lawyer Assistance Program and the Other Bar. Consider an intervention. But do not ignore the problem. Urge the addict/alcoholic to seek help. You may save a life or a license.

Signs & Symptoms of Chemical Dependency

(With thanks to the Florida Lawyers Assistance, Inc.)

Family	Physical	Community	Office	Professional
Withdrawal from family and pleasurable activities	Multiple complaints	Decrease participation in community affairs	Disorganized appointment schedule	Inappropriate behavior or moods
Frequent absences	Increased use of prescription medication	Change of friends, acquaintances	Hostile behavior to staff and clients	Decreasing quality of performance
Frequent arguments; child/spousal abuse	Increased hospitalizations	Drunk & disorderly incidents, public intoxication, DWI arrests	"Locked door" syndrome (drinking or using at work)	Inappropriate pleadings, decisions
Family members display codependent behaviors	Frequent visits to physicians, dentists, medical professionals	Leaders in community lose confidence	Borrowing money from partners, associates or staff	Partners, associates, staff notice changes in behavior
Children engage in abnormal, antisocial, or illegal activities	Personal hygiene, dress, and appearance deteriorate	Marked change in participation in weekly routines – including religious and volunteer participation.	Frequently absent, sick or missing from work	Client complaints, disciplinary issues and malpractice suits
Sexual problems (impotence, affair)	Accidents, trauma, ER visits	Sexual promiscuity	Clients openly complain to partners, associates, staff	Missed hearings, appointments, depositions
Separation or divorce (initiated by spouse)	Serious emotional crisis	Isolation from support systems, friends and family	Increasing unexplained absences	Loss of clients, practice, unemployment

DOS and DON'TS:
FOR THE FAMILIES, FRIENDS, AND CO-WORKERS
OF ALCOHOLICS AND OTHER DRUG DEPENDENT PEOPLE

- DO talk to someone who understands the disease of alcoholism and other drug addiction.
 - DO learn the facts about chemical dependency
 - DO develop an attitude to match the facts
 - DO go to Al-anon and/or seek professional help.
 - DO learn about yourself, your needs, desires, reactions and behavior patterns.
 - DO maintain a healthy and consistent atmosphere in your home or workplace as much as possible.
 - DO take care of your needs and let the addicted person take care of his/her needs.
 - DO share your knowledge with others.
 - DO be committed to your own growth, health, and life goals – be constructively selfish.
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- DON'T preach and lecture to the person addicted to alcohol or other drugs
 - DON'T make excuses for the chemically dependent person.
 - DON'T rescue – let them clear up his or her own mistakes and assume the responsibility for the consequences of his or her drinking behavior
 - DON'T make threats you won't carry out.
 - DON'T believe that you are the cause of the other person's alcoholism or drug dependency.
 - DON'T suffer for the chemically dependent person.
 - DON'T protect the chemically dependent person from alcohol or drinking situations whether he or she is drinking or in a program of recovery.

Adapted from information provided by: The National Council on Alcoholism and Other Drug Dependencies – Bay Area's.

A Self-Test: Use this questionnaire to assess alcohol and/or chemical dependency problems

1. Are my associates, clients, or support personnel alleging that my drinking/drug use is interfering with my work?
2. Do I plan my office routine around my drinking/drug use?
3. Am I fooling myself into believing that my drinking at business lunches is really necessary?
4. Do I ever feel I need a drink/drug to face certain situations?
5. Do I drink/use drugs alone?
6. Because of my drinking/drug use has I ever had a loss of memory when I was apparently conscious and functioning?
7. Has my ambition or efficiency decreased since I began drinking/drugging?
8. Do I ever drink/drug before meetings or court appearances to calm my nerves, gain courage, or improve performance?
9. Do I want, or take, a drink/drug the next morning?
10. Have I missed or adjourned closings, court appearances or other appointments because of my drinking/drug use?
11. Because of my drinking/using drugs, have I ever felt any of the following: fear, remorse, guilt, real loneliness, depression, severe anxiety, terror, or a feeling of impending doom?
12. Is drinking/drug use making me careless of my family's welfare or other personal responsibilities?
13. Does my drinking/drug use lead me to questionable environments or acquaintances?
14. Do I really "need" a drink/drug to steady my nerves?
15. Have I ever neglected my office administration or misused funds because of my drinking/drug use?
16. Am I becoming increasingly reluctant to face my clients and colleagues in order to hide my drinking/drug use?
17. Have I ever had the shakes, the sweats, or hallucinations as the result of my drinking/ drug use?
18. Do I lie to hide the amount I am drinking or using drugs?
19. Could my occasional or frequent disturbed or fitful sleeping be the result of my drinking/ drug use?
20. Have I ever been hospitalized or treated by a doctor directly or indirectly as a result of my drinking/drug use?

IF I HAVE ANSWERED YES TO ONE OR MORE OF THE ABOVE QUESTIONS, IT IS TIME TO SEEK HELP. You do not have to manage it alone. Don't put off calling while you are trying to decide whether things are bad enough. You do not have to lose your license, reputation or family before reaching out for assistance.

How Can a Firm or Corporation Deal with the Issue of a Partner or Employee who is abusing Substances?

Promptly—Addiction is a disease that gets worse, never better. It is important for the firm as well as the individual involved to break through DENIAL and address the problem.

Firmly—Set boundaries, conditions for the individual in the workplace. INTERVENTION??? The addict senses when and where there is wiggle room, and often will not get help without an ultimatum. They may be in their own denial.

Openly—With discretion, of course, and respecting privacy and Employment law issues, but do not feed paranoia. Focus directly on the substance abuse affects work quality and performance. Be specific. Share with the others on a “need to know” basis.

Employment Law Issues turn on the status of the relationship, whether employee or partner. Some criteria:

- Power to hire/fire
- Right to supervise

If an employee, issues of Discrimination (ADA, Family Medical Leave Act (if more than 50 people), Privacy of medical records, Defamation arise, one is required to respect confidentiality, and make accommodation, and not discriminate.

If a partner, issues of Fiduciary Duty apply.

- 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, and 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.

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 alcohol 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.

“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.

** 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.*

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)
