

The Black Box of Lawyers Assistance Programs:
Explaining the Need for Special Advocates for Impaired Attorneys

I. Introduction

This article proceeds by first relating the story of an attorney who participates in a Lawyers Assistance Program (LAP) treatment plan. It will then describe the prevalence of depression and health issues in the legal profession, the role of lawyers assistance programs, and the relevant ABA Model Rules of Professional Conduct invoked by an incapacitated attorney participating in a LAP treatment plan. This article will then analyze how these rules create a tension between a firm's responsibility to protect its clients, the lawyer's assistance program's responsibility to protect the Bar, and how an incapacitated attorney can be forced to choose between either recovery or remaining a practicing attorney. I will conclude by proposing the creation of a Special Counsel's Advocate—an attorney who will act as an advocate for an incapacitated lawyer. This Special Counsel's Advocate will be privy to all communication between the lawyer's employer and the lawyers assistance program and will advocate on behalf of the incapacitated attorney in order to ensure that the interests and recovery of an incapacitated attorney are adequately protected.

A. Fact Pattern

Mark is a fifty-eight year old, divorced, father of three adult children.¹ He has had a successful legal career for nearly thirty years and is a partner in a small firm. He is regarded as fair, honest, and smart by his local Bar colleagues, and as a singularly devoted father by friends and family.

¹ The proceeding fact pattern is based on a real-life scenario. Documents are on file with the author.

Unfortunately, Mark suffers from several serious medical issues. After undergoing emergency surgery for a back condition, Mark had innumerable subsequent operations to deaden the nerves in his back and to fuse vertebrae. Despite these surgeries, Mark suffers from chronic pain. He also suffers from ulcerative diverticulitis, which causes severe abdominal pain, dehydration, fever, nausea, and diarrhea. Mark is frequently weak, pale, and unable to stray far from the bathroom, often for days at a time. Most of his colleagues and friends do not know the extent of Mark's medical problems because he obfuscates or minimizes the depth of these issues when symptoms become noticeable. In addition to his physical medical issues, Mark suffers from depression. At one point, he is prescribed nine different medications to treat his various maladies.

Over the years, his physical and mental health decline while his absence from the office becomes more frequent. Although he is known as a capable attorney, Mark's illnesses negatively affect his work. Mark uses conference calls instead of attending regular client meetings, to the chagrin of both clients and colleagues. He fails to appropriately log his billable hours, resulting in lost income for the firm. Mark is also routinely late in fulfilling his state's CLE requirements.

After more than a decade of escalating issues, the partners at Mark's firm contact their state's Lawyers Assistance Program. Together with representatives from LAP, the partners hold an intervention. Mark is advised that he is no longer an *active* member of the firm, but may return to active-member status if he fulfills the following conditions: cooperate with LAP to identify his medical and mental health issues, develop and participate in a program for treatment or rehabilitation or any other recommended course of action; participate in any course of treatment or action recommended by experts or medical personnel that is related to his medical

or mental health issues; and authorize the firm to audit or confirm his participation in any such treatment.

Mark seems relieved. After a few days, he drives to the out-of-state drug and alcohol rehabilitation facility mandated by LAP. On arrival, Mark fills out a survey on what he wants from treatment. On a scale of 0–3, with 3 indicating that he DEFINITELY wants or needs this from treatment and 0 indicating that he definitely does NOT want or need this from treatment, Mark circles 3 for the following: personal problems; health problems; depression or moodiness; feelings of loneliness; and a desire to see a doctor or nurse about medical problems. Mark indicates no interest in help with alcohol or drug issues.

Mark is discharged from the facility after less than a week, primarily because he is not an addict. Mark soon returns to the firm and continues counseling for his mental health issues. At no point did Mark see a medical physician as part of his LAP treatment plan. Mark's return to the firm was marked by a strong start, but eventually his attendance again waned as he was hobbled by his medical issues. Mark explains his absences by stating that he has been at the doctor. While this is true some of the time, Mark frequently uses “doctor visits” as a polite euphemism to avoid saying he is unable to leave the toilet or his bed.

