ALCOHOLISM, DRUG ABUSE AND LAWYERS: ARE WE READY TO ADDRESS THE DENIAL?

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I. INTRODUCTION

It is generally accepted that 10 percent of the adults in the United States chronically abuse alcohol.¹ This percentage does not seem to apply to lawyers. In fact, the percentage is much higher for attorneys. A Washington study found that "18 percent of lawyers who practiced 2 to 20 years had developed problem drinking, [and the number increases to] 25 percent [among] lawyers who practice 20 years or

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In a similar study in Arizona, these numbers were confirmed in young lawyers. Furthermore, a study in Wisconsin showed that 79 percent of the lawyers in that state use “alcohol regularly or sometimes to reduce stress.” Drug abuse among attorneys is also problematic. In the Washington study, “less than one [percent] of the lawyers exceeded the clinical cut off established to determine cocaine abuse.” However, an amazing “26 percent of the sample had used cocaine at some point in their life, compared with 12 percent of the general population.”

In 1994, the Association of American Law Schools reported the results of a questionnaire submitted to a substantial sample of law students in the United States. The students were asked whether they had abused various substances during their lifetime and whether they had done so during law school. Almost a third, 30.9 percent of the students responding admitted that they had abused alcohol during their lives, and 11.7 percent confessed to abusing alcohol since they started law school. In addition, a number of participants reported that they had abused marijuana (10.1 percent) and cocaine (5.4 percent) during their lifetime. While there have been no similar studies in Nebraska, there is no reason to believe that these statistics are not applicable in the state.

The diseases of alcoholism and drug abuse have devastating effects upon the legal profession and are major factors in the loss of public trust. Afflicted lawyers are unable to practice law in a competent manner and in accordance with professional rules of conduct. The result is that the majority of lawyer-discipline cases involve alcoholism or chemical dependency. Lawyers who remain untreated probably will become subjects of disciplinary investigations.

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4. Id.
5. Id. (quoting Benjamin, Darling & Sales, 13 INT'L J.L. & PSYCHIATRY at 241).
6. Id.
8. Id.
II. THE PROBLEM: CHEMICAL DEPENDENCY AND DENIAL

A. THE DISEASE

As early as 1957, the American Medical Association, (AMA) endorsed the concept that alcoholism is a disease. The determination was made because as a primary disease alcoholism has predictable symptoms and outcomes. Alcoholism has been recognized as a diagnosable and treatable illness for nearly forty years by the American Psychiatric Association. It is a chronic, progressive and deadly disease that literally affects all areas of the sufferers' life. The disease in its progression leads to the deterioration and destruction of ones' health, employment and relationships.

B. SYMPTOMS

As a pattern of compulsive use of alcohol develops, individuals may devote substantial time to compulsive thoughts of drinking, obtaining and consuming alcoholic beverages. The dependent individual often continues to use alcohol despite evidence of adverse psychological or physical consequences (such as depression, blackouts, liver disease, hangovers, or other symptoms).

The effect of alcohol “on the nervous system is insidious and progressive, with alcoholism being characterized by a loss of control over drinking and habituation or addiction to alcohol.” As alcohol usage “becomes abusive or dependent, maladaptive behavioral changes due to recent ingestion of alcohol arise in increasing frequency and intensity.” Behavioral changes may include “aggressiveness, impaired judgement, impaired attention abilities, irritability, depression, emotional ability, and other manifestations of impaired social or occupational functioning.” Studies have shown that the existence of “alcohol in the blood stream interferes significantly with the acquisition and recall of new information, both critical cognitive capabilities for practicing lawyers.” As alcohol dependence continues, neuropathological alterations can lead to Korsakoff's syndrome, re-

10. Id. at 1272-74.
13. Id.
16. Id.
17. Id. at 234-35.
18. Id. at 235.
sulting in substantial deficits in short-term retention, new learning, and memory.\textsuperscript{19} One of the baffling characteristics of alcoholism is that alcoholics having full knowledge of the above facts, with life problems escalating, will deny the relationship between alcohol and their problems.\textsuperscript{20} As a result of their education, intellect and ability to rationalize, lawyers seem to have greater difficulty accepting and admitting that they have a problem with alcohol than the general population.\textsuperscript{21} Paradoxically, society's encouragement and in some instances demand for professional achievement and success are strong contributing factors entrenching denial in alcoholics which may lead to burn-out and depression.\textsuperscript{22}

