



# **Tennessee Judicial Academy**

## **August 23, 2022**

### **Murfreesboro, TN**



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**WHAT *is* TLAP?**

# **TLAP'S SERVICES**

## **TLAP's