The firm sends him a formal warning letter, noting deficiencies in his attendance in the office and work production, both for that month and the year. The letter states that the firm hoped that he would rejoin them, functioning at a “high level.” The letter also states that LAP remarked to the firm, “no one goes to the doctor that much.” Again, Mark has not seen a medical physician as part of his LAP treatment. The partners make plain their expectations in the letter: Mark is to be present in the office from 9:00 am until 5:00 pm every weekday; record all billable hours in the firm's case management system; complete his CLE requirements;

continue to participate in any recommended course of treatment or action by LAP; and continue to allow the firm to audit or confirm his participation of any treatments or rehabilitations.

Less than a month later, Mark is let go from the firm. He is unable to retain any of his clients from the firm and is unsuccessful at gaining employment elsewhere. Clutching pictures of his children late one afternoon, Mark takes out a handgun and ends his life.

Although the preceding situation may appear to be an extreme example, it exposes a serious deficiency in how our profession addresses issues posed by impaired attorneys. Communications between an attorney and a lawyers assistance program are confidential, but attorneys in Mark's position must often waive this protection in order to participate in a recovery plan. Requiring attorneys to waive this fundamental protection raises several conflicts: the impaired attorney seeks recovery; the firm must protect both itself and its clients; and the lawyers assistance program must protect the integrity of the Bar. An attorney whose conduct is of such a degree to warrant the intervention of colleagues is placed at a serious disadvantage in a process attempting to safeguard the interests of multiple parties that are not necessarily in harmony.

II. Background

A. Depression and Mental Health Issues in the Legal Profession

The practice of law is a uniquely stressful profession.² Despite the potential risks posed by impaired attorneys, precise information regarding the prevalence of mental health issues

² See Rosa Flores and Rose Marie Arce, *Why are Lawyers Killing Themselves?*, CNN (Jan. 20, 2014), <http://www.cnn.com/2014/01/19/us/lawyer-suicides/> (noting that lawyers rank fourth when lawyers' suicide rates are compared to other professions such as medical physicians, but that surgeons do not face an opposing physician who is trying to kill the patient); see also Hugh Grady, *Study shows lawyers have higher rates of problem drinking and mental health issues*, THE IOWA LAWYER, Vol. 76, No. 4 (May 2016), available at http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lis_colap_may_2

among legal practitioners is difficult to ascertain.³ Until 2016, one of the most prominent studies of these issues involved surveying 1,200 attorneys in Washington state in 1990.⁴ That study indicated that 19% of attorneys participating in the study suffered from elevated levels of depression.⁵

More recent research involving a sample of 12,825 licensed attorneys indicates 28% of the attorneys surveyed experience mild or higher levels of depression, 19% experience anxiety, and 23% experience stress.⁶ This national study, conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs, “paints the picture of an unsustainable professional culture that's harming too many people. Attorney impairment poses risks to the struggling individuals themselves and to our communities, government, economy and society.”⁷ Although rates of problematic drinking in the Hazelden

016_iowa_lawyer_magazine.authcheckdam.pdf at 7 (listing the difficulty and importance of legal work, negative outcomes of cases, the competitive job market, and high debt as explanations for the stressful nature of the legal profession); *cf.* Connie J.A. Beck, Bruce D. Sales and G. Andrew H. Benjamin, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 *J.L. & Health* 1 (1995–1996) (indicating that stress is a recognized factor in both physical and psychological illness).

³ See Laura Rothstein, *Law Students and Lawyers with Mental Health Substance Abuse Problems: Protecting the Public and the Individual*, 69 *U. Pitt. L. Rev.* 531, 532 (2008) (synthesizing information from various sources); Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW, *The Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys*, 10 *J. Addict. Med.* 1, 46 (2016) (noting that few studies have been done on the widely-held belief that attorneys suffer from substance abuse and other mental health problems at a high rate).

⁴ *Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys* at 46 (citing Eaton W, Anthony J, Mandel W, Garrison R. *Occupations and the Prevalence of Major Depressive Disorder*. *J. Occup. Med.* 1990.

⁵ *Id.*

⁶ *Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys* at 46.