The symptom of denial is not limited to the alcoholic, it appears to be evident in the reluctance of many lawyers and judges to report impaired or incompetent colleagues.\textsuperscript{23} This institutional denial is an obvious violation of the obligation to report impairment or incompetence under the Model Code and the Model Rules.\textsuperscript{24} Described as the "conspiracy of silence," it may be the "greatest obstacle to better regulation of the legal profession."\textsuperscript{25}


A. LAWYER DISCIPLINE AND MALPRACTICE

It is difficult to assess the exact relationship between lawyer discipline cases, malpractice and alcoholism or chemical dependency because many jurisdictions do not keep such statistics. However, available statistics indicate that a majority of discipline cases involve alcoholism or chemical dependency.\textsuperscript{26} An ABA survey in California and New York determined that "50-70 percent of all disciplinary cases involved alcoholism."\textsuperscript{27} The statistics may be much higher than re-

\begin{itemize}
\item 19. Id.
\item 20. Benjamin, Sales & Darling, 16 L. & PSYCHOL. REV. at 114.
\item 21. Id. at 116.
\item 24. Id. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR1-102 to - 103(A)(1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(c)(1983).
\item 27. Benjamin, Sales & Darling, 16 L. & PSYCHOL. at 118.
\end{itemize}
cent estimates because of the lack of uniformity of record keeping.\textsuperscript{28} A 1986 study by the Oregon State Bar Professional Liability Fund of 100 lawyers who entered its lawyer assistance program for alcohol or drug abuse therapy, established that 61 percent of the lawyers had disciplinary complaints and 60 percent had malpractice suits filed against them.\textsuperscript{29} The logical conclusion is that untreated, impaired lawyers are very likely to be the subject of disciplinary actions and/or malpractice cases.

B. PUBLIC TRUST AND THE PURPOSE OF LAWYER DISCIPLINE

Based upon published surveys and media coverage, public trust in lawyers is at an all time low. Much of the public perception, whether real or imagined, can be attributed to lawyers afflicted with alcoholism. Unfortunately, they are often the subject matter of media attention, violating rules of professional conduct, ignoring legal matters entrusted to them and even committing crimes.

The purpose of lawyer discipline is not to punish lawyers, but instead, "to protect clients, the public, the courts, and the legal profession."\textsuperscript{30} Jurisdictions have adopted two approaches in imposing sanctions. Some have decided that alcoholism will be considered, if raised, as mitigation in deciding sanctions.\textsuperscript{31} However other jurisdictions have rejected this approach, seemingly adopting a position that individuals are either qualified to practice law or they are not.\textsuperscript{32} There is obviously a delicate balance between the need to protect the public and a desire to restore the respondent to the profession.

IV. ALCOHOLISM AS A MITIGATING FACTOR IN LAWYER DISCIPLINE

A. "BUT FOR" CAUSATION TEST (\textit{IN RE KERSEY})

Probably one of the most well reasoned cases involving alcoholism as a mitigating factor in lawyer discipline is in \textit{In re Kersey}.\textsuperscript{33} In Kersey, the District of Columbia Court of Appeals reached a fair and equitable decision that addressed the balance between the need to protect

