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*Professionalism/Ethics  
Series:*

*Mental Health and  
Substance Abuse: Tips and  
Skills to Avoid Professional  
Liability*

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# *About the Presenter*

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Jefferey Ogden Katz is a leading professional liability litigation lawyer. Mr. Katz has handled hundreds of professional liability cases throughout the country, both of behalf of Plaintiffs and Defendants. Mr. Katz and his firm regularly represent individuals, private and public corporations and law firms in litigation, trials and alternative dispute resolution involving professional liability and disciplinary issues.

Mr. Katz has been a frequent speaker on professional liability issues and has presented to the Chicago Bar Association, American Association for Justice and American Conference Institute, among others, on professional liability issues. Mr. Katz has frequently been cited by the media, including ESPN, Sports Illustrated, and Law 360 on issues relating to professional liability.

Mr. Katz is a graduate of the University of Wisconsin at Madison and Case Western Reserve University School of Law. He is admitted to practice full time in the states of Illinois and Wisconsin.

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## **Course Description**

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### *Course Presentation*

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This course contains substantial Professionalism and Ethics material related to mental health and substance abuse issues.

This course examines mental health and substance abuse issues faced by attorneys and when dealing with a client with an impairment. This course examines all aspects of dealing both with a client with a disability as well as working as a lawyer with a disability.

This course covers working as an attorney with an impairment. The Course will focus on the Rules of Professional Conduct to guide attorney decisions and practice. The course reviews resources available to attorneys when dealing with a client with a disability. The course examines and identifies resources for lawyers dealing themselves with a disability.

### *Course Material*

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This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



## Course Learning Objectives and Outcomes

This course is designed to provide the following learning objectives:

This is a Broad Fundamental course in the area and is good for a new attorney or overview for any attorney.

### **This course does contain Ethics/Professionalism information relating to mental health and substance abuse.**

The primary practice areas for this course are Ethics and Professionalism and alcohol and substance abuse and the Model Rules of Professional Conduct.

This course contains Ethics/Professionalism information in the area of lawyers' requirements under various Rules of Professional Conduct.

Participants will develop an understanding on ways to deal with their own mental health and substance abuse issues.

Participants will develop an understanding on ways to deal with client's mental health and substance abuse issues.

Participants will learn about ethics issues related to mental health and substance abuse.

Participants will learn how to apply the Rules of Professional Conduct to situations involving attorney mental health and substance abuse issues.

Participants will learn how to apply the Rules of Professional Conduct to situations involving client mental health and substance abuse issues.

Participants will develop an understanding about what the Model Rules of Professional Conduct require a lawyer to understand about alcohol and substance abuse in order to be able to competently represent their clients.

Participants will develop an understanding about the need for an attorney to understand alcohol and substance abuse order to comply with the Rules of Professional Conduct while effectively representing their clients.

This course provides a variety of tools and techniques available to an attorney to recognize and reduce possible ethical violations or sanctions.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.



## Timed Agenda:

**CLE Course Title: Professionalism/Ethics Series: Mental Health and Substance Abuse: Tips and Skills to Avoid Professional Liability**

**Presenter Name: Jeffrey O. Katz**

<b>Time Format (00:00:00 - Hours:Minutes:Seconds)</b>	<b>Description</b>
00:00:00	ApexCLE Company Credit Introduction
00:00:20	CLE Presentation Title
00:00:30	CLE Presenter Introduction
00:01:12	CLE Substantive Material Presentation Introduction
00:06:34	Preamble: A Lawyer's Responsibilities
00:11:35	Lawyer's Conduct
00:19:14	Lawyer's Good Character
00:20:35	PREAMBLE
00:21:05	Violation of a Rule does no give rise to a cause of action against a lawyer
00:24:06	Rule 1.0 Terminology
00:28:52	TERMINATING REPRESENTATION
00:29:35	Withdrawal from Representation
00:32:31	Competence and Conflict of Interest
00:33:43	Diminished Capacity
00:36:15	DIMINISHED CAPACITY
00:37:07	Maintain a normal client-lawyer relationship
00:40:49	Client Capacity
00:51:38	Rule 1.6
00:53:06	Emergency Legal Assistance
01:07:47	Mental Health
01:12:03	Lawyer's Assistance Program
01:16:03	Presenter Closing
01:16:46	ApexCLE Company Closing Credits
01:16:53	End of Video



## Disclaimer

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The materials in this presentation are intended to provide a general overview of the issues contained herein and are not intended nor should they be construed to provide specific legal or regulatory guidance or advice. If you have any questions or issues of a specific nature, you should consult with appropriate legal or regulatory counsel to review the specific circumstances involved. Views expressed are those of the speaker and are not to be attributed to his firm or clients.



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# *Mental Health and Substance Abuse: Tips and Skills to Avoid Professional Liability*

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## **Materials Presented Within This Course**

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### Illinois Rules of Professional Conduct

[http://www.illinoiscourts.gov/supremecourt/rules/art\\_viii/default\\_new.asp](http://www.illinoiscourts.gov/supremecourt/rules/art_viii/default_new.asp)

#### RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Adopted July 1, 2009, effective January 1, 2010.

[http://www.illinoiscourts.gov/supremecourt/rules/art\\_viii/ArtVIII\\_NEW.htm#1.1](http://www.illinoiscourts.gov/supremecourt/rules/art_viii/ArtVIII_NEW.htm#1.1)

#### RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.



(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Adopted July 1, 2009, effective January 1, 2010.

[http://www.illinoiscourts.gov/supremecourt/rules/art\\_viii/ArtVIII\\_NEW.htm#1.14](http://www.illinoiscourts.gov/supremecourt/rules/art_viii/ArtVIII_NEW.htm#1.14)

#### RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except 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:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.



(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Adopted July 1, 2009, effective January 1, 2010.

[http://www.illinoiscourts.gov/supremecourt/rules/art\\_viii/ArtVIII\\_NEW.htm#1.16](http://www.illinoiscourts.gov/supremecourt/rules/art_viii/ArtVIII_NEW.htm#1.16)

#### RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(d) engage in conduct that is prejudicial to the administration of justice.

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. Nor shall a lawyer give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge's family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.



(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Adopted July 1, 2009, effective January 1, 2010.



