

The Ethics of Addiction and Legal Partnership Agreements: How Current Partnership Laws and the Rules of Professional Conduct Fail to Account for the Epidemic of Addiction in the Legal Profession

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“There is no . . . protection of the public without treatment and recovery for the impaired lawyer. Promises do not and cannot suffice. Alcoholics and addicts compulsively deny and deceive, not because they are bad people, but because they are sick people.”¹

INTRODUCTION

In *Lawlis v. Kightlinger & Gray*, the plaintiff, a senior partner at his Indiana law firm, was expelled due to his struggle with substance abuse and an unfortunate relapse into alcoholism.² He brought a wrongful dissolution suit against the firm and the court decided against him, holding that the alcoholism created a material, ethical, and reputational risk to the partnership. The court clarified:

Any condition which has the potential to adversely affect the good will or favorable reputation of a law partnership is one which potentially involves the partnership’s economic survival. Thus, if a partner’s propensity toward alcohol has the potential to damage his firm’s good will or reputation for astuteness in the practice of law, simple prudence dictates the exercise of corrective action . . . since the survival of the partnership itself potentially is at stake.³

The struggle of lawyers battling addiction is well documented by the American Bar Association.⁴ Alcoholism, or alcohol dependence, as defined by the American Psychological Association, is a disease marked by a pattern of repetitive, compulsive, and dependent alcohol use “despite significant behavioral, physiological, and psychosocial problems . . . resulting in impaired control.”⁵

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1. George Edward Bailly, *Impairment, The Profession and Your Law Partner*, 15 ME BAR J. 96, 100 (1999).
2. See *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435 (Ind. Ct. App. 1990).
3. *Id.* at 442.
4. James Gray Robinson, *Lawyers, addiction and COVID-19: ‘Changing the landscape for everyone,’* A.B. A. J. (June 4, 2020), <https://www.abajournal.com/voice/article/attorneys-addiction-and-covid19> [<https://perma.cc/ZM7Z-575C>] see also Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 52 (2016).
5. Am. Psych. Ass’n, *APA College Dictionary of Psychology* 13 (1st ed. 2009).

“Addiction” refers to the “state of psychological or physical dependence” on alcohol or other substances.⁶ Addiction is diagnosed based on criteria that include “tolerance, withdrawal, loss of control, and compulsive use of the substance.”⁷ Finally, substance abuse refers to a pattern of use that is subsequently followed by significant adverse consequences. Such consequences may be “social, occupational, legal, or interpersonal.”⁸ Yet, despite these adverse consequences, the substance abuse persists.⁹ For purposes of this Note, these three terms may be used interchangeably, except that alcoholism refers only to alcohol use and substance abuse and addiction may refer to a wide range of substance-induced impairment.

This Note will argue that the American Bar Association’s *Model Rules of Professional Conduct* (“*Model Rules*”), along with both the statutory and common law of partnerships, fail to contemplate the epidemic of substance abuse and alcoholism in the legal profession. It seems that the law has not yet caught up to the contemporary understanding of addiction as a disease or medical condition, rather than a conscious choice. A legal partnership agreement tends to provide for the expulsion of a partner without notice and without cause, despite the general proposition that copartners “owe to one another . . . the duty of the finest loyalty.”¹⁰ Furthermore, this Note argues that the *Model Rules* fail to provide particularized guidance on how law firms, and courts, should address lawyer incompetence resulting from addiction or substance abuse. In addition, this Note addresses how the *Model Rules* as they stand disincentivize transparency, with the threat of sanctions and other punitive measures, and deter the struggling attorney from coming forward with his addiction. Together, these deficiencies reward dishonesty and deception, fail to acknowledge the epidemic of addiction in the legal profession, and ultimately harm the members of the public whom our profession seeks to serve.

I. BACKGROUND

A. LAWYERS AND ADDICTION

While many would consider white collar professionals to be society’s least vulnerable to addiction, the available data tells us otherwise.¹¹ A 2016 study found that twenty-one to thirty-six percent of licensed attorneys qualify as problem drinkers, while other studies have anticipated the number to be about one in three.¹² Ironically, many scholars have noted that the same qualities that make a

6. *Id.* (emphasis added).

7. *Id.*

8. *Id.* at 412.

9. *See id.*

10. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); *see also* UNIF. P’SHIP ACT § 105(c)(5) (2001) (explaining that a partnership agreement may not “alter or eliminate the duty of loyalty or the duty of care” between copartners).

11. *See Robinson*, *supra* note 4.