\begin{itemize}
  \item \textsuperscript{28} Id. (citing \textsc{Roseanne Theis, Center for Professional Responsibility, American Bar Association Disciplinary Survey (1989)}).
  \item \textsuperscript{29} Id. (citing \textsc{Don Muchogrosso, Oregon State Bar Professional Liability Fund, Profile of Legal Malpractice - A Statistical Study of the Determinative Characteristics of the Lawyers' Professional Liability Fund (May, 1981)}).
  \item \textsuperscript{30} \textsc{James Duke Cameron, Standards for Imposing Lawyer Sanctions—A Long Overdue Document, 19 Ariz. St. L.J. 91, 97 (1987)}.
  \item \textsuperscript{31} \textit{In re Kersey}, 520 A.2d 321, 322 (D.C. 1987).
  \item \textsuperscript{32} \textit{In re Hein}, 516 A.2d 1105 (N.J. 1986).
  \item \textsuperscript{33} 520 A.2d 321 (D.C. 1987).
\end{itemize}
the public and a desire to restore the respondent to the profession.\footnote{Kersey, 520 A.2d at 322.} In addition, it is apparent that the decision is based upon a thorough knowledge of the disease of alcoholism and its effects.\footnote{Id. at 325-26.} Kersey's problems with alcohol were apparent from his days in high school.\footnote{Id. at 324.} Yet, in spite of his alcoholism, he was able to graduate from law school and become a very competent member of the bar, not unlike many lawyers afflicted with the disease.\footnote{Id. at 325.} “In 1973, professors at Howard University told students to watch Kersey litigate and to analyze his trial technique. In the words of one observer, ‘He was good. Very good.’”\footnote{Id. at 325.}

The court held in Kersey that alcoholism is a mitigating factor to be considered in determining discipline. In so doing, the court acknowledged that failure to so would be a defiance of both scientific information and common sense.\footnote{Id. at 326.} The court noted that excessive alcohol use affects the parts of the brain involving memory, emotion and higher level functioning. . . . Alcohol also interferes with the brain’s electrical system and the neurotransmitters which convey thoughts, feelings and learning throughout the body. . . . Chronic alcoholism may lead to Korsakoff's syndrome, characterized by severe memory loss, impaired learning, and brain injury, or to alcoholic dementia. Alcoholic dementia, which is similar to Alzheimer's disease, results in a decline in abstracting abilities, problem solving and verbal expression.\footnote{Id.}

The court also noted that alcohol is a depressant and the alcoholic suffers from feelings of futility, and exhibits signs of reality distortion, such as “‘paranoia, aggressiveness, extreme lack of confidence and an inability to accept criticism, or to see how their behavior is affecting others.’”\footnote{Id. at 326.} Similarly, the court recognized that the judgment and attention span of the alcoholic are impaired.\footnote{Id.}

The court in Kersey did not establish that alcoholism is ipso facto a mitigating factor to be considered.\footnote{Id. at 325.} Not all alcoholic lawyers steal their client's money. Also, the alcoholic's recovery, unlike recovery from other diseases, is predicated on a choice to confront his or her problem, combined with a supportive program.\footnote{Id.}

\begin{thebibliography}{9}
\item Kersey, 520 A.2d at 322.
\item Id. at 325-26.
\item Id. at 324.
\item Id.
\item Id. at 325.
\item Id. at 326.
\item Id.
\item Id.
\item Id. at 325.
\item Id.
\end{thebibliography}
considered in mitigation there must be a sufficient nexus between the disease and the misconduct of the lawyer.\textsuperscript{45} Thus, the court established the “but for” test as a standard that must be satisfied in order to meet the burden of causation in disciplinary cases involving alcoholism.\textsuperscript{46}

The court of appeals ultimately placed Kersey on a strict, five year, supervised probation.\textsuperscript{47} The probation included the following: (1) "Total abstinence from the use of alcohol to be verified by a sobriety monitor. The sobriety monitor has the right to require that Kersey attend A.A. Lawyer's Group meetings and he should take whatever steps are necessary to ensure that Kersey remain abstinent."\textsuperscript{48} (2) Kersey's professional conduct was to be monitored by a practice monitor.\textsuperscript{49} (3) The respondent's professional financial activities were to be supervised by a financial monitor.\textsuperscript{50} The financial monitor was to be a "joint signatory on any trust account maintained by Kersey."\textsuperscript{51} The monitor also was to have access to all of respondent's personal and professional financial records.\textsuperscript{52}