[http://www.illinoiscourts.gov/supremecourt/rules/art\\_viii/ArtVIII\\_NEW.htm#8.4](http://www.illinoiscourts.gov/supremecourt/rules/art_viii/ArtVIII_NEW.htm#8.4)

## **Avoiding Professional and Ethical Problems Caused by Alcohol and Substance Abuse**

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This course explores some of the problems within the legal profession related to alcohol and substance abuse, as well as, touch upon some mental health. The course explores the stress unique to attorneys, how to balance your work and personal life and where to turn if you find that you have an alcohol or substance abuse problem.

The course will also explore what actions can be taken by a state attorney disciplinary commission and how to attempt to avoid losing your license. These steps vary by state and you should review your own jurisdiction's available resources and governing body.

### **Alcohol and Substance Abuse In the Legal Profession**

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Alcoholism and drug dependence are major problems within the United States and they affect anywhere between 8 to 10% of the general population. The rates of addiction for lawyers are as much as 30%.<sup>1</sup> The American Bar Association estimates that fifteen to twenty percent of lawyers suffer from some form of alcoholism and substance abuse. 28 percent of lawyer suffer from depression, and 19 percent show symptoms of anxiety based on a study of 12,825 licensed, employed lawyers in 19 states around the country.<sup>2</sup> This is a pretty high number and roughly one-in-three lawyers are impacted by alcohol.

Illinois attorneys had 5,199 grievances for its 94,000 attorneys.<sup>3</sup> That's about 5% of the attorney population which is similar to the 6% nationally that receive grievances.<sup>4</sup>

An alcoholic is a man or a woman who is addicted to alcohol, meaning that they can't control their consumption of alcohol. The result of consumption of alcohol

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<sup>1</sup> <https://www.nytimes.com/2016/02/05/business/dealbook/high-rate-of-problem-drinking-reported-among-lawyers.html>

<sup>2</sup> <https://www.nytimes.com/2016/02/05/business/dealbook/high-rate-of-problem-drinking-reported-among-lawyers.html>

<sup>3</sup> <https://www.iardc.org/AnnualReport2017Highlights.pdf>

<sup>4</sup>

[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2016\\_sold\\_chart%201a.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016_sold_chart%201a.pdf)



and repeated intoxication is a general deterioration of health, quality of life, and their own professional ability. About one-third of the adult population in the United States does not consume any alcohol at all and that's for either by choice, political reasons, religious reasons or even health reasons. But as indicated, lawyers do drink alcohol in much more higher rates than the general population. Many jurisdictions have discovered that there is a correlation between alcoholism and law practice and discipline. Studies in Canada and the United States indicate that approximately 60% of all disciplinary prosecutions involve some form of alcohol use and this is also the same for malpractice claims. Looking at discipline history and why lawyer did what they did and it's very common that there is some sort of alcohol issue whether it's alcoholism or just abuse or looking to alleviate whatever stress they have that does result in why they did do what they did and what could possibly lead to discipline.

Alcoholism is also known as alcohol dependence and it is a chronic disease. It progresses as the years go by and it's not that it's the stereotype that somebody can't function and they lose their home and they're homeless and they drink, wake up, and then they go to bed and they're drinking. Certainly there are people that have those types of characteristics and alcoholism can develop slowly over time. It can take many, many years. It can take 5, 10, 15 or 20 years to develop. Every situation is unique and you have to look at it, at the facts and circumstances and you have to look at each particular person. If you're an alcoholic, the way to prevent it obviously it's not drink anymore, but that's easier said than done and typically somebody who decides that they're going to stop drinking and evaluated to be an alcoholic, they might go through treatment but may not be ready to handle not drinking and they relapse. That can happen for many, many years and somebody can go in and out of facilities and have every intention of not drinking, but then they go back to drinking and it's really until they're ready or until things are so bad that they can't handle it. Until they have the support system that they need, they can't make the step to not drink.

Lawyers are at risk of high rates of substance abuse for a lot of different reasons. There's no one set of reasons why lawyers drink and turn to alcohol, but a lot of it can be attributed to just the stress in the profession. Lawyers have long work days. Average lawyer works anywhere between 60 and 80 hours a week and studies do show that people that work 50 hours or more a week are three times more likely to abuse alcohol than those that work less.

Our profession and work requires communication, it requires creativity, requires consistency. We learn how to exhibit a professional demeanor and in doing so we often hide our own fears, our own disgust, our boredom and we turn to alcohol because we're so stressed out and because we have so many demands in terms of our professional lives. We are even good at hiding alcoholism.



Lawyers are often in litigation and we are adversarial and we have to not show any weakness. Sometimes we turn to alcohol because that's a way to escape the lives that we've created for ourselves. We often work with others in a professional capacity and being a professional we often forget that it's not always just about being the best and adversarial, but other factors as well. Lawyers also have a very high rate of depression and depression can certainly feed into alcohol use or alcoholism. The average rates of depression for lawyers are 20% for law students and even higher for lawyers and when you compare that with the typical depression rates of adults in the United States of only 6.5%, that's a great deal more.

As attorneys, we are developing a way to self divert attention away from ourselves. We're focused on our cases were focused on our clients were looking constantly to build our case and represent our clients and zealously add on their behalf. If somebody has an alcohol issue, we as lawyers have the ability to divert their attention away from us and come up with different reasons in ways that we minimize our problems and minimize the fact that we may have an alcohol problem.

#### Signs of Alcohol or Substance Abuse

Alcohol symptoms can overlap whether you're an alcoholic or whether you're an alcohol abuser. An alcohol abuser is somebody that does not have to be an alcoholic, is not physically dependent on alcohol, but exhibits problems with alcohol. Sometimes, it can be to lifestyle, people just out of school may be used to fraternity or and sorority parties, and alcohol abuse is certainly prevalent then. But it can be situational; it can arise throughout somebody's career. Somebody who abuses alcohol can drink too much and experience problems. The symptoms for an alcoholic and alcohol abuser are pretty common and there is some overlap.

If you think that you may have a problem, you need to critically think whether you exhibit some of the signs. Some of the symptoms are:

- An inability to limit the amount that you drink;
- You can't stop drinking, 1 more always turns into 5-10 more;
- Feeling the need to drink after a long day, a hard day, being ready to get to that bar and have a martini and a glass of wine;
- Your tolerance increases to alcohol so it takes more for you to feel the effects of alcohol;
- You drink more and more to reach the point where you feel the same level of intoxication;
- Any sign of having legal problems because of alcohol;



- Any sign of employment problems, not being able to work on your case as well, not being able to meet deadlines neglecting client matters financial problems;
- Taking a taxi or Uber home often from a bar;
- Somebody having to take your keys away or tell you that you shouldn't drive;
- Anyone asking you if you think you have drinking problem. If anyone has ever asked you about your drinking, you should seriously consider whether you have a problem.