12. *See id.*

good lawyer are those likely to lead to addiction and substance abuse disorders; these include a strong and internal conviction for justice, commitment to detail, and a tendency toward perfectionism.¹³

Around thirty-six percent of lawyers report problems with alcoholism, revealing substantial rates of behavioral health problems, with about twenty percent screening positive for hazardous, harmful, and potentially alcohol-dependent drinking and one in four lawyers falling into the category of “at risk for alcoholism.”¹⁴ Lawyers are more likely than members of the general population to develop mental health illnesses, including depression and anxiety, and this increases the likelihood of alcoholism or substance abuse problems.¹⁵ Even more noteworthy, research suggests that members of the legal profession may have a much more difficult time acknowledging a problem with alcohol or other substances as compared to the general population.¹⁶ In fact, one 2018 survey of managing partners and human resources personnel at the top two hundred law firms in the United States “revealed that stigma associated with mental illness and substance abuse is prevalent in the [legal] profession.”¹⁷ Such findings have led the American Bar Association to recently launch initiatives to help alleviate the incidences of alcoholism, substance abuse disorders, and other mental health illnesses that plague the profession.¹⁸

B. LEGAL PARTNERSHIPS

A legal partnership is one business organization consisting of two or more partners that carry on as co-owners of a business for profit.¹⁹ Such is the business form achieved by most law firms.²⁰ In such a firm, partners owe to one another the fiduciary duties of care and loyalty, requiring that each partner carries on in

13. *Id.*

14. John Miranda, *Legally bombed: Young millennial lawyers, same old alcoholism*, A.B.A. J. (Oct. 9, 2018), https://www.abajournal.com/voice/article/legally_bombed_young_millennial_lawyers_same_old_alcoholism#:~:text=Numerous%20studies%20through%20the%20decades,scores%20consistent%20with%20problem%20drinking [<https://perma.cc/RB9Y-A6LM>]; *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change [The Report of the National Task Force on Lawyer Well-Being]*, A. B.A., at 7 (Aug. 2017), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf> [<https://perma.cc/8WT9-HN9R>].

15. Krill et al., *supra* note 4, at 46 (detailing that “[t]hese data underscore the need for greater resources for lawyer assistance programs, and also the expansion of available attorney-specific prevention and treatment interventions”).

16. See generally Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265 (1997).

17. Jarrod F. Reich, *Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being*, 65 VILL. L. REV. 361, 393 (2020).

18. See, e.g., *Midyear 2018: Panel to examine lawyer substance abuse, mental health – and solutions*, A.B.A. (Feb. 1, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/midyear_2018_panel/ [<https://perma.cc/U4F8-BDK8>].

19. JEFFREY D. BAUMAN, RUSSELL B. STEVENSON & ROBERT J. RHEE, *BUSINESS ORGANIZATIONS LAW AND POLICY: MATERIALS AND PROBLEMS* 263 (9th ed. 2017).

20. *Id.* at 264.

the partnership in good faith and fair dealing.²¹ However, these default rules owed by parties to a partnership may be limited via the partnership agreement, as long as those limitations are not manifestly unreasonable.²²

Generally, most default partnership agreements do not contemplate the indisposition of one partner at the hands of addiction to drugs or alcohol.²³ In the *Lawlis* case, the partnership agreement at issue provided that the involuntary expulsion of a partner could be executed upon a two-thirds vote on a proposal by the Finance Committee.²⁴ The plaintiff, Lawlis, remained a senior partner at the law firm until he was expelled in accordance with the partnership agreement.²⁵ Lawlis contended that “his expulsion contravened the agreement’s implied duty of good faith and fair dealing.”²⁶

The lawyer struggling with addiction may expose a law firm to liability for malpractice lawsuits or violations of the *Model Rules*.²⁷ Because of this, different jurisdictions have taken different approaches to resolving the case of an impaired lawyer. The D.C. Court of Appeals explained that “alcoholism is a mitigating factor to be considered in determining discipline” for lawyers who have violated the rules of professional responsibility, as alcoholism “can result in uncontrollable behavior and [physical and] psychological . . . changes.”²⁸ Other jurisdictions have taken a related approach, considering substance use as a mitigating, rather than exculpatory, factor for consideration.²⁹

II. RELEVANT RULES

The *Model Rules* can be read together to establish a framework for a lawyer’s behavior as a citizen with a special responsibility toward promoting and upholding justice.³⁰ Examples of this framework include: 1) defining lawyer competence; 2) calling for withdrawal from representation; 3) supervisory duties owed by other attorneys; 4) guidelines for lawyer communication; and 5) rules for reporting professional misconduct. What the *Model Rules* fail to provide, however, is a comprehensive and targeted approach to securing lawyer well-being and tackling the reality of substance abuse and addiction in the legal profession.

The *Model Rules* fail for several reasons. They do not advise on whether the lawyer’s disclosure of an addiction to a client satisfies modern standards of

21. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); Allan W. Vestal, *Law Partner Expulsions*, 55 WASH. & LEE L. REV. 1083, 1086–87 (1998).

22. See *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 442–43 (Ind. Ct. App. 1991).

23. See Bailly, *supra* note 1, at 105.

24. *Lawlis*, 562 N.E.2d at 439.

25. *Id.* at 440.

26. *Id.*

27. Bailly, *supra* note 1, at 103 (citing George Overton, *Supervisory Responsibility: A New Ball Game for Law Firms and Lawyers*, 78 ILL. B.J. 434 (1990)).

28. *In re Kersey*, 520 A.2d 321, 326 (D.C. 1987).