⁷ Press Release, Hazelden Betty Ford Foundation, ABA, Hazelden Betty Ford Foundation Release First National Study on Attorney Substance Use, Mental Health Concerns (February 3, 2016) available at <http://www.hazeldenbettyford.org/about-us/news-media/press-release/2016-aba-hazelden-release-first-study-attorney-substance-use>.

study are “generally consistent” with the 1990 study, the Hazelden research reveals “considerably higher levels of mental health distress” over the course of their career.⁸ The study noted that 61.1% of participants report experience anxiety, 45.7% report depression, 11.5% report suicidal ideation at some point.⁹ Furthermore, 2.9% of participants report self-injurious behaviors and 0.7% report at least one prior suicide attempt.¹⁰

B. Lawyers Assistance Programs

While heavily regulated, the legal profession is a self-governing profession.¹¹ The highest court of a respective state substitutes for the legislature by adopting the rules regulating lawyers.¹² The drafting of these rules is usually done by a committee of practicing lawyers, judges, and law professors.¹³ Self-regulation serves to maintain the legal profession’s independence from government influence, thus ensuring that the profession operates as counterforce to abuse of authority.¹⁴ Due to the substantial responsibility of self-governance, “courts and bar associations take seriously the charge to protect the professional reputation and

⁸ *Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys* at 50–51.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 Min. L. Rev. 1147, 1147 (noting that attorneys are licensed in each state and governed by the professional rules adopted and enforced by a state supreme court). Professor Zacharias argues that describing the legal profession as “self-regulating” is a misnomer because attorneys are also regulated by courts (through supervisory decisions and imposing civil liability for malpractice, breach of fiduciary duty, etc.); administrative agencies (by establishing and implementing rules governing the lawyers practicing before them); and both federal as well as state legislatures (by enacting statutory regulations and criminal penalties). *Id.* at 1147–48.

¹² Lisa G. Lerman and Philip G. Schrag, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 25, 3rd ed. (2012).

¹³ *Id.*

¹⁴ MODEL RULES OF PROF'L CONDUCT Preamble.

the public perception of it.”¹⁵ Thus, the goal of disciplining attorneys who violate the rules governing the profession is not merely to punish the offending attorney, but also to “protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future.”¹⁶

Disciplining attorneys for misconduct serves to protect the public.¹⁷ However, disciplining impaired attorneys by imposing disbarment or public censure does not necessarily further the goal of protecting either the public or the integrity of the legal profession.¹⁸ Indeed, the prospect of punishment keeps many attorneys from seeking help for their impairment . Rather, the public is better served by allowing an attorney to recover.¹⁹ To that end, the original LAP began as an effort by recovering alcoholic attorneys in Kentucky to help their colleagues during the mid-1980s.²⁰ The American Bar Association created the Commission on Lawyer Assistance Program in 1988 to assist member bar associations deal with addiction.²¹ LAPs now

¹⁵ Kristy N. Bernard & Matthew L. Gibson, *Professional Misconduct by Mentally Impaired Attorneys: Is there a Better Way to Treat an Old Problem?*, 17 Geo. J. L. Ethics 619, 627 (2004).

¹⁶ *Id.* (citing *In re Sheridan*, 813 A.2d 449, 451-52 (N.H. 2001)).

¹⁷ *Professional Misconduct by Mentally Impaired Attorneys*, supra note 15 at 627.

¹⁸ *Id.*

¹⁹ *C.f.* Judith A. McMorrow, *In Defense of the Business of Law*, 40 Fordham Urb. L.J. 459, 463 (2012) (noting that as clients are not typically the primary focus of non-disciplinary assistance and that the benefits ostensibly flow to future clients).

²⁰ John W. Clark, Jr., “*We’re from the Bar, and We’re Here to Help You*”—*Lawyers Assistance Programs*, GPS SOLO MAGAZINE, October/November 2004 available at http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/werefromthebar.html. However, courts recognized the need to impose sanctions while factoring in impairment or mental illness. *Professional Misconduct by Mentally Impaired Attorneys*, supra note 15 at 628.

²¹ *Professional Misconduct by Mentally Impaired Attorneys*, supra note 15 at 628. In 2002, the Law School Outreach Committee was created to over law school administrators tools to cope with substance abuse in law schools. *Law Students and Lawyers with Mental Health Substance Abuse Problems*, supra note 3 at 554.

assist members with a wide array of conditions that can impair an attorney's ability to practice law.