All of those are very much systematic and can ultimately result in disciplinary problems.

Symptoms also can be physical if you're an alcoholic.

- You can have the shakes;
- You can have sweats;
- You are not able to sleep;
- Headaches;
- Blackouts or not remembering certain conversations;
- Losing interest in other activities;
- Having your activities center around drinking and don't do anything else, even if you're engaged in an activity, your focus is on going to the bar afterwards or having a drink afterwards;
- Being irritable when drinking time is near. For example if you're not able to drink, you're stuck in a deposition and the deposition is going later than you thought it was going to be and then you start really thinking about having that drink;
- Hiding alcohol, keeping alcohol in unlikely places.

It's important to really look at your friends, your colleagues, people around you, to see if they do have signs of a problem with alcohol and sometimes that's easy to spot and sometimes it's not so easy to spot. One way to look at it is too if you work in a firm and the work product of an associate of one of the partners seems to be different from what it used to be or deadlines aren't being met or their physical appearance changes, maybe they're more bloated, maybe they have features that are now more red, their eyes look bloodshot. Those are all certainly symptoms of alcohol abuse and you want to look for that to identify and support co-workers if possible.

You want to see if there's an appearance change and then maybe they're more disheveled, maybe they're not taking care of themselves. They're not dressing with the same care that they used to. Also, pay attention to their mood. Are they going through a difficult time in their life? If their mood significantly changes from what you're used to seeing and what you're used to demonstrating to you.

It's very difficult for a lawyer to admit that they might have a substance abuse issue and denial is a big problem. A lot of lawyers don't feel that they have a problem because it comes about gradually. They don't see their own changes that have been going on and it's also very hard for people to admit that they need help. They're concerned that if they seek counseling or if they seek an evaluation or they go to AA or lawyers assistance program, that in some way it shows a weakness on their part and it shows that they're not as strong as they think they ought to be. So as a result, lawyers do not really ask for help, so that's why it's really important to look at the signs and take action if it is you and try to help if it is someone else.

## The Stressful Life of an Attorney

Attorneys at large law firms are expected to bill at least 1,800 hours a year and some lawyers may routinely bill over 2,200 hours a year. This doesn't include time for eating, socializing, meetings, reading the mail, and even seeing clients. It's also not uncommon for lawyers to take work home with them, to work on weekends, and to take a vacation but bring work with them. I know for me I'm always bring my laptop with me and I'm constantly checking my phone, even if I'm away I'm still connected to the office and plugged in and certainly it's nice to work from the beach or mountains, but it doesn't mean that I'm still in the back of my mind not thinking about work. So even if we take a vacation, we bring our phones, we bring the laptops, and the work never stops and we're always in communication.

### Factors Contributing to Attorney Stress

The life of a lawyer means we're always striving to achieve in a law firm, you're striving to become a partner. Striving to become an equity partner and bring in business to increase your profit. If you have your own firm as a sole practitioner, you need to do the work and you need to bring in the business. You're worried about marketing; you're worried about running the business and there's all kinds of pressure that just never seems to really stop. All of causes significant stress and the stress in your practice can lead you to turn to alcohol and other substances. We have stress because we have constant time constraints and deadlines not only if you're in litigation and have deadlines imposed by the judge but also if you're doing a transaction practice and you have a contract to write or a deal that needs to be completed by a certain day, you're always worried about getting something done by a certain time.

As lawyers were also expected to always be the expert was supposed to know the law in the field that we concentrate in. We were expected to know the law and other areas even if we don't regularly practice or at least we're supposed to be able to find an answer or find the someone that can provide the answer and that can certainly impose a great pressure. Our work is always scrutinized by our



clients. There's a lot of lawyers throughout the country and clients can certainly turn to another lawyer and hire that lawyer if they don't like your work or they don't like the way you don't respond quickly enough to them or they don't like the way your office is run or for whatever reason your clients are scrutinizing you. Of course you have judges scrutinizing your appearance in court and also opposing counsel during litigation. Opposing counsel is filing pleadings and your filing responses and back and forth and they're looking at your work and you're looking at their work and you're all trying to poke holes in one another's case and advance your client and all that can be very stressful. The legal profession is a conflict driven and one sided profession.

Another factor in terms of stress is that we assume our clients burdens and then we worry about their problem. If we have a client that is going in front of a panel or meeting an interview, going to trial or going in front of a disciplinary counsel, we worry about that client no matter how well we prepare them, no matter how much we have gone over what the process will be, what the recommendation will likely go towards. It is still something that we worry about

Also there's a lack of professionalism within the profession and that also is stressful. We all know the uncivil opposing counsel even co-counsel that are difficult to work with, that don't respect a position that you've advanced, that make personal attacks, that fire up the file at 6:00 p.m. on Friday just communicate in a hostile fashion at every opportunity. The fire in picking up the phone with opposing counsel sometimes can be hard or an email and that's certainly something that can be very difficult to deal with.

It when you work in a firm there is an endless supply of associates that are looking to move into you position and are vying for your job. If you do something wrong, they may feel like you're easily expendable. So you have that kind of a sweatshop mentality that can occur. The law is not only a profession but, it's also a business where you're expected to bring in clients are expected to develop new business and work on the business to continually provide a stream of business. All of these things affect your stress level. Your stress level can then be affected if you turn to alcohol and other substances because of the problems of the legal profession.

It is very difficult to achieve a work in a life balance because we work so many hours, have so many stresses and find it almost impossible to say no if you're assigned to a matter and you have a deadline. Extensions can certainly be given it at times but it's difficult to ask for those. It's a pride thing, it's an ego thing but it is really important to have a life balance and it is really important to find activities outside of the law and apart from the law where you can use your interest in a more productive manner than turning to alcohol or to drugs.



We spend so much time practicing law as lawyers that we have little time for ourselves and for our family and our social activities and it's really important to make that time. Lawyers have a high rate of divorce within the profession and have difficulty maintaining personal relationships and some of that certainly is because of all the stress that's involved with being a lawyer. Some turn to alcohol to help mask some of that pain. There are organizations throughout the country that provide assistance to lawyers and judges when they have addiction or substance abuse issues or mental health issues.