29. See Bailly, *supra* note 1, at 99.

30. See MODEL RULES OF PROF’L CONDUCT pmbl. (2018) [hereinafter MODEL RULES].

communication.³¹ They do not explain whether the struggling lawyer needs to make her addiction known to her law firm or supervisory partner.³² They do not clarify whether struggling with addiction automatically exposes the lawyer to disciplinary action.³³ Even more so, the *Model Rules* do not address whether disclosure of addiction is required between copartners in a legal partnership agreement, nor do they address whether the partner struggling with addiction can be expelled from the partnership without facing any disciplinary action under the respective state's ethical rules. The *Model Rules* plainly leave open the question as to whether battling addiction, which data assuredly tells us is a widespread issue in the legal community, is an automatic violation of a lawyer's duties of professional responsibility. To understand the piecemeal approach taken by the *Model Rules*, we must evaluate the relevant rules in turn and identify what holes each rule leaves in its stead.

Rule 1.1 requires a lawyer to provide "competent representation" to the client, which means that the lawyer has the requisite "legal knowledge, skill, thoroughness and preparation" to represent the client.³⁴ To maintain this competence, the lawyer should keep up to date on changes in the law and its practice, "including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."³⁵ Lawyers who suffer from addiction or substance abuse may have trouble providing competent representation to clients.³⁶ But lawyers seeking help for their addiction may be capable of mitigating the risk created by their condition, through intervention and treatment, as well as balancing competent representation for clients. This balance does not seem to be contemplated by, nor addressed in, Rule 1.1.³⁷

Rule 1.16(a)(2) explains that, "[e]xcept as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."³⁸ One Iowa court noted that "[t]here is very little case law interpreting this rule," which is often thought to be the place where lawyer wellness meets withdrawal of representation.³⁹ Simultaneously, Rule 1.16(a)(2) is thought to be the only provision

31. See MODEL RULES R. 1.1.

32. See MODEL RULES R. 5.1.

33. See STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 1.3 (A.B.A. 1986).

34. MODEL RULES R. 1.1.

35. MODEL RULES R. 1.1 cmt. 8.

36. LISA G. LERMAN, PHILIP G. SCHRAG & ROBERT RUBINSON, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 104 (5th ed. 2020).

37. See MODEL RULES R. 1.1.

38. MODEL RULES R. 1.16(a)(2).

39. Mark J. Fucile, *Model Rule 1.16(a)(2): Where Wellness Meets Withdrawal*, A.B.A. (Oct. 2, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/model-rule-116a2-where-wellness-meets-withdrawal/ [<https://perma.cc/2X2E-GHDE>].

within the *Model Rules* that specifically addresses lawyer impairment.⁴⁰ This rule does not, however, provide sufficient guidance to the struggling attorney or his partners on what steps to take to resolve the impairment. In this way, Rule 1.16(a)(2) poses more questions than it provides answers.

Rule 1.16(a)(2) was not borne from the Canons of Professional Ethics, meaning that the rule is relatively young in its adoption and cannot be predated to the Canons of 1908.⁴¹ Rather, Rule 1.16(a)(2) “was first introduced as a regulation with DR 2-110(B)(3) in the ABA Model Code of Professional Responsibility in 1969,” which “required withdrawal if a lawyer’s ‘mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.’”⁴² Substantively, this rule has been applied to physical and mental conditions, with a particular focus on substance abuse.⁴³ However, the rule does not make clear the remedy available to a lawyer struggling with addiction who, under this rule, must withdraw from the case in front of him. Thus, as previous courts have stated, Rule 1.16(a)(2) provides little guidance to struggling attorneys and their supervisory attorneys.

Rule 1.4 is known as the “[c]ommunications” rule⁴⁴ and suggests that a serious illness, such as an addiction, which impacts the ability of counsel to handle a client’s case, should be disclosed to the client or the firm.⁴⁵ However, this rule also invokes a balance to be struck between the client’s need to be consulted on the case and the privacy concerns of the lawyer involved in the representation.⁴⁶ This balance is not wholly clarified in the ABA commentary, which does not offer any explicit guidance as to how the balancing should be conducted, especially while considering a lawyer who is impaired by substance abuse.⁴⁷ Nor is it clear where exactly a lawyer’s addiction falls while conducting such a balancing.

Rule 5.1 specifies the responsibilities of a partner or supervisory lawyer, invoking the legal and fiduciary relationships that are required between partners at a law firm.⁴⁸ The rule provides that, “A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial

40. *See id.*

41. *See id.* (explaining that, while Canon 44 addressed withdrawal, it did not include an affirmative withdrawal requirement similar to that of Rule 1.16(a)(2)).

42. *Id.* (quoting A.B.A., COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 251 (2019)).

43. Fucile, *supra* note 39.

44. MODEL RULES R. 1.4.

45. *See* ABA Formal Op. 03-429 (2003).

46. *See* MODEL RULES R. 1.4 (explaining that, in contemplation of the lawyer-client relationship, “(a) [a] lawyer shall: . . . (3) keep the client reasonably informed about the status of the matter; . . . and (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law” and “(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”).

47. *See* ABA Formal Op. 03-429 (2003).