Despite the broadened scope of LAP assistance, impairments such as physical disabilities and conditions such as Alzheimer's are "less readily ameliorated by LAP staff and volunteers."²³ The structure and functions of LAPs vary state to state.²⁴ However, most programs offer services such as assessments, interventions, counseling, and referrals.²⁵ LAP funding primarily comes from the court or the Bar as well as program fees, CLE programs, and private donations.²⁶ Funding, along with under-utilization, have been identified as the greatest concerns for LAPs.²⁷

Confidentiality and privacy are paramount concerns for legal practitioners seeking assistance.²⁸ Indeed, concerns regarding confidentiality are also shared by law students prior to entry into the Bar.²⁹ Experts note that confidentiality is an integral component of successful

²³ Id. Some LAPs may explicitly offer assistance with physical disabilities. For example, Indiana's Judges and Lawyers Assistance Program provides assistance to "judges, lawyers, and law students who suffer from physical or mental disabilities resulting from disease, chemical dependency, mental health problems or age that impair their ability to practice or serve." Tim A. Baker, *What does treatment look like for lawyers, judges in need?*, THE INDIANA LAWYER (Mar. 8, 2017) available at <http://www.theindianalawyer.com/what-does-treatment-look-like-for-lawyers-judges-in-need/PARAMS/article/43009>.

²⁴ See "*We're from the Bar, and We're Here to Help You*" *supra* note 20 (stating that while the ABA House of Delegates approved a model LAP after which real LAPs have been established, the standard is not mandatory).

²⁵ Mary Dunnewold, *Lawyer Assistance Programs: Help is on the Way*, ABA FOR LAW STUDENTS (Dec. 1, 2012) available at <http://abaforlawstudents.com/2012/12/01/lawyer-assistance-programs-help-way/>

²⁶ ABA COMMISSION ON LAWYER ASSISTANCE PROGRAMS, 2010 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS (2011) at 37

²⁷ Id. at 42.

²⁸ *Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys* at 50 (stating that participants who either did or did not seek treatment for substance use named fears regarding confidentiality or privacy as the primary barriers to obtaining treatment).

²⁹ Jerome M. Organ, David B. Jaffe, and Katherine M. Bender, Ph.D., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. Legal Educ. (2016) at 142 (stating that while

treatment programs.³⁰ To that end, the ABA’s Model Lawyer Assistance Program suggests that the state’s highest court, as well as the state legislature, should provide confidentiality as to all communications directed to LAP staff, volunteers, and persons providing information or other assistance.³¹ The Model Program further acknowledges that “experience demonstrates that fear of disclosure and discipline keeps many legal professionals and those close to them from seeking help from agencies”³² Much as the primary purpose of attorney-client confidentiality is to encourage open communication, confidentiality serves to encourage members of the legal profession to seek help.³³

C. Model Rules of Professional Conduct Implicated by an Impaired Attorney

Impaired attorneys share the same obligations as unimpaired attorneys under the ABA Model Rules of Professional Conduct.³⁴ Impairment does not relieve an attorney of their duty to provide competent representation to their clients.³⁵ Even if an attorney’s breach of the Model

80% of respondents believed that conversations with a state LAP would be confidential, 58% thought that a conversation with a dean of students would be confidential). While those figures may seem promising, 49% of respondents indicated that their chances of gaining admission to the bar would be greater if they concealed a drug or alcohol problem, and 43% of respondents thought they would be more likely to gain admission by concealing a mental health problem. *Id.*

³⁰ *Law Students and Lawyers with Mental Health Substance Abuse Problems* supra note 3 at 553.

³¹ AMERICAN BAR ASSOCIATION COMMISSION ON LAWYER ASSISTANCE PROGRAMS, MODEL LAWYER ASSISTANCE PROGRAM (2004) available at http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lis_colap_model_lawyer_assistance_program.authcheckdam.pdf

³² *Id.* at 14.

³³ Lerman and Schrag, *supra* note 12 at 161.

³⁴ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003) [hereinafter ABA Formal Op. 03-429]

³⁵ See Donald B. Hilliker, *The Impaired Lawyer: Implications Under the Rules of Professional Conduct*, *Professional Lawyer* (2004); See also Robert Dowers, *Duties Invoked Under the Model Rules of Professional Conduct by A Mentally Impaired Lawyer*, 19 *Geo J. Legal Ethics* 681, 682 (2006) (stating that mental impairment does not allow an attorney to represent clients with a lesser degree of professionalism than an unimpaired lawyer); *Model Rules of Prof'l Conduct* R. 1.1 (2003) (mandating that a lawyer provide competent representation to a client).