## Attorney Discipline and Alcohol and Substance Abuse

With disciplinary cases, state disciplinary offices are very familiar with lawyers that are impaired. If somebody has a substance abuse issue it doesn't always mean that they're going to be formally disciplined. A disciplinary office certainly wants to make sure that the lawyer is getting the help that they need and required and not all of those cases result in formal discipline for the lawyer. There is a program in Illinois through the disciplinary office that is a conditional probation with the lawyer. Maybe the lawyer has had some issues that won't go to any formal charges but they'll be put on conditions and require treatment for alcohol abuse and treatment so that they won't get formal discipline probationary.

That could be 18 months or it could be a year or two. This is private and confidential here in Illinois and these types of programs are very common in other states too. If the lawyer is receptive to addressing the problem, there can be a forgiving nature within the disciplinary system. If a lawyer is willing to continue getting help and willing to stop drinking and meets all of the other probationary conditions, the respondent attorney on probation might go on longer than what it originally was set for.

There are cases where a lawyer will be disciplined because of the fact that they have alcohol issues and they have committed various acts of misconduct separate and apart from the alcohol issue. These attorneys may not be eligible for the conditional probation due to the overwhelming acts of misconduct.

The state or jurisdiction disciplinary office can become involved in alcohol-related cases in many different ways. It may start as a case of neglecting client matters or bringing an attorney in and discovering that they have an alcohol problem. There may be an attempt to trying to find out why they neglected the matter, why they were having so many problems and alcohol and mental health issues certainly can come up. There's also other ways that the disciplinary office can find out if somebody has an alcohol problem that can be an example of a lawyer's getting a DUI. If an attorney has a felony DUI, most jurisdictions have a duty to self-report. If an attorney has been convicted of a felony and if a DUI is a felony then that's something that the attorney usually has a duty to report.



Driving under the influence is a red flag to a disciplinary office that an attorney has a drinking problem.

Receiving a DUI conviction that is a felony forces the attorney to deal with their issues. That may provide a way for a disciplinary office to get involved in an attorney's life leading to treatment or to discipline. It can take many, many years for somebody to hit rock bottom. That may be when a discipline office first sees that there is an issue. There may be a sudden start of complaints that the attorney is not showing up for court, that they are not returning client phone calls, or they are taking money in their practice and spending their client's money that's held in trust or comingling it and converting it to the attorney's own use. Attorneys are a self-policing industry and profession it's really best if we can look for those signs before they rise to the level of involving client funds or ignoring client matters. So that we can help people before they get into disciplinary problems and before they lose their license.

They can certainly go on probation and they can be suspended but disbarment definitely is a possibility. It really is important to try to get them help to try to get them to see that they should go to some kind of lawyer's assistance program or AA or an evaluation in order to take responsibility and understand that it is a disease.

The alcohol or the mental health issues aren't always on the forefront. They can sometimes come up after further investigation by disciplinary authority but sometimes the Commission will receive complaints from clients that they were in court and their lawyer smelled like alcohol. A judge might send a report or opposing counsel, who has an obligation to report instances of what we refer to in Illinois as Himmel violations, may send a report on the attorney. Sometimes lawyers will report others who they believe have a drinking problem to the Illinois ARDC. In Illinois, with its 94,000 lawyers<sup>5</sup>, the ARDC receives approximately 500 reports each year. About 20% of these reports lead to the filing of formal disciplinary complaints.<sup>6</sup> The disciplinary office may discover that the lawyer has a substance abuse problem and the procedures are similar in each jurisdiction. There is a complaint filed, an attorney generally has to write a response.

The process for the disciplinary office varies from state-to-state but it's similar in certain regard. A lawyer can be referred by a client. The client doesn't like what happened in their case or lack of communication or money could have been taken or a case could have been neglected.

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<sup>5</sup> <https://www.iardc.org/AnnualReport2017Highlights.pdf>

<sup>6</sup> [https://www.iardc.org/ethics\\_faq.html](https://www.iardc.org/ethics_faq.html)



Disciplinary cases are a little different than litigation and a lot of people get this wrong. In disciplinary cases although it's adversarial, it's more quasi adversarial. If you've done something wrong, you want to show a recognition that you've done something wrong, you want to take ownership, you want to take responsibility for your actions and in cases involving substance abuse or drinking, you want to show that there is a problem.

Get an evaluation, maybe they've been going to AA for the past 5 years maybe they have a sponsor, then those types of factors are brought into the defensive of a disciplinary complaint. Hire a lawyer to help you because lawyers who do disciplinary work know the right way in order to handle it. You could do it alone but, it's best not to practice outside your area. There are always landmines that an experience discipline attorney will spot from a long way off.

You want to make sure that you present evidence of acceptance and treatment and that you show that you are getting help and you explain what you're doing. You might get letters from your sponsor other people that can say that you're an alcoholic and that you're working on your program. If you're not involved in AA, then you're doing some kind of other non-traditional support mechanism to help you stay sober. All of those things are important. A disciplinary office will look at those factors and may bring somebody in for the equivalent of a deposition. An interview or a sworn statement, it can be called different things in different jurisdictions. In an interview or in the deposition, it's important to be very truthful and to be very honest. What you don't want to do is you don't want to minimize your drinking or attempt to say that you don't have a problem. You need to own up to how much you were doing and what you were doing, you want to be forthcoming you want to be honest and you want it certainly tell the truth.

It is really important to be honest and it's really important to be truthful because this will help set the tone with the disciplinary office and certainly the staff counsel that's reviewing your case because they're going to make a recommendation as to what type of discipline, if any, you're going to receive and the more cooperative you are and the more forthcoming and the more truthful and how candid you are about any problems that you have, the better the outcome.

Lawyers have alcohol related issues and they've been disciplined for this for years and the cases and disciplinary law are pretty much endless and so is the range of sentences. This is something could potentially be something that's held confidential with an interoffice type of probation where you just work with a probationary officer within the office or to a disbarment and it really does depend on how you handled the course of the investigation and what your manner is and how honest you are and if you are ready to get help. Many states have diversion



programs in one form or another.<sup>7</sup> For example, in 2016, Kentucky reported 172 complaints referred to alternative discipline or diversion programs, Florida – 167, and Virginia – 749.<sup>8</sup>

Disciplinary counsel will certainly look at somebody who is going through treatment who is going to AA meeting if their an alcoholic and doing what they need to do in order to say stay sober in a way that’s different than at somebody who doesn’t own up to their own responsibility.

In character and fitness proceedings that’s also the case. If a law student has had several alcohol-related incidents in their youth and also during law school and they’ve gotten help and they’re working with the lawyer’s assistance program, the admission office will generally look at that much more favorably.