48. MODEL RULES R. 5.1.

authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”⁴⁹ Rule 5.1 also provides that in some instances a lawyer may be found “responsible for another lawyer’s violation of the Rules of Professional Conduct” if that lawyer knows of conduct that violates the ethical rules but fails to take reasonable and available remedial action.⁵⁰

This responsibility explicitly applies to members of a legal partnership, where partners in a private firm have a responsibility for all work being done by the firm and may be liable for the professional shortcomings of any other partner at the firm.⁵¹ Furthermore, professional misconduct by a lawyer under direct supervision could reveal a violation on the part of the supervisory lawyer. Such an imposition makes the failure to explicitly provide for the addiction of a fellow partner at a law firm somewhat more understandable. That is to say, on some occasions, one lawyer’s struggle with addiction to alcohol or other substances may put not only the other partners, but the entire law firm at risk.

Rule 8.3 includes a duty to report the professional misconduct of any other lawyer or judge in order to maintain and protect the integrity of the legal profession.⁵² It requires that, “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”⁵³ The ABA also emphasizes that self-regulation is essential to maintaining the integrity of the legal profession and that the duty to report professional misconduct is especially important when “[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”⁵⁴

Rule 8.3 is widely known as the “whistle-blowing” rule for lawyers.⁵⁵ One issue with the language of this rule is that it mandates a seemingly punitive approach to lawyer addiction when a more interventionist and preventative approach is likely a better technique for preventing professional misconduct in the field of law. The punitive approach may be observed in the outcomes of various jurisdictions. For example, the Supreme Court of Illinois held that an attorney violates his ethical duties for failure to report the misconduct of another

49. MODEL RULES R. 5.1.

50. MODEL RULES R. 5.1 (requiring that a lawyer shall be responsible for the violative conduct of another lawyer if “the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action”).

51. MODEL RULES R. 5.1 cmt. 1.

52. See MODEL RULES R. 8.3.

53. MODEL RULES R. 8.3(a).

54. MODEL RULES R. 8.3 cmt. 1.

55. See Bailly, *supra* note 1, at 102.

attorney.⁵⁶ Furthermore, because a lawyer has the duty to report, any code of silence adhered to by the attorney possessing such a duty, may indicate to the proper authority that he is not fit to practice law.⁵⁷ Not only does this rule propose punitive measures for the struggling attorney, but also any other attorney contiguous to his addiction.

Lastly, while Rule 8.3 requires the reporting of professional misconduct,⁵⁸ Rule 8.4 clarifies exactly what that misconduct looks like. Rule 8.4 declares that “[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the [applicable] Rules of Professional Conduct, . . . commit a criminal act[,] . . . engage in conduct involving dishonesty, fraud . . . or misrepresentation[,] . . . [and] engage in conduct that is prejudicial to the administration of justice.”⁵⁹ While it remains unclear whether a lawyer’s battle with addiction on its own may be enough to find a violation of the *Model Rules*, as evidenced in the previous discussion of Rules 1.1, 1.16(a)(2), and 1.4, it seems evident that a lawyer struggling with addiction is more likely to engage in conduct that falls within the more explicit prohibitions of Rule 8.4. Specifically, lawyers struggling with addiction may be more likely to commit a criminal act, to engage in dishonest or fraudulent conduct, or to engage in conduct prejudicial to the administration of justice.⁶⁰ But given the rate of addiction in the legal profession, the *Model Rules* must consider whether the struggling lawyer should be immediately subject to disciplinary action for engaging in lawyer misconduct.

III. THE DEFAULT PARTNERSHIP AGREEMENT

Most default partnership agreements *do not* contemplate the potential indisposition of a partner to alcoholism, substance abuse, or addiction at the inception of the partnership.⁶¹ Given the incidences of addiction reported among law partners,⁶² this deficiency poses a risk for members of a partnership. Default partnership agreements tend to focus on more general questions, none of which include addiction. Instead, the focus of the well-drafted partnership agreement concerns: 1) management of the business, 2) decision-making processes, 3) capital

56. See *In re Himmel*, 533 N.E.2d 790, 793 (Ill. 1998) (holding that an attorney’s failure to report the misconduct of another attorney to the proper authority may be enough to warrant suspension or disbarment from the practice of law) (citing ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1210, 447 (1972) (stating that “the Code of Professional Responsibility through its Disciplinary Rules necessarily deals directly with reporting of lawyer misconduct or misconduct of others directly observed in the legal practice or the administration of justice.”)).

57. *In re Himmel*, 533 N.E.2d at 794.

58. MODEL RULES R. 8.3.

59. MODEL RULES R. 8.4(a)-(d); see also Bailly, *supra* note 1, at 98.

60. See MODEL RULES R. 8.4(b)-(d).

61. See Bailly, *supra* note 1, at 96.

62. See, e.g., Amanda Griffin, *Addiction Problems Continue to Grow in Law Firms*, JD J. (Aug. 1, 2017), <https://www.jdjournal.com/2017/08/01/addiction-problems-continue-to-grow-in-law-firms/> [<https://perma.cc/J5Q8-D6FM>].

contributions, 4) allocations of profits and losses, 5) new partners, 6) expulsion of partners, 7) annual reporting and financial statements, 8) non-competition and non-solicitation, 9) restrictions on transferability of the partnership interest, 10) dissolution, and 11) fees and costs of the partnership.⁶³ This Note will argue that each well-drafted partnership agreement should anticipate lawyer addiction and provide for that possibility in various sections of the agreement.