Rules stems from an underlying impairment, that attorney is subject to discipline.³⁶ Model Rule 1.16 explicitly prohibits an attorney from either undertaking or continuing to represent a client if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.³⁷ Further, an attorney such as a partner in a law firm will also violate his or her obligations by failing to make reasonable efforts to ensure a subordinate attorney complies with the model rules.³⁸

However, an attorney may not always be cognizant of his or her own impairment, or may be in denial of a diminished ability to adequately represent clients.³⁹ A law firm's "paramount obligation is to take steps to protect the interests of its clients."⁴⁰ If reasonable efforts to ensure compliance with the Model Rules are made, neither partners nor a supervising attorney may be held responsible for an impaired attorney's violation of the Model Rules "unless they knew of the conduct at a time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action."⁴¹

All attorneys have an obligation under Model Rule 8.3 to report violations of the Model Rules that raise "a substantial question as to that lawyer's honesty, trustworthiness, or fitness" to the appropriate professional authority.⁴² However, this duty does not apply to an attorney retained to represent another lawyer whose professional conduct is in question.⁴³ Nor must a

³⁶ ABA Formal Op. 03-429 at 2.

³⁷ *Model Rules of Prof'l Conduct* R. 1.16(a)(2) (2003)

³⁸ Hilliker, *supra* note 35; *Model Rules of Prof'l Conduct* R. 5.1(b) (2003)

³⁹ ABA Formal Op. 03-429 at 3. Colleagues of an attorney who is periodically impaired may have to conclude that the lawyer's ability to represent clients is materially impaired if such episodes have "an appreciable likelihood of recurring" *Id.*

⁴⁰ ABA Formal Op. 03-429 at 4.

⁴¹ *Id.*

⁴² *Model Rules of Prof'l Conduct* R. 8.3(a) (2003). If the

⁴³ *Comment on Model Rules of Prof'l Conduct* R. 8.3.

firm report an attorney if the condition that caused a violation has been resolved.⁴⁴ Furthermore, if a firm is able to eliminate the risk of future violations of the duties of competence and diligence by closely supervising an attorney, reporting that attorney's violation would be unnecessary.⁴⁵

Some impairments, such as the type of work performed or the environment in which an attorney works, may be accommodated by the firm⁴⁶. Should a firm find it necessary to remove or replace an attorney whose client matter is still pending, the firm may need to discuss with the client the circumstances of said change.⁴⁷ If a firm removes an impaired lawyer or the lawyer leaves the firm, the firm must inform existing clients of the circumstances surrounding the impaired lawyer's exit "to the extent disclosure is reasonably necessary to make an informed decision about the selection of counsel."⁴⁸

III. Analysis

A. Parties Involved with Attorney Recovery Through Lawyers Assistance Programs have Inherently Conflicting Obligations and Priorities

Lawyers Assistance Programs have evolved over decades to better address serious health problems in our profession. Although LAPs are well-intentioned, the structure of the programs creates an array of potential conflicts between the various stakeholders. LAPs may be constrained by funding, manpower, and expertise. Some state LAPs are prepared to assist legal practitioners with substance abuse or depression, but not other medical problems. As part of a

⁴⁴ ABA Formal Op. 03-429 at 5.

⁴⁵ Id.

⁴⁶ Id. at 4

⁴⁷ Id. citing *Model Rules of Prof'l Conduct* R.1.4. In discussions with the client, the firm should be conscious of the privacy of the impaired lawyer. Id.