B. NEBRASKA

The Nebraska Supreme Court has acknowledged that alcoholism is a prevalent problem in American society.\textsuperscript{53} In Nebraska ex rel. Nebraska State Bar Assoc. v. Barnett, a 1993 case, an attorney was charged with one count of neglect of a legal matter and one count of failure to respond to a disciplinary complaint.\textsuperscript{54} In Barnett, the attorney alleged in mitigation abnormal depression, together with the excessive use of alcohol.\textsuperscript{55} Before the matter reached the Nebraska Supreme Court, the lawyer had been admitted into a residential alcohol treatment facility.\textsuperscript{56} After hearing and receiving evidence, including the admittance of a psychiatric report, a court appointed referee suggested that the attorney be placed on probation for 18 months.\textsuperscript{57} The referee also recommended that (1) "the respondent shall not con-

\textsuperscript{45.} Id. at 327.
\textsuperscript{46.} Id.
\textsuperscript{47.} Id. at 328.
\textsuperscript{48.} Id.
\textsuperscript{49.} Id.
\textsuperscript{50.} Id.
\textsuperscript{51.} Id.
\textsuperscript{52.} Id.
\textsuperscript{55.} Barnett, 243 Neb. at 668, 501 N.W.2d at 716.
\textsuperscript{56.} Id.
\textsuperscript{57.} Id.
sume alcohol during the period of his probation, (2) the respondent shall continue as an active participant in Alcoholics Anonymous, (3) the respondent shall continue with medication and therapy as prescribed by his physician, (4) the respondent shall meet with a partner of his law firm at least once per month for the purpose of reviewing the status of each of the respondents pending cases, and (5) the respondent shall file a written report with the Counsel for Discipline on the first of each month specifically indicating whether he has complied with the conditions of probation.\textsuperscript{58} The supreme court accepted the report of the referee, including the recommendations, and placed the attorney on probation.\textsuperscript{59}

While the Nebraska Supreme Court's decision was informed and to be commended, Nebraska had no effective means of structured monitoring on a continuing basis lawyers placed on probation. Unfortunately in 1995, the attorney was again before the supreme court as a result of violation of his probation.\textsuperscript{60} The attorney had consumed alcohol and failed to file four monthly reports with the Counsel for Discipline.\textsuperscript{61} The attorney requested that his probation be extended.\textsuperscript{62} The court reasoned, and correctly so, that "for probation to be a useful sanction in disciplinary proceedings, there must be adherence to its provisions."\textsuperscript{63} The court ruled that under the facts of the case to hold otherwise would taint the procedure.\textsuperscript{64} The probation was not extended and the attorney was suspended from practice until further order of the court.\textsuperscript{65} However, the attorney's problems were not over. In 1996, he was again before the court for failure to comply with court rules.\textsuperscript{66} The attorney voluntarily surrendered his license to practice law and was disbarred.\textsuperscript{67}

The saga of this alcoholic lawyer in Nebraska raises two issues. First, if probation is appropriate in a disciplinary proceeding, how can the bar better serve the Nebraska Supreme Court and Counsel for Discipline in an effort to promote compliance by the lawyer placed on probation? Second, whether alcoholism is accepted or not as mitigation in a lawyer disciplinary proceeding, neither approach protects the public from alcoholic lawyers. The obvious reason is that no formal

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item \textit{Id.} at 668-69, 501 N.W.2d at 716.
\item \textit{Barnett}, 248 Neb. at 602, 501 N.W.2d at 634.
\item \textit{Id.} at 602-03, 501 N.W.2d at 634.
\item \textit{Id.} at 604, 501 N.W.2d at 635.
\item \textit{Id.} at 605, 501 N.W.2d at 635.
\item Id.
\item Id.
\item \textit{Barnett}, 251 Neb. at 319, 556 N.W.2d at 642.
\end{enumerate}
\end{footnotesize}
action will be sanctioned against the alcoholic lawyer until the harm has occurred.\textsuperscript{68}