IV. COVID-19

Where the long hours of legal practice are already extensive, quarantine and social isolation may exacerbate the symptoms of an addicted or an at-risk-for-addiction attorney.⁶⁴ The coronavirus pandemic has worsened rates of addiction in the United States⁶⁵ and some of the most at-risk individuals include white-collar professionals.⁶⁶ Recent studies identified that attorneys are at higher risk for depression, and thus for substance abuse, as the pandemic rages on.⁶⁷ Professionals who already face heavy workloads and inflexible deadlines are now required to complete the same amount of work while socially isolated, working from home, and without the support of colleagues and the structure of an office.⁶⁸

Some have called this a collision between two epidemics: the COVID-19 pandemic and the opioid epidemic.⁶⁹ Isolation coupled with uncertainty and a lack of control are the perfect storm for depression, anxiety, substance use, and excessive drinking.⁷⁰ In addition, the move to remote work has made it easier for some professionals to hide their substance use. Zoom and Microsoft Teams meetings only require a picture from the neck up, making it less difficult for the impaired lawyer to hide hangovers, drug and alcohol intoxication, poor hygiene, and more obvious symptoms of substance abuse. With support programs like Alcoholics Anonymous and Narcotics Anonymous also moving to online platforms in light of the COVID-19 pandemic, lack of connection may be driving the impaired professional toward unsustainable and addictive behavior⁷¹ and causing the

63. Matthew Pollock & Prasad Taksal, *Partnership agreements: A primer*, DLA PIPER (Oct. 14, 2020), <https://www.dlapiper.com/en/canada/insights/publications/2020/08/partnership-agreements/> [<https://perma.cc/424D-ECS7>].

64. See Robinson, *supra* note 4.

65. See Overdose Deaths Accelerating During COVID-19, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 17, 2020).

66. Eilene Zimmerman, *Why professionals, depressed and anxious, are developing addictions during Covid*, GUARDIAN (Oct. 13, 2020), <https://www.theguardian.com/lifeandstyle/2020/oct/13/white-collar-professionals-substance-use-disorders-pandemic> [<https://perma.cc/D5VF-GP74>].

67. *Id.* (explaining that “[l]awyers are especially vulnerable to substance abuse; they already have high rates of depression, anxiety and alcoholism, and many are struggling”).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

rates of overdose in the U.S. to increase by almost eighteen percent.⁷²

With lawyers having to figure out how to practice, communicate, and advocate from their computers, such a fundamental change to everyday realities of the legal practice may make it difficult and costly for supervising attorneys and partners at a law firm to monitor the behavior and work of their colleagues as required by Rule 5.1.⁷³ Even more so, the isolation might make it easier for an attorney to hide addictive behavior from law firms; being at home twenty-four hours a day and seven days a week can result in increased substance abuse⁷⁴ and reliance because lawyers don't have to leave their homes and function in the workplace or perform in physically social settings. In their current form, the *Model Rules* make little to no room for the increased instances of addiction and substance abuse within the new reality of COVID-19 that legal professionals are forced to live and work in.

V. WHAT'S NOT WORKING

Threat of disbarment or other sanctions do not serve to deter legal professionals from alcohol abuse or substance addiction. Because alcoholism must be understood as a disease, the focus needs to shift from retrospective castigation to prevention and intervention. The policy considerations behind lawyer disciplinary proceedings include protecting “the public and the administration of justice” from lawyers who have not, are not, or will likely not be able to properly execute their duties as a lawyer.⁷⁵ But who is there to protect the struggling lawyer from herself? The practice of lawyer disciplinary proceedings tends to be the last stop on a path to destruction and there should be preventative safeguards built in to help the struggling lawyer before he reaches the point of irreparable harm to his career.

ABA Standard 1.3 explains:

These standards are designed for use in imposing a sanction or sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Model Rules of Professional Conduct (or applicable standard under the laws of the jurisdiction where the proceeding is brought).⁷⁶

72. Aliese Alter & Christopher Yeager, *COVID-19 Impact on US National Overdose Crisis*, OVERDOSE DETECTION MAPPING APPLICATION PROGRAM (2020), <http://www.odmap.org/Content/docs/news/2020/ODMAP-Report-June-2020.pdf> [<https://perma.cc/UE8J-5JVR>].

73. See MODEL RULES R. 5.1.

74. See Alter & Yeager, *supra* note 72.

75. STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 1.1 (A.B.A. 1986) (explaining that “[t]he purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession”).

76. STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 1.3 (A.B.A. 1986) (clarifying that “[t]he Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to

But how then do these proceedings fairly consider all relevant matters relating to the lawyer in front of them when nothing in the *Model Rules* mandates intervention for the lawyer struggling with alcohol abuse or other forms of addiction? One study conducted by the American Bar Association reported that fifty to seventy percent of all lawyer disciplinary cases involved alcoholism.⁷⁷ The scope of sanctions involved in disciplinary proceedings ranges anywhere from suspension or disbarment to probation, admonition, public censure, assessment of costs, and the limitation of practice.⁷⁸

Furthermore, lawyer assistance programs (LAPs) are separate and distinct from state bar disciplinary authority and are focused on intervention and prevention through lawyer education.⁷⁹ More states are acknowledging LAPs as a helpful tool for lawyers struggling with substance abuse and some states are going beyond that. For example, the New York City Bar issued a report strongly recommending that authorities overseeing attorney admission to the New York State Bar include “programs regarding mental health, substance use and well-being in the legal profession” as a separate and required credit.⁸⁰ And while an emphasis on continuing legal education and prevention is important, it completely ignores the question of what to do when a lawyer, and specifically a partner at a law firm, *is already struggling* with substance use. This lapse is what makes it important for substantive change to occur at the level of the *Model Rules of Professional Conduct*. Cultural change without bona fide structural reinforcement is frankly not enough.