#### Typical Illinois Discipline Process

Most jurisdictions follow a procedure similar to Illinois. In Illinois, The Illinois Supreme Court granted the ARDC the “sole authority to regulate the admission and discipline of lawyers in Illinois.”<sup>9</sup> The proceedings before the ARDC are governed by Supreme Court Rules 751-780 and the Rules of the ARDC

The rules are enforced through a seven member Commission appointed by the ARDC Board Members.<sup>10</sup> There are 4 lawyers and 3 non lawyers all serving a 3 year term as volunteers.<sup>11</sup> The Commission appoints an Administrator who acts as the Principal Executive Officer of the ARDC.<sup>12</sup> Among numerous other responsibilities, the Administrator, along with his or her 100 plus employees, is responsible for the investigation of claims and prosecution of disciplinary cases.<sup>13</sup>

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[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2016\\_sold\\_chart%202.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016_sold_chart%202.pdf)

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[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2016\\_sold\\_chart%202.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016_sold_chart%202.pdf)

<sup>9</sup> <http://www.iardc.org/overview.html>. See Ill. S. Ct. Rule 751(a).

<sup>10</sup> Ill. S. Ct. Rule 751(b).

<sup>11</sup> Ill. S. Ct. Rule 751(b) and (c).

<sup>12</sup> Ill. S. Ct. Rule 751(e)(1).

<sup>13</sup> See also Ill. S. Ct. Rule 752(a); <http://www.iardc.org/overview.html>



When a party wants to make a complaint against an attorney, they contact the ARDC. A complaint can be made by anyone who has knowledge of something they believe to be misconduct. Typically, a complaint is initiated by a former client, an opposing party, opposing counsel, or a judge. There is no statute of limitations for an ethical violation. So, a party can bring a complaint at any time and an attorney may end up defending against something that occurred many years prior. The ARDC also has a team of paralegals that look at the daily papers specifically to see if an attorney is involved in an ethical violation.<sup>14</sup> If so, the ARDC will initiate its own investigation.<sup>15</sup>

Most files start in the Intake Division. The attorneys in the Intake Division can decide that a case has no merit, referred to as a NM for no misconduct. In such cases, the ARDC notifies the respondent via mail about the complaint and will include a cover letter that indicates there is no basis for a response.<sup>16</sup> The investigation is at that point closed.<sup>17</sup>

However, "...the ARDC undertakes to investigate any complaint that has even marginal validity."<sup>18</sup> So usually the Respondent is asked to write a response to the complaint. This response is known as the 14 day letter because the respondent has 14 days to respond to the allegations.<sup>19</sup> Attorneys are urged to take a 14 Day Letter very seriously. Rule 8.1 of the Illinois Rules of Professional Conduct requires attorneys to respond to a disciplinary complaint.<sup>20</sup> Failure to respond is a rule violation in and of itself and can lead to a default hearing and formal disciplinary charges.<sup>21</sup>

Once received by the ARDC, the response is forwarded to the complainant for review. The complainant has 14 days to review the response. During this time, the ARDC conducts its own investigation. The ARDC has full subpoena power and can subpoena witnesses and records. Eighty to ninety percent of files are

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<sup>14</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program;  
[www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>15</sup> ARDC Rule 51

<sup>16</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program;  
[www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>17</sup> ARDC Rule 54.

<sup>18</sup> 84 ISBA Journal 452 (September 1996).

<sup>19</sup> ARDC Rule 53.

<sup>20</sup> IRPC 8.1(a)(2).

<sup>21</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program;  
[www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)



closed at this point and remain private and confidential. They are self-expunged after three years.<sup>22</sup>

If the file is not closed, it is referred to the Litigation Division. The Litigation Attorney will perform an independent review of the file. If they do not close the file, the first thing they will do is call the Respondent in for a sworn statement, which is similar to a deposition.<sup>23</sup>

The Litigation Attorney will conduct an additional investigation. If it is determined that there is enough information to substantiate the complaint, it is referred to the Inquiry Board.<sup>24</sup> If not, the file is closed.

Like the Administrator, the members of the Inquiry Board are appointed by the Commission.<sup>25</sup> There are three panels in Chicago and one in Springfield. Each panel consists of two lawyers and one lay person all of whom are volunteers.<sup>26</sup> The Inquiry Panel acts like a Grand Jury. It is their job to decide if there is enough evidence for the filing of a formal complaint.<sup>27</sup> If there is not, the case is closed. The Inquiry Board votes to proceed in about 70-80% of the investigations. They can close a file with an admonishment or they can hold a Supreme Court Rule 108 Proceeding.<sup>28</sup> Supreme Court Rule 108 allows the Inquiry Board to defer proceedings while the attorney complies with Board imposed conditions such as periodic reports to the ARDC, supervision of one's practice, and education requirements.<sup>29</sup> This type of probation is disallowed if the charge involves misappropriation of funds, a criminal act, the behavior led to actual prejudice to a client, or the attorney has previously been disciplined.<sup>30</sup>

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<sup>22</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>23</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>24</sup> ARDC Rule 5.

<sup>25</sup> <http://www.iardc.org/overview.html>

<sup>26</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>27</sup> ARDC Rule 102.

<sup>28</sup> ARDC Rule 102.

<sup>29</sup> ARDC Rule 108.

<sup>30</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies); ARDC Rule 108.



At the Inquiry Board level all proceedings, results and discipline are private and confidential. If the Inquiry Board decides that a complaint should be filed, it will go to the Hearing Board. Once the complaint is served on the respondent, it becomes formal and public.<sup>31</sup>

The Hearing Board is also made up of a Chairperson, an attorney and a layperson.<sup>32</sup> They are appointed by the Commission and are volunteers.<sup>33</sup> The proceedings at the Hearing Board are much like a trial court in a civil case. They are governed by the Illinois Statutes and Supreme Court Rules and are open to the public. The rules of evidence apply,<sup>34</sup> although they may be applied liberally.<sup>35</sup> “Since a disciplinary action’s primary purpose is to protect the public from unqualified or unethical practitioners, technicalities will not be invoked either to shield an attorney from discipline or to prevent him from establishing a legitimate defense.” *Id.* The respondent is served a complaint and must respond within 21 days.<sup>36</sup> Failure to respond will result in the admittance of all allegations and a default judgment will be entered.<sup>37</sup> The Chair makes all evidentiary rulings.<sup>38</sup>

The ARDC must prove every allegation by clear and convincing evidence.<sup>39</sup> The Hearing Board hears evidence, makes findings of fact and then, if warranted, recommends discipline.<sup>40</sup> The Board issues a report and recommendation. This is a concise report outlining the proceedings and making a determination as to whether or not the behavior warrants disciplinary action and if so, what action is recommended.<sup>41</sup> The case is either settled or either party can file an exception

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<sup>31</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>32</sup> ARDC Rule 201.