V. HOW NEBRASKA HAS ADDRESSED THE PROBLEM

A. NEBRASKA LAWYERS ASSISTANCE PROGRAM

The American Bar Association ("ABA") created The Commission on Impaired Attorneys in 1988 to encourage and help bar associations in developing programs to help lawyers suffering from alcoholism.\textsuperscript{69} The Commission's focus later expanded to include lawyers with drug addictions.\textsuperscript{70} In August 1995, the ABA adopted the Model Lawyer Assistance Program.\textsuperscript{71} Since then, "the Commission has been working to incorporate the education and support of lawyers facing stress, depression and other mental health problems, into the focus of lawyer assistance programs throughout the U.S., Canada, Puerto Rico and Great Britain."\textsuperscript{72} In 1996, the name of the ABA Commission on Impaired Attorneys was changed to the Commission on Lawyer Assistance Programs "to better describe its role in educating the profession on chemical dependency and mental health problems and supporting the development of solutions for recovery."\textsuperscript{73} In 1980, there were only 26 state bar lawyer assistance programs.\textsuperscript{74} Presently, all 50 states have lawyer assistance programs or committees that are concerned with "quality of life issues, use intervention, peer counseling, referrals to 12-step programs" and treatment to assist a lawyer's recovery process.\textsuperscript{75}

In 1979, the Nebraska State Bar Association ("NSBA"), acknowledging that the conduct of every attorney reflects upon the entire legal profession, and accepting that alcoholism is a treatable disease, created the Committee on Alcoholism and Drug Abuse.\textsuperscript{76} In 1994, the Committee voted to request an evaluation and recommendation from the ABA Commission on Impaired Attorneys.\textsuperscript{77} As a result of this request, a review containing four recommendations was completed and

\textsuperscript{68} Bloom & Wallinger, 61 Temp. L. Rev. at 1410.
\textsuperscript{69} American Bar Association Comm. on Impaired Attorneys Takes New Name to Better Describe Its Services, ABA News Release, July 24, 1996, at 29.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 30.
\textsuperscript{73} Id. at 29.
\textsuperscript{74} Id. at 30.
\textsuperscript{75} Id.
\textsuperscript{76} Lawyer Assistance Program Nebraska State Bar Assoc., Proposed 1996 Budgets for NSBA Committee on Alcoholism and Drug Abuse and for NSBA Lawyers Assistance Program 2, 5 (May 2, 1995).
\textsuperscript{77} Id.
submitted to the NSBA on March 30, 1995. The first recommendation in the review was to establish the Nebraska Lawyers Assistance Program (NLAP) as a stable, permanent program of the State Bar and hire a director (full or part-time) with the experience, skills and attributes necessary to effectively coordinate the operation of the program and to make appropriate reports to the NSBA. Second, the Committee suggested the establishment of a statewide “800” telephone number for NSBA members to receive assistance and effectively educate them of the existence of the Program. The committee noted that the 800 number and the nature of any call for assistance shall remain confidential. Third, the Committee recommended continuing the excellent relationship established between the Committee and the Disciplinary and Bar Admissions authorities and staffs by developing monitoring programs for both entities. Finally, the Committee recommended obtaining assistance of the Nebraska Supreme Court to mandate that every law student attend a presentation hosted by the Nebraska Lawyers Assistance Program (“NLAP”) discussing the effects of alcohol drug abuse on the legal profession.

As a result of the Commission’s recommendations, the House of Delegates of the NSBA, at the 1995 Annual Meeting, approved the establishment of, and provided funding for the NLAP. The NLAP’s mission is “to provide immediate and continuing assistance to lawyers, judges and law students who suffer from the diseases of Alcoholism and Drug Addiction with a view to reducing the harm clients and the entire system of justice suffer as a result of active alcoholism and drug addiction among the members of the bench and bar.” The NLAP will accomplish this by: (1) assisting chemically dependent lawyers, judges and law students in their recovery, and (2) providing education to the bench, bar and law students concerning recognition of this problem and the treatment options available. The NLAP was initiated in May 1996. A toll-free, twenty four hour, confidential hotline became operational one month later.

78. Id. at 4.
80. Id.
81. Id.
82. Id.
83. Nebraska State Bar Assoc. Lawyers Assistance Program, Establishment of the Nebraska State Bar Association Lawyer Assistance Program 1 (December 8, 1995).
84. Id.
85. Id.
B. CONFIDENTIALITY OF THE NLAP

It is important that an individual who seeks or receives aid through the NLAP or the Committee know that he or she can do so with the guarantee of confidentiality. The NSBA's policy states that voluntary involvement by any lawyer or judge will not be grounds for any type of professional discipline. In support of this policy, the Nebraska Supreme Court amended the Code of Professional Responsibility to include DR 4-101(E). DR 4-101(E) provides that "the relationship between a member of the Nebraska State Bar Association Committee on Alcoholism and Drug Abuse and a lawyer who seeks or receives assistance through the Nebraska State Bar Association Committee on Alcoholism and Drug Abuse shall be the same as that of attorney and client for the purposes of the application of DR 1-103, DR 4-101 and DR 7-102(B). The NLAP Director is ex officio a member of the Committee. In addition, the Director and members of the Committee must always comply with DR 4-101(E).