VI. SOLUTIONS AND RECOMMENDATIONS

This Note proposes four structural recommendations to address the ethical problems associated with legal partnerships and attorneys struggling with addiction. First, all partnership agreements should include a clause specifically identifying a plan for responding to a lawyer struggling with substance abuse or addiction. Second, law firms and the ABA at large should continue to engage in and propose proactive education and intervention requirements to address the epidemic of addiction in the legal profession; these tools should go beyond the

promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.”).

77. Reich, *supra* note 17, at 370 (citing G. Andrew H. Benjamin, Bruce Sales & Elaine Darling, *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 L. & PSYCHOL. REV. 113, 118 (1992)).

78. STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standards 2.2–2.8 (A.B.A. 1986).

79. Bailly, *supra* note 1, at 100.

80. *Report in Support of Mental Health, Substance Use and Lawyer Well-being Continuing Legal Education (CLE) Requirement for New York Attorneys*, N.Y.C. B. ASS’N, at 1 (June 2020), https://s3.amazonaws.com/documents.nycbar.org/files/2020700-Mental_Health_CLE.pdf (2020) [<https://perma.cc/79NH-E2M7>].

current lawyer assistance programs put forth by the state bar associations. Third, the ABA should issue temporary guidance for legal partnerships addressing the risk posed by an impaired lawyer during the COVID-19 pandemic. Fourth and finally, the American Bar Association should revise the *Model Rules* to account for addiction and discourage punitive measures taken against the struggling attorney. To be more specific, small, substantive changes should be made to relevant *Model Rules*, especially Model Rules 5.1, 8.3, and 8.4.

A. THE WELL-DRAFTED PARTNERSHIP AGREEMENT

One of the best methods in anticipating the prevalence of lawyer addiction is to create a contingency plan at the inception of a legal partnership.⁸¹ Additional details may be provided for in legal partnership agreements that anticipates the possibility (and probability) that at some point a partner at a law firm will struggle with addiction or substance abuse. Precautionary language in the well-drafted partnership agreement may be useful and necessary in protecting the firm, the struggling partner, and the partner's clients.⁸² Partners may outline the fiduciary duties owed to one another in case such a circumstance arises. The partnership agreement should include specific procedures relating to the discovery of the condition, remedial requirements prior to the dissolution of the partnership agreement or expulsion of the partner, and relevant disclosures to clients regarding the indisposition of a partner or the possibility for a transfer of cases to another member of the firm.

To illustrate, anticipatory language should, at a minimum, be incorporated into the sections of the partnership agreement concerning 1) decision-making procedures and 2) expulsion of partners. Such language should detail that, upon the occurrence of a triggering event (such as the partner coming forward with alcoholism or another lawyer reporting that partner's substance-related conduct to the firm), a certain protocol is to be followed.⁸³ The language should include what happens to the partner's voting interest, whether the partner is encouraged to seek rehabilitation services, how the firm will compensate the partner during her period of indisposition, and more.

An overarching goal of the well-drafted partnership agreement should be to incentivize truthfulness. In firms where a partner can be expelled from the partnership without cause or by a minimum vote of the remaining partners, as was the case in *Lawlis*,⁸⁴ he will likely keep his addiction to himself for fear of retribution, disciplinary action, social isolation, loss of income, etc. In proactively establishing a set of procedures to guide the partner and the firm through the difficulties of

81. Bailly, *supra* note 1, at 96.

82. *Id.*

83. *Id.* at 105 (explaining that “[t]he agreement should be part of an overall firm alcohol and drug policy, be rigorously followed, and never waived”).

84. See *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435 (Ind. Ct. App. 1991).

addiction, the partner will feel supported and the firm will be able to retain its talent. This sort of contingency plan “balances the recovery of the partner” with the needs and risks of the law firm.⁸⁵ Where recovery and support, as opposed to discipline and expulsion, are put at the forefront of the well-drafted partnership agreement, the partner will be able to rejoin her practice and go forward in her career as a contributing member of the legal profession. When law firms incentivize honesty, rather than deter it, the legal profession at large will become more equipped to deal with the hidden realities of addiction that threaten to overwhelm many members of our community.