<sup>33</sup> <http://www.iardc.org/overview.html>

<sup>34</sup> Yamaguchi, 515 N.E.2d at 1237-1238.

<sup>35</sup> *Id.* at 1238.

<sup>36</sup> ARDC Rule 231.

<sup>37</sup> ARDC Rule 236.

<sup>38</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>39</sup> *In re Rosin*, 118 Ill.2d 365, 515 N.E.2d 85, 91, 113 Ill.Dec. 276 (Ill. 1987); *In re Cutright*, 233 Ill.2d 474, 910 N.E.2d 581, 589, 331 Ill.Dec. 172 (Ill. 2009).

<sup>40</sup> <http://www.iardc.org/overview.html>

<sup>41</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)



which goes before the Review Board.<sup>42</sup> The Hearing Board is considered the fact finder and as such their findings will be given great deference. In re Timpone, 208 Ill.2d 371, 804 N.E.2d 560, 566, 281 Ill. Dec. 595 (Ill. 2004). The Illinois Supreme Court will not disturb the findings of the Hearing Board unless they are contrary to the manifest weight of the evidence. Id.

The Review Board is made up of 9 lawyers. The parties submit briefs and partake in oral arguments.<sup>43</sup> The Review Board, much like an Appellate Court, approves, modifies or rejects the findings of the Hearing Board.<sup>44</sup> The Review Board can remand, dismiss or dispose the case. Id.

If either party is still not satisfied, the objecting party can file with the Illinois Supreme Court where the case may be adjudicated.<sup>45</sup> The Supreme Court generally avoids hearing disciplinary cases unless it is regarding an area of the law where the court wants to make a point.<sup>46</sup> Typically, the Court approves the Hearing Board or Review Board. Although, the court is not bound by those Board's findings as those opinions are advisory.<sup>47</sup> The Supreme Court has the ultimate responsibility for determining the appropriate discipline.

If an attorney is found to have violated the Illinois Rules of Professional responsibility, discipline will be imposed. The types of discipline are set forth in Ill. S. Ct. Rule 770 and include: reprimand by the court, the Review Board or a hearing panel, censure, probation, suspension for a specified time, suspension until further order of the court, disbarment on consent or disbarment.

A reprimand is essentially a slap on the hand. A reprimand may be issued by the Hearing Board, the Review Board, or the Supreme Court. The remaining types of discipline must be confirmed by the Supreme Court.<sup>48</sup> When a reprimand is issued by the Hearing Board it becomes part of the Respondent's permanent

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<sup>42</sup> <http://www.iardc.org/overview.html>

<sup>43</sup> ARDC Rules 302 and 304.

<sup>44</sup> <http://www.iardc.org/overview.html>

<sup>45</sup> . <http://www.iardc.org/overview.html>

<sup>46</sup> Elizabeth Granoff, ARDC Investigations, [www.ApexCLE.com](http://www.ApexCLE.com) CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies).

<sup>47</sup> Timpone, 804 N.E.2d 560 at 566; Cutright, 910 N.E.2d 581 at 590.

<sup>48</sup> [http://www.law.cornell.edu/ethics/il/narr/IL\\_NARR\\_0.HTM#0.1:100](http://www.law.cornell.edu/ethics/il/narr/IL_NARR_0.HTM#0.1:100) citing Ill. S. Ct. Rule 771.



record but since it does not need to go before the Supreme Court, that case will be resolved quickly.<sup>49</sup>

A censure is similar to a reprimand. It is also a slap on the hand but it does need to be confirmed by the Supreme Court, so the process takes much longer.<sup>50</sup>

When probation is instituted, the respondent is allowed to continue practicing law so long as he follows certain conditions.<sup>51</sup> Probation is permissible if the attorney is capable of performing legal services, is unlikely to hurt the public during his rehabilitation, the imposed conditions can be supervised, the disability is temporary or minor and the attorney is not guilty of acts that warrant disbarment.<sup>52</sup>

Rule 758(c) gives the court the authority to “impose reasonable conditions” on an attorney’s practice if circumstances warrant.<sup>53</sup> Where the respondent has practiced law without complaint for over 30 years and no client was harmed while he was incapacitated, the court will not impose conditions on his continued practice of law.<sup>54</sup> Probationary conditions can be imposed with other forms of discipline.<sup>55</sup>

A suspension prevents an attorney from practicing law for a specific period of time. It can be as short as one month or as long as several years.<sup>56</sup> Where there is a pattern of neglect, suspension will be imposed.<sup>57</sup>

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<sup>49</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies).

<sup>50</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>51</sup> In re Eckberg, 192 Ill.2d 70, 733 N.E.2d 1244, 1252, 248 Ill.Dec. 246 (Ill. 2000) citing Ill. S. Ct. Rule 758.

<sup>52</sup> Ill. S. Ct. Rule 772.

<sup>53</sup> Ill. S. Ct. Rule 758.(c).

<sup>54</sup> Eckberg, 733 N.E.2d 1244 at 1253.

<sup>55</sup> See In re Smith, 168 Ill.2d 269, 560 N.E.2d 896, 907, 213 Ill.Dec. 550 (Ill. 1995). (attorney suspended for 17 months with a stay of 12 months if he successfully met court imposed probationary conditions).

<sup>56</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>57</sup> Smith, 560 N.E.2d at 908.

Under Supreme Court Rule 76, if the suspension is for 6 months or longer, the respondent must remove any indicia that he is a practicing lawyer, law clerk, or legal assistant from his practice, notify all of his clients and withdraw from every case.<sup>58</sup> It is not clear what an attorney who is suspended for less than 6 months, may do with regards to the practice of law.<sup>59</sup> When determining whether a suspended attorney is partaking in the unauthorized practice of law, the court looks to the character of the attorney's actions.<sup>60</sup> If the actions require legal discretion, knowledge and skill, they will be deemed the practice of law.<sup>61</sup> "The practice of law encompasses not only court appearances, but also services rendered out of court and includes the giving of any advice or rendering any service requiring the use of legal knowledge." *Id.*

Another type of suspension is a Suspension Until Further Order or Suspension UFO. After disbarment, this is the most severe sanction the court can impose.<sup>62</sup> When an attorney is suspended UFO, he may seek reinstatement only after the period of suspension has passed.<sup>63</sup> To be reinstated the attorney must file a petition seeking a reinstatement and needs a court order to be allowed to practice again.<sup>64</sup>

The most severe sanction the court can impose is disbarment. Disbarment prevents the attorney from any future practice of law.<sup>65</sup> It can be imposed by the court or instituted on consent. For disbarment on consent, an attorney petitions to have his name be stricken from the roll of practicing attorneys.<sup>66</sup> Once the date of disbarment occurs, there can be no indicia that the respondent is practicing law.<sup>67</sup> He must refrain from doing any type of legal work, even acting as a paralegal is prohibited. "Disbarment is the utter destruction of an attorney's professional life, his character and his livelihood, and therefore a court should use disbarment

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<sup>58</sup> Ill. S. Ct. Rule 764(b) and (c).

