

[Preamble: In 2019, the Policy Committee of the ABA Commission on Lawyer Assistance Programs (CoLAP) and the ABA Working Group to Advance Well-Being in the Legal Profession developed this template to provide suggested guidelines to legal employers for responding to an employee who is experiencing impairment due to a substance use disorder, mental health disorder or cognitive impairment. Each employer should tailor this document to meet the specific needs of its workplace, taking into consideration size, resources and practice setting. In particular, the employer MUST consult with labor and employment counsel to ensure that language adopted conforms to the panoply of federal and state laws, regulations and orders that apply to the workplace, which include: privacy, disability and human rights laws; federal laws, such as HIPAA, FMLA, ADA; and other applicable restrictions, such as collective bargaining agreements.]

WELL-BEING TEMPLATE FOR LEGAL EMPLOYERS

[Legal employer] is committed to the well-being of its personnel, as well as to the prevention of impairments, and to assisting our staff in obtaining treatment when needed. Impairment of a personnel member, due to substance use or mental disorder¹, as well as cognitive impairment or dementia, adversely affects not only the individual's well-being, but also our ability to serve our clients capably and responsibly.

Our goals are: (1) early identification of impairment and proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) preventing our professional standards and the quality of our work from being compromised by any personnel member's impairment. This document is intended to demonstrate compliance with those professional regulations which require firms to establish internal policies and procedures ensuring that all lawyers (including those impaired) conform to the Rules of Professional Conduct ("RPC"), as well as state or federal rules, regulations or statutes.

I. Implementation

The following terms apply to all legal professionals including, but not limited to, partners, managing attorneys, associates, paralegals, and legal assistants, whether full-time, part-time, contract or temporary. This [protocol or policy] will be publicized in the workplace and placed in the personnel handbook. A contact person, such as a managing partner, human resources director, or designated person will be responsible for its implementation. This person will not undertake counseling or treatment. The contact person should notify individuals of the availability of lawyer assistance programs which can refer impaired persons to agencies for counseling and treatment.

II. Definition of Impairment

For purposes of this document, [legal employer] considers "impairment" to be a condition that materially and adversely affects a person's judgment, memory, intellectual functioning, or otherwise interferes with work performance and the rendering of legal services in a manner consistent with our standards and the RPC. The diagnosis of an illness does not automatically equate with impairment. Illness is the existence of a physical or mental disease,

¹ See <https://www.samhsa.gov/disorders> for descriptions of mental and substance use disorders.

while impairment is a functional classification that implies inability (perhaps affected by physical or mental disorder) to render services with reasonable skill and safety. Impairment may be due to the use of alcohol or drugs (prescribed or non-prescribed), a mental health disorder, or a physical illness or condition that would adversely affect cognitive skills. Determinations about impairment will be made carefully, following a thorough investigation, based on objective information and should be made in consultation with a medical or behavioral health specialist with expertise in the alleged impairment.² (See also section V regarding confidentiality.)

III. Well-Being Initiatives

[Legal employer] is committed to assisting our lawyers and non-lawyer personnel to thrive professionally and personally. We support well-being initiatives in order to reduce lawyer and staff turnover, reduce illness, and improve competence and career satisfaction, as well as to ensure provision of the highest quality legal services to our clients. To support well-being in the work environment, we:

- A) have a proactive written protocol and leave policy that covers the assessment and treatment of substance use and mental health problems, including a defined back-to-work policy following treatment;
- B) encourage all personnel to use accrued leave time, consider flexible work schedules, and eliminate artificial deadlines while continuing to provide competent, diligent representation;
- C) will assist lawyers and all personnel to establish self-care well-being goals; and
- D) provide training to identify signs and symptoms of substance use and behavioral health issues and to prevent work addiction and social isolation.

IV. Addressing Impairment Concerns

Lawyers shall not practice law or otherwise render legal services while impaired, and staff members shall not assist in providing legal services while impaired. Firm personnel shall not help a colleague conceal his or her impairment, including by knowingly assisting an impaired colleague in providing legal services.

- A. Personnel who:
 - 1. believe they are themselves impaired or at risk of becoming impaired, or
 - 2. reasonably suspect that a lawyer or staff member may be impaired,[choose one: shall/should] report their concerns to [name and title of designee³].

² Examples of relevant specialists include: neuropsychologist for cognitive impairment, a medical doctor certified by the American Society of Addiction Medicine (ASAM) to diagnose a substance use disorder, and a psychiatrist or other behavioral health specialist authorized to diagnose a mental health condition. Lawyer assistance programs can provide referrals to qualified experts in any of these areas.

³ This contact person could be a department head or practice group leader, member of the executive or leadership committee, general counsel, chief operating officer, or managing partner.