B. PROACTIVE EDUCATION AND INTERVENTION PROGRAMS

The American Bar Association has attempted to address the prevalence of alcoholism and substance use in the legal profession via *The Path To Lawyer Wellbeing: Practical Recommendations for Positive Change*.⁸⁶ While this is a start, these recommendations do not propose a set of ethical rules that detail how firms and clients should respond to lawyers struggling with such alcoholism or substance abuse.⁸⁷ Cultural suggestions include discouraging alcohol-centered events and offering support for struggling lawyers via LAPs.⁸⁸ The report also suggests widespread training that covers the “warning signs of substance [ab] use,” how to approach a struggling colleague, and emphasis on the “[f]reedom from substance use and mental health disorders as an indispensable predicate to fitness to practice.”⁸⁹

This report is a good start. It includes suggestions that law firms form a lawyer well-being committee and provide training and education on well-being during new lawyer orientations.⁹⁰ It also recommends that LAPs continue to receive sufficient funding and emphasize confidentiality.⁹¹ These recommendations are valuable in that they underscore the need for education and intervention and are bringing the realities of lawyer addiction to the center of the conversation around lawyer well-being. But cultural changes must be supported by structural acknowledgement of the problem as supplemented by revisions to the *Model Rules* and additional clauses in the well-drafted partnership agreement.

C. TEMPORARY GUIDANCE DURING THE COVID-19 PANDEMIC

The American Bar Association (ABA) should issue temporary guidance to law firms and state bar associations emphasizing the increased risk of addiction⁹² that

85. Bailly, *supra* note 1, at 106.

86. *The Path to Lawyer Well-Being*, *supra* note 14.

87. *See generally id.*

88. *Id.* at 11–14 (noting that these programs may decrease future risk of alcohol use on average).

89. *Id.* at 17.

90. *Id.* at 31.

91. *Id.* at 45.

92. Zimmerman, *supra* note 66.

lawyers face as the COVID-19 pandemic continues to unfold. While the epidemic of addiction within the legal profession should always be a consideration of the ABA, this need is even greater now. The ABA should issue guidelines identifying the risk of addiction during the pandemic and include educational materials on lawyer well-being and substance abuse, as well as information connecting lawyers to their local LAPs. In addition, the ABA should advise state courts and bar associations to take a less draconian or punitive approach to lawyer discipline during the pandemic.⁹³ Where a lawyer may otherwise face bar complaints for failures under rules like Model Rules 1.1 or 1.4, a certain measure of grace should be extended at this time.

D. REVISIONS TO THE *MODEL RULES OF PROFESSIONAL CONDUCT*

Finally, the ABA should make substantive revisions to the *Model Rules of Professional Conduct* to account for the epidemic of addiction in the legal profession. As emphasized before, cultural acknowledgement of the problem without structural change is simply insufficient. Revisions should be made to Rules 1.1, 5.1, 8.3, and 8.4 with specific reference to lawyer well-being and lawyer addiction.

First, ABA comments to Rule 1.1 should be amended to include reference to lawyer well-being as essential to the competent representation of clients.⁹⁴ *The Report of the National Task Force on Lawyer Well-Being* suggests that competence should be extended to include the “‘mental, emotional, and physical ability reasonably necessary’ for the representation.”⁹⁵ Furthermore, failure to observe personal well-being alone should not give rise to disciplinary actions absent gross and otherwise actionable misconduct.⁹⁶ Adopting this change to Rule 1.1 would signify a genuine endorsement of mental health and addiction management as an essential component to lawyer competence. In addition, adopting the guidance that failure to observe personal well-being should not give rise to disciplinary action would reinforce revisions made to Rules 5.1, 8.3, and 8.4 and signal that the principal goal in addressing lawyer addiction is prevention and intervention as opposed to discipline and admonition.

Second, Rules 5.1, 8.3, and 8.4 should be looked at as a comprehensive surgical tool for addressing lawyer addiction. The goal in revising these three rules is

93. See e.g., In the Matter of the Coronavirus/COVID-19 Impact on Attorney Well-Being and the Iowa Lawyers Assistance Program, available at [https://www.iowacourts.gov/collections/603/files/1320/embed/Document/\[https://perma.cc/852J-ABK2\]](https://www.iowacourts.gov/collections/603/files/1320/embed/Document/[https://perma.cc/852J-ABK2]) (Mar. 11, 2021) (Iowa 2021) (ordering that “[i]n order to help lawyers and judges who may be struggling with attorney wellness, mental health, and alcohol/substance abuse, the Court has authorized informal referrals from the Attorney Disciplinary Board to the Iowa Lawyers Assistance Program”).

94. *The Path to Lawyer Well-Being*, *supra* note 14, at 26.

95. *Id.* (citing to CAL. RULES PROF'L CONDUCT R. 3-110, available at <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules/Rule-3-110> [https://perma.cc/2N9W-55UQ]).

96. *Id.*

to create an offramp from lawyer discipline that encourages the struggling attorney to address her addiction, inform her fellow partners of her addiction, and seek treatment for her addiction without fear of reprimand or castigation. The prevailing question in making these revisions should be this: “How do we incentivize honesty and transparency for the lawyer struggling with addiction?”

My first proposition is that Rule 8.4⁹⁷ should be amended to include the following: “A lawyer who has a substance abuse problem and takes appropriate steps to treat it, *may* not otherwise be guilty of misconduct under this rule.” That is *not* to say that it is *not* misconduct if a lawyer violates applicable ethical rules because of alcoholism or addiction. Rather, adding this discretionary language to Rule 8.4 will provide an offramp from lawyer discipline by incentivizing the struggling lawyer to address his condition and seek help to treat his addiction. In taking these proactive steps, the lawyer is helping himself, his clients, and the law firm he represents.