<sup>59</sup> Howard, 721 N.E.2d at 1135.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1134.

<sup>62</sup> Timpone, 804 N.E.2d at 570; Cutright, 910 N.E.2d 581 at 590.

<sup>63</sup> *Id.* at 571.

<sup>64</sup> *Id.* citing Ill. S. Ct. Rule 767.

<sup>65</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>66</sup> Ill. S. Ct. Rule 762.

<sup>67</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)



in moderation.”<sup>68</sup> “...where corrupt motives and moral turpitude are not clearly shown, the proper punishment is suspension rather than disbarment.”<sup>69</sup> Disbarment will be deemed “not only appropriate, but essential” where there is a great deal of serious misconduct, a lack of mitigating factors, and the respondent does not show remorse.<sup>70</sup> An attorney can attempt to seek reinstatement after five years unless he was disbarred on consent and they he can seek reinstatement in three years.<sup>71</sup> Although, reinstatement petitions are usually unsuccessful.<sup>72</sup>

“In determining the appropriate discipline, we bear in mind that, although fairness requires a reasonable degree of consistency and predictability, each disciplinary matter is unique and must be decided on its own facts.”<sup>73</sup> Mitigating circumstances will be considered.<sup>74</sup> For example, the courts may look to the attorney’s service to others including volunteer work, representation of indigent clients pro bono, and provision of free lectures to local law schools.<sup>75</sup> The court may also consider whether the attorney made full restitution to the client where appropriate.<sup>76</sup> Additionally, the Court may take into account the attorney’s degree of cooperation with the disciplinary process and his expression of remorse.<sup>77</sup> Additional mitigating factors include – whether this offense is the first action alleging dishonesty, whether the respondent profited or attempted to profit, and whether harm was intended or resulted from the respondent’s actions.<sup>78</sup> The court also looks to the length of time the respondent has practiced and the

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<sup>68</sup> Yamaguchi, 515 N.E.2d at 1240

<sup>69</sup> Howard, 721 N.E.2d at 1136.

<sup>70</sup> Lewis, 562 N.E.2d at 214.

<sup>71</sup> Ill. S. Ct. Rule 767.

<sup>72</sup> Elizabeth Granoff, ARDC Investigations, ApexCLE.com CLE program; [www.apexcle.com/pages/ARDCPolicies](http://www.apexcle.com/pages/ARDCPolicies)

<sup>73</sup> Yamaguchi, 515 N.E.2d at 1239.

<sup>74</sup> Id. at 1240.

<sup>75</sup> In re Howard, 188 Ill.2d 423, 721 N.E.2d 1126, 1132, 242 Ill. Dec. 595 (Ill. 1999).

<sup>76</sup> Id. at 1134.

<sup>77</sup> Id at.1136.

<sup>78</sup> Yamaguchi, 515 N.E.2d at 1240. See also Vrdolyak, 560 N.E.2d at 848 (“The motive or intent of the attorney is not relevant in determining whether the attorney violated the Code of Professional Responsibility, but may properly be considered as a mitigating factor in determining the degree of discipline.”).

testimony of character witnesses.<sup>79</sup> The court will not find the fact that other attorneys engage in similar conduct as a mitigating factor.<sup>80</sup>

When determining the proper discipline, the court's "goal is not to punish the attorney but rather to protect the public from incompetent or unscrupulous attorneys, to maintain the integrity of the profession and to protect the administration of justice from reproach."<sup>81</sup> The question is "whether the attorney is a proper person to be permitted to practice his profession."<sup>82</sup>

### Tips to Avoid Heading Down the Path to Discipline

Now let's talk about some general tips that are good to stay out of trouble and I'm going to assume that most of us don't have alcohol issues that we still want to stay out of trouble and we don't want our clients unhappy with us, we don't want to receive letters from the disciplinary commission asking us to respond.

The biggest complaint that clients make to the disciplinary office is a lack of communication. Clients are extremely upset with lawyers who don't communicate with them and that's tricky because as a lawyer you're busy you don't just generally have one client you have many and some cases are more pressing and some matters are more pressing and you can't always respond as quickly to your clients calls or your client emails that they would have liked.

Sometimes they call every day and have family members call you too. There's only so much that one person can take. But remember, that if your clients are happy with you they're going to be much less likely to file any kind of complaint against you and communicating with them is important. So try to return calls as quickly as possible. Check your email often during the work day. Try to return calls or emails within 24 hours, if not sooner. A lot of other attorneys do that too and if you can't return a call, have your assistant just contact the client and say "Mr. Attorney is unavailable right now, he received your message and he will call you back as soon as possible" and give a date and perhaps even a time. If not an assistant, just send a quick email letting them know you heard from them and will call when you have a chance to review the file. Clients prefer a quick note to complete silence. If they feel you are responsive to them and they feel like you understand their needs, they're much less likely to complain about you. Communicate all the time if you can and when you can't, then you let the client know that you can't at this particular time and that you will when you can.

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<sup>79</sup> Lewis, 562 N.E.2d at 212.

<sup>80</sup> Id. at 213.

<sup>81</sup> Howard, 721 N.E.2d at 1132.

<sup>82</sup> In re Smith, 168 Ill.2d 269, 560 N.E.2d 896, 908, 213 Ill.Dec. 550 (Ill. 1995).



You should also stay in your own lane. If you have a practice focusing on wills, trusts and estates, do not take on a medical malpractice case. It's important to take cases that you know how to do. Many small offices or sole practitioners are tempted to take on a new matter in an area where they think they can make money. Some people dabble in an area from time to time. These will always take you more time than it's worth because you don't know the area and may need to find people to help you to research and learn what you are supposed to do. It's okay to admit you don't do that kind of work but you're going to help you find somebody who can help the client and to refer that out or to give the client suggestions know where they can find somebody to help them.