VI. RECOMMENDATIONS: MONITORING AND DIVERSION

The most important factor in successful treatment of alcoholism is early detection. Lawyer Assistance Programs are in part designed to protect the public from lawyer misconduct. Protection of the public is accomplished by assisting alcoholic lawyers in their recovery and providing education concerning recognition of the problem and the treatment options available. The NSBA has acknowledged the problem of the alcoholic lawyer and has taken positive action in the creation of the NLAP.

In addition to starting Lawyers Assistance Programs, other states have instituted monitoring and diversion programs in response to the problems of chemical dependency in the profession. The first professional associations to apply monitoring programs were physicians and airline pilots. Monitoring programs have been shown to be highly effective in satisfying the dual goals of protection of the public and

86. Id. at 4.
87. Id.
88. Id.
89. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(e) (1997).
90. NEBRASKA STATE BAR ASSOC. LAWYERS ASSISTANCE PROGRAM, supra note 83, at 4.
91. Id.
93. NEBRASKA STATE BAR ASSOCIATION LAWYERS ASSISTANCE PROGRAM, supra note 86, at 1.
rehabilitation of the impaired practitioner. Dr. Douglas Talbot, the director of an impaired physician treatment program in Georgia, conducted the first study gauging the effectiveness of such programs. The study proved that ninety-three percent of the impaired physicians placed on a probation program that included monitoring remained sober. The ninety-three percent rate has been confirmed in subsequent studies. This result is astounding when compared to the recovery rate of the general population, which ranges from forty to sixty percent.

Monitoring programs are really in their infancy and vary from state to state. Highly trained probation monitors may be assigned in disciplinary cases when disbarment is not mandated, but public protection must be insured. Disciplined lawyers are assigned highly-skilled probation monitors who evaluate their law practices, finances, and sobriety, filing regular reports as may be required.

While disciplinary-probation monitoring generally follows serious misconduct, diversion programs are designed to “divert” the impaired lawyer before serious disciplinary violations have occurred. Lawyers in need of help are referred to professionals, groups or agencies for treatment and education in order to address the problem or problems that lead to misconduct.

VII. CONCLUSION

The magnitude of the problems relating to alcoholism and chemical dependency in the legal profession cannot be denied. The “conspiracy of silence” must be addressed and appropriate action taken by the bench and bar. Lawyers suffering from the disease of alcoholism far exceed the percentage in the general public. Furthermore, alcoholism and drug abuse are substantial contributing factors in the majority of discipline cases. The problem of addiction in lawyers is a principle

96. Id. at 274.
97. Id.
98. Id.
99. Id.
102. Id.
103. Id.
104. Id.
105. Id.
underlying factor in the erosion of public trust and confidence in lawyers and the judicial system.

Many courts, including those in Nebraska, have acknowledged the relationship between substance abuse and disciplinary matters. The establishment of the “but for” test as the nexus between the illness and a lawyer’s misconduct is a positive step in acknowledging and addressing the problem. Courts are to be commended for stressing recovery from the illness, rather than the illness itself, as the mitigating factor in discipline cases involving alcoholism or drug abuse. The bar, however, must recognize the importance of confronting the issue before the misconduct has occurred.

Through the establishment of Lawyer Assistance Programs, Nebraska and other state bars have recognized the problem of substance abuse among their members and the importance of attempting to reach out to impaired lawyers before they have harmed the public, the bar or themselves. This is a first and most important step, but state bars have an ongoing responsibility to the public and their membership to continually review and adopt programs to address the institutional denial that exists in the profession. The time has come for Nebraska and similarly situated states to take the next step and establish meaningful monitoring and diversion programs.