- B. All personnel have the obligation to report any of the following incidents in which they have been arrested or charged with: driving while under the influence, public intoxication, and possession or sale of any illegal substance. Such information may be reported to the member listed in IV, subsection A, above.
- C. Upon learning of a personnel member's possible impairment, [legal employer] will investigate the circumstances and undertake reasonable measures to assist that person on a confidential basis.
- D. Both individuals who may be impaired or at risk of becoming impaired and those concerned for another personnel member are encouraged to also contact their state or local lawyer assistance program or our employee assistance program for confidential assistance.⁴

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| [State] Lawyer Assistance Program | Website/Phone |
| [Legal Employer's] Employee Assistance Program | Website/Phone |

V. Confidentiality

[Legal employer] will treat all communications as confidential to the extent consistent with our duties to protect clients, as well as to comply with the RPC, state or federal rules, regulations or statutes. All protected health information will be handled in accordance with state and federal laws. Communications include those by and between the potentially impaired individual, the personnel assigned with responsibilities to investigate and assist, as well as anyone who reports concerns regarding the potential impairment of another. Statutory exceptions to confidentiality will be followed, including but not limited to: a threat to harm oneself or others, future criminal conduct, and child or elder abuse.

VI. Prohibition Against Retaliation

Any concern about retaliation must be reported immediately to the contact person listed in IV, subsection A, above. [Legal employer] will investigate any report of retaliation and take such action as may be appropriate, including disciplinary action against anyone found to have retaliated against a person for reporting a possible impairment or participating in the investigation of a report.

⁴ The Firm should include the name and phone number of the lawyer assistance program (LAP) in each state in which it operates. Most LAPs provide free consultations, assessments, brief counseling and education, peer support, intervention, monitoring and referrals. A directory of LAPs may be found at: https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state.html.

VII. Considerations Upon Determination of Impairment

[Legal employer] seeks early identification of impairment issues of its personnel in order to provide the impaired individual with qualified treatment services as soon as possible to facilitate that person's recovery. At the same time, we will take such steps as may be necessary to protect the interests of our clients and to comply with the RPC and any state or federal rules, regulations or statutes. Those steps may include one or more of the following:

- A. Leave of Absence: [Legal employer] will permit the impaired individual to use accrued paid leave time for treatment and will provide accommodations upon a return to work as permitted under its leave policies and as required under state and federal law.
- B. Referral and Treatment: [Legal employer] will make concerted efforts to assist the impaired individual in obtaining appropriate medical care and treatment. The state's lawyer assistance program may be consulted for assistance with referrals, evaluations and/or monitoring of lawyers.
- C. Restriction of Work Duties: [Legal employer] may restrict the impaired individual by removal from client or other work matters, supervision of work activities, or any other reasonable restriction of activities or client matters deemed necessary to protect client interests and comply with the RPC.
- D. Review of Activity: After determining that a personnel member is, or has been, suffering from an impairment, we will determine if a review of all matters recently handled by that person is warranted in order to take remedial action on client matters. This review may include: review of client files, time and billing records, electronic communications, and telephone records.
- E. Remedial Action: [Legal employer] shall immediately take any remedial action on client matters deemed necessary to mitigate any violation, or potential violation, of the RPC or other adverse consequences arising as a result of the impairment. [See state version of Rule 5.1(c) of the Model Rules of Professional Conduct.] Disclosure to the client may be required and will be done in compliance with the RPC.
- F. Reporting to Disciplinary Authorities: A report will be made to the appropriate professional disciplinary authorities if required by the RPC, state or federal rules, regulations or statutes. [See state version of Rule 8.3 of the Model Rules of Professional Conduct, ABA Formal Opinion 03-431; and ABA Formal Opinion 03-429].
- G. Conditional Employment: Continued employment (unless otherwise required by the FMLA, ADA or other state or federal law or court judgment) may be conditioned upon any of the following:
 - 1. Taking a leave of absence;
 - 2. Execution of a Return to Work Agreement;
 - 3. Evaluation by a healthcare professional (see footnote 2 supra);

4. Commitment to a treatment plan, if recommended by the healthcare professional;
5. Periodic alcohol or drug testing resulting in consistent negative results;
6. Ongoing participation in peer support recovery programs;
7. Continuing in individual or group psychotherapy;
8. Compliance with a medication treatment plan;
9. Monitoring by a lawyer assistance program or other professionals monitoring program; and/or
10. Disclosure of evaluation results and treatment recommendations, as well as verification of participation in appropriate treatment and support programs.

VIII. Consequences of Violations

Any personnel member who acts contrary to provisions contained herein, or violates any standards hereby established, [choose one: will/may] be subject to disciplinary action up to and including termination. [Legal employer] may, however, in its discretion, offer personnel the opportunity to participate in a counseling, treatment or rehabilitation program in lieu of such discipline.

IX. Other Laws

This document is in no way intended to interfere with [legal employer's] obligations to provide reasonable accommodations to those who are disabled under the Americans with Disabilities Act. Please see the Firm's EEO and Reasonable Accommodation policies for further information.

Note: This template was prepared by the Policy Committee of the ABA Commission on Lawyer Assistance Programs and the ABA Working Group to Advance Well-Being in the Legal Profession in 2019. Questions or comments may be directed to CoLAP Staff Counsel at Theresa.gronkiewicz@americanbar.org or 312-988-5299.