The cases that you don't take on are as important as the ones that you do take. So in order to stay out of trouble you don't want to dabble in things unless you're really prepared in things that you don't know and it's certainly best to focus on the area that you do practice in and try to stay within those rounds and refer out the ones that you don't. Model Rule 1.1, and most state rules provide that:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.<sup>83</sup>

I suggest to you that dabbling is not competent representation.

Another way to stay out of trouble is to put everything in writing that you can, you want to take notes, you want to memorialize your conversations, you certainly want to put together fee agreements with your client even if it's a flat fee, you want the terms of the flat fee to be in writing. It just protects you in terms of any dispute or any disagreement in the future as to what the scope of your representation is. If you have a limited scope of representation, in most states and under the Model rules, that limitation must be done with informed consent.<sup>84</sup> The only way to effectively prove informed consent is to show the written agreement.

Take notes of conversations with your clients. If a client claims that you didn't tell them about the fact that they had waived their right to a jury trial, or the right

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<sup>83</sup>

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_1\\_competence/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/)

<sup>84</sup>

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_2\\_scope\\_of\\_representation\\_allocation\\_of\\_authority\\_between\\_client\\_lawyer/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer/)

to file suit, your note will help establish what was said to the client. All these things were really helpful when you need to answer the ARDC's allegations about the fact that the client claimed that you had not told them that they had waived a jury trial. Taking notes is just a way to protect yourself and they don't have to be long but memorializing what your clients and you talked about and putting it in your file may help at some unknown point in the future. You need to think about protecting yourself should a claim arise, whether legal malpractice claim or a disciplinary claim.

You should prepare disengagement letters if you decide not to take a case or if you withdraw from a case. If you are fired from a case you want to make sure that the client gets a letter that you're no longer acting on their behalf. Those are important because it sets the tone and it sets the terms that you're no longer acting for them and they need to protect their own interests.

You want to be on time for your client, you want to be on time for meetings, you want to be on time for court, you want to be gracious to your client, you want to treat your client professionally and respectfully. As a lawyer you sometimes forget that people come to you because they have problems and because they're scared and they're looking to you for your professional judgment and your experience to help them and being on the other end of that and receiving another lawyer's help and just sitting back in and putting your trust in them, it makes you remember that other people are putting your trust in you and it's important to always respect that because that's exactly what they're doing. The more you can bond with your client the better it can be in terms of staying out of trouble. They're not going to report you if they don't like a billing statement or if they don't like your fee, now they're going to come to you. They're going to be more willing to work with you than if they felt you were disrespectful.

These are tips that can help a lawyer with their practice and help them in terms of their client base and help them so that they don't get into trouble with the disciplinary office.

## Using Available Resources To Assist Attorneys

There are organizations created throughout the country to provide assistance to lawyers, judges, law students whose performance is impaired due to addiction or mental illness. In the materials provided with this course, there are resources listed throughout the country. Your state will have similar resources available for attorneys. In Illinois one organization is called the Illinois Lawyers Assistance Program. The ILAP's mission is to:

Help lawyers, judges, and law students get assistance with substance abuse, addiction and mental health problems;



To protect clients from impaired lawyers and judges; and

To educate the legal community about addiction and mental health issues.<sup>85</sup>

The ILAP provides Counseling, Peer Support, Educations and Interventions. LAP offers free individual and group counseling to all Illinois lawyers, judges and law students. There is a Men's Group that meets on Mondays and a Women's Group that meets on Wednesdays. There are also individual counseling sessions available by appointment.

The ILAP provides trained volunteers for free peer support for Illinois lawyers, judges and law students. Volunteers are matched with ILAP clients based on demographics and interests and they are bound by strict confidentiality.

The ILAP education offerings include training to attorneys interested in learning more about addiction, stress, and how to improve overall wellbeing. They offer both online and in-person continuing legal education and regularly speak law firms, law schools, and bar associations.

Interventions aren't just for cheap TV drama; they are a real event and can assist an attorney in need. The ILAP provides interventions for legal professionals who may not realize they need help. Interventions are a group process initiated by family, friends or colleagues, and involve trained intervenors.<sup>86</sup>

There are similar organizations throughout the country. New York has a similar program as do many other states.<sup>87</sup> Lawyers routinely turn to these organizations in order to get help and to meet with other lawyers who have alcohol related problems and mental health problems that affect their ability to practice law. In these organizations, there's counseling and peer mentoring and AA type meetings where somebody can go and get involved in a good support system where friendship and mentoring is very effective.

The legal profession holds a special place in the world of employment. Lawyers are entrusted with client's money, client's secrets and our client's trust. If an attorney is no longer in complete control of their life, no longer in control of their practice and no longer able to control their intake of alcohol or other substances, the client's money, property or even their freedom can be lost. We are each

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<sup>85</sup> <https://illinoislap.org/about-lap/mission/>

<sup>86</sup> <https://illinoislap.org/mental-health-recovery-services/>

<sup>87</sup> [www.nysba.org](http://www.nysba.org)



responsible to take action for ourselves and others if we see that we are no longer able to protect our clients.

If you have an issue with alcohol or you see somebody who has an issue with an alcohol or even think somebody is having a problem, it's important to ask questions, to look at them, to monitor them, to ask others who may have more involvement with them and other colleagues. It's better to be safe than to be sorry and if you have a problem, there's no shame in getting help, there's nothing wrong with seeking advice, seeking professional counseling and working through it, because it makes us all better lawyers and better people.



## Resources

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### Resources Specific to this Course

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In addition, please see the resources cited within the material.

### Resources for the Legal Professional

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ABA Center for Professional Responsibility - [www.abanet.org/cpr](http://www.abanet.org/cpr)

Chicago Bar Association - [www.chicagobar.org](http://www.chicagobar.org)

Commission on Professionalism - [www.2civility.org](http://www.2civility.org)

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - [www.ilbaradmissions.org](http://www.ilbaradmissions.org)

Illinois Department of Financial and Professional Regulation - [www.idfpr.com/default.asp](http://www.idfpr.com/default.asp)

Illinois Lawyers' Assistance Program, Inc - [www.illinoislap.org](http://www.illinoislap.org)

Illinois State Bar Association - [www.isba.org](http://www.isba.org)

Illinois Supreme Court - [www.state.il.us/court](http://www.state.il.us/court)

Lawyers Trust Fund of Illinois - [www.ltf.org](http://www.ltf.org)

MCLE Program - [www.mcleboard.org](http://www.mcleboard.org)