⁴⁸ Id. at 6.

state's Bar association, LAPs may compete with the disciplinary arm of the Bar for resources, including both funding and staffing.⁴⁹ LAPs may even share resources such as office space and staff with the Bar, raising other ethical concerns.⁵⁰ LAPs and disciplinary proceedings share common goals, such as improving the quality of the Bar, but function differently.⁵¹

It is important to note these conflicts and take care that programs intended to aid the recovery of attorneys do not become adversarial.⁵² In the preceding fact pattern, the intervention with Mark places LAP representatives in a difficult position. The program seeks to help Mark recover from his impairment, but it must also protect the integrity of the Bar. While LAPs are advertised as being on the side of attorneys, the LAP in Mark's case did not act as an advocate for him in its *ex parte* communications with the firm.⁵³ Rather, Mark's participation in the LAP treatment plan became something of a black box—he is aware of the inputs (what he tells the LAP representatives) and the outputs (the warnings he receives from the firm and his eventual firing), but the machinations of what LAP and the firm do with that information remain opaque.

Allowing *ex parte* communication between LAP and an impaired attorney' leaves an impaired or troubled attorney, such as Mark, as the only person advocating for his or her interests. Further, an impaired attorney in these circumstances is inherently at a severe disadvantage relative to the unimpaired attorneys at the firm. Here, the LAP representatives' remark to the firm, "no one goes to the doctor that much," reveals the risk present for impaired

⁴⁹ Fred C. Zacharias, *A Word Of Caution for Lawyer Assistance Programming*, 18 Geo. J. Legal Ethics 237, 244 (2004).

⁵⁰ *Id.* at n. 32.

⁵¹ Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 Wm. & Mary L. Rev. 675, 734 (2004).

⁵² *See Id.* at 734 (stating that regulators need to be aware of potential inconsistencies between these two arms of the Bar).

⁵³ *See Dunnewold supra* note 25 (stating that "Lawyers assistance programs are here so that nobody has to do this alone. There is always someone in your corner.").

attorneys who are forced to waive confidentiality with LAP in order to maintain employment. Knowing their communications with LAP representatives may be passed to the firm, it is natural for Mark to present an image of recovery.

Guaranteeing confidentiality between impaired attorneys and representatives of a lawyer's assistance program may serve to encourage members of the Bar to seek help, though it does not protect the interests of clients already injured by an attorney's impairment.⁵⁴ The public may be best protected from future harm by incentivizing attorneys to seek help, but this benefit comes at a cost to an impaired attorney's current clients.⁵⁵ Thus, an attorney's firm is placed in a difficult situation, both practically and ethically.

In the above fact pattern, Mark's firm must balance their ethical duty to protect their clients against their desire to aid their friend and colleague in recovering.⁵⁶ Given Mark's decades of legal practice and reputation among the local Bar, the firm also wants Mark to become a productive member again. However, if Mark has committed a violation of the Model Rules—failing to act with diligence and promptness, or failing to communicate with a client due to his absenteeism—the firm has an obligation to report that violation to the appropriate authority.⁵⁷ The firm is also required to institute policies and measures to ensure adherence to the Model Rules.⁵⁸ Following Mark's removal from the firm, his former colleagues are required to inform its existing clients of the reason for Mark's departure in order for those clients to make

⁵⁴ Zacharias, *A Word Of Caution for Lawyer Assistance Programming*, 18 Geo. J. Legal Ethics 237, 242 (2004).

⁵⁵ *Id.* at 242.

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⁵⁷ *Model Rules of Prof'l Conduct* R. 8.3(a) (2003).

⁵⁸ *Model Rules of Prof'l Conduct* R. 5.1(a) (2003). The requisite measures depend on the size and structure of the firm as well as the nature of its practice. ABA Formal Op. 03-429 at 3–4.

an informed decision regarding selection of counsel.⁵⁹ Although the firm is obligated to limit any such statements to those “for which there is a reasonable factual foundation,” such disclosures risk lasting harm to Mark’s reputation, and in the case of a small town, they could fuel gossip.

Mark is also in an untenable position. Despite his physical or psychological impairments, he must comply with the Model Rules. By continuing to represent clients or undertaking representation of new clients, Mark violates Model Rule 1.16.⁶⁰ There were no specific accusations of any violations of the Model Rules in the fact pattern. However, it is imaginable that Mark, who is often unable to leave his home because of his ulcerative diverticulitis and chronic back pain, may fail to adequately communicate or act with diligence. Thus, impaired attorneys such as Mark may fear disciplinary action and avoid seeking help. By allowing LAP representatives to report on his progress to the firm, Mark is incentivized to continue his pattern of denial and obfuscation regarding his underlying medical issues in order to demonstrate compliance as well as improvement.