Treating the problem might include, but is not limited to, attending a rehabilitation program, seeking out an addiction counselor, participating in a lawyer assistance program, attending meetings with Alcoholics or Narcotics Anonymous, starting therapy, or taking time off to ensure personal well-being. When a lawyer *acknowledges* the problem and then proceeds to take *preventative steps* to combat the problem, he should be rewarded. Where a lawyer may otherwise be subject to disciplinary proceedings for missing a deadline or failing to communicate with a client, if he is honest about his condition and demonstrates that he has taken corrective action, the discretionary language added to Rule 8.4 will allow for punitive measures to be avoided. Conversely, if a lawyer violates the relevant ethical rules because of her addiction, proceeds to deny her addiction, and refuses to treat the problem, this offramp from lawyer discipline need not be extended.

Similarly, Rule 5.1 should be amended to impose an ethical duty on a partner or supervisory lawyer who becomes aware of another lawyer’s substance abuse problem. Rule 5.1 provides that a “lawyer shall be responsible for another lawyer’s” misconduct if she has knowledge of the misconduct and “fails to take reasonable remedial action.”⁹⁸ The language of this rule should be revised to impose an ethical duty to address a lawyer’s substance abuse problem once one becomes aware of the problem. Specifically, the commentary to Rule 5.1 should include relevant behavior that serve as indicia of a possible problem with substance abuse. For example, behaviors associated with alcohol abuse include drinking in secret, neglecting responsibilities, missing deadlines, failing to observe personal appearance and hygiene, etc.⁹⁹ If a partner becomes aware of another lawyer’s

97. MODEL RULES R. 8.4 (explaining that lawyers are subject to discipline when they engage in professional misconduct).

98. MODEL RULES R. 5.1(c).

99. *Alcoholic behaviour – recognising the signs and managing its impact*, PRIORITY GROUP, <https://www.prioritygroup.com/blog/alcoholic-behaviour-recognising-the-signs-and-managing-its-impact> [<https://perma.cc/6B3D-XWLQ>] (last visited Feb. 24, 2021).

substance abuse, she should first be required to address it with the lawyer and refer them to a lawyer assistance program. If the lawyer takes corrective action, as laid out in the preceding paragraph, the partner who becomes aware of the problem has satisfied her ethical duty. If, however, the struggling lawyer *does not* take corrective action, then the partner should have a subsequent duty to report to the relevant authorities in order to satisfy her ethical duties under Rule 5.1.

Finally, Rule 8.3 emphasizes the importance of reporting misconduct in what is largely a self-regulating profession.¹⁰⁰ Similar to the revision suggested to Rule 8.4, a lawyer who becomes aware of another lawyer's misconduct shall have the same offramp from lawyer discipline if he knows that the lawyer "who has a substance abuse problem and takes appropriate steps to treat it, *may not* otherwise be guilty of misconduct." To illustrate, if Lawyer A becomes aware of Lawyer B's struggle with alcohol abuse, and Lawyer B assures Lawyer A that he is taking corrective action (seeing a counselor, attending AA meetings etc.), Lawyer A should not be required to report Lawyer B to the relevant authorities. So long as he reasonably believes that Lawyer B is treating the problem, Lawyer A has satisfied his ethical duties under the Model Rule 8.3 and is not required to take further action.

Altogether, these revisions to the *Model Rules* will incentivize honesty and encourage taking corrective action for the attorney struggling with substance abuse. These revisions provide the necessary structural supports to genuinely address and treat the epidemic of addiction in the legal profession.

CONCLUSION

The legal field must evolve to meet the demand and realities of the profession. Given the pervasiveness of addiction in the legal profession, these recommendations are meant to be only a starting point. Both cultural and structural changes are needed to account for the epidemic of addiction among lawyers. This evolution requires a more substantive response to the epidemic of addiction, especially in light of the COVID-19 pandemic. The *Model Rules of Professional Conduct* should provide specific commentary addressing the legal and ethical obligations of lawyers struggling with addiction and their supervisory attorneys. Given the pervasiveness of addiction in the profession, alcoholism and substance abuse conditions should not automatically constitute a violation of the *Model Rules*; instead, legal partnerships should specifically safeguard the rights of lawyers struggling with alcoholism and substance abuse disorders provided certain disclosures are made.

In order to combat the prevalence of addiction in the legal profession and provide adequate support for the struggling lawyer, this Note has proposed four structural solutions to the ethical problems associated with legal partnerships and

100. MODEL RULES R. 8.3 cmt. 3.

attorneys struggling with addiction. First, all partnership agreements should include a clause specifically identifying a plan for responding to a lawyer struggling with addiction or addictive behaviors. Second, law firms and the ABA at large should continue to engage in and propose proactive education and intervention in terms of the epidemic of addiction in the legal profession. Third, the ABA must issue guidance addressing the increased likelihood of an impaired law partner during the COVID-19 pandemic. Lastly, the American Bar Association should revise its *Model Rules of Professional Conduct* to account for addiction and discourage punitive action against the struggling attorney.