B. A Special Counsel’s Advocate Would Help Mitigate the Inherent Conflicts of Interest
Between Parties Involved with LAP Programs

All of the parties involved in the intervention—Mark, the firm, and LAP—have conflicting interests. It is unlikely that tinkering with the structure or role of LAPs would perfectly remedy these conflicts. Instead, I propose the creation of a new role: a Special Counsel’s Advocate (SCA). The SCA will be a licensed attorney, will share an attorney-client

⁵⁹ ABA Formal Op. 03-429 at 6.

⁶⁰ See *Model Rules of Prof’l Conduct* R. 1.16(a)(2) (2003) (prohibiting an attorney from representing clients when the lawyer’s physical or mental condition materially impairs their ability to represent the client).

relationship with the impaired attorney, and will work to ensure the attorney's interests are represented.⁶¹

The function and role of this SCA is based on the United States Army's Special Victim Counsel Program.⁶² A Special Victim Counsel (SVC) provides a no-cost military attorney to qualifying victims of sexual assault, such as members of the armed forces or their family members.⁶³ SVCs "provide zealous advocacy for the victims of sexual assault throughout the military justice and administrative process."⁶⁴ These military attorneys are charged with representing the best interests of their clients, "even when those interests do not align with [those of] the Government[,]" and their primary duty "is to his/her client and no other person, organization, or entity."⁶⁵

If Mark had faced disciplinary action for violations of the Rules of Professional Conduct, rather than participating in a LAP-monitored treatment plan, he most likely would have had an attorney to represent him. Mark could have benefited greatly from an independent advocate in the above fact pattern. Mark, while at the LAP-mandated facility, expressed a strong desire to speak with a doctor or nurse regarding his health problems. On what may have been one of the few times Mark was honest with others as well as with himself regarding his physical health, his words fell on deaf ears. An attorney could have drawn attention to Mark's numerous physical

⁶¹ See Comment on Rule 8.3 [4] (explaining that the duty to report misconduct does not apply to a lawyer representing another lawyer whose professional conduct is in question).

⁶² 10 U.S. Code § 1044e

⁶³ UNITED STATES ARMY, OFFICE OF THE STAFF JUDGE ADVOCATE, FORT KNOX, KENTUCKY, SPECIAL VICTIM COUNSEL PROGRAM available at <http://www.knox.army.mil/garrison/supportoffices/sja/svc.aspx> (last visited April 1, 2016).

⁶⁴ U.S. DEP'T OF THE ARMY, SPECIAL VICTIMS' COUNSEL HANDBOOK (2016) available at http://jpp.whs.mil/Public/docs/07RFI/Set_6/Responses/RFI_Attachment_Q149_USA1.pdf

⁶⁵ Id.

ailments, noted the fact that the LAP plan did not include any form of physical evaluation or treatment, and advocated for addressing the physical problems as part of his treatment plan.

The remark by the LAP representatives to the firm, that “no one goes to the doctor that much,” was a careless and unprofessional comment. However, because this comment was made *ex parte*, it had severe consequences. Neither Mark nor anyone else representing his interests was present to provide evidence to the contrary or draw attention to the fact that, while Mark agreed to cooperate with LAP to identify and treat his medical and mental health issues, no effort was made to address any issue but his depression. An attorney representing Mark could have argued that a problem years in the making would not be solved in a few short months.

V. Conclusion

Lawyers Assistance Programs are a critical resource for impaired attorneys, despite the aforementioned conflicting interests. Legal practitioners are charged with the duty to protect society itself. Yet, our profession suffers from an alarming rate of mental health and substance abuse issues. LAPs have evolved over decades to reconcile the need to protect both the public and the integrity of the profession from risks posed by impaired attorneys with a desire to aid them in their recovery. The current structure of some LAPs creates a troubling power imbalance between an impaired attorney and his or her colleagues. We must take care that the structure of LAPs do not mirror the disciplinary process it is intended to avoid. To that end, a licensed attorney should work with an impaired lawyer participating in a LAP-monitored recovery plan. Although nothing could guarantee outcomes like that in Mark’s story will be prevented, adding an advocate whose sole duty is to the impaired attorney could mitigate risks. If our profession is to live up to its role of protecting society, we must protect the rights of our colleagues when they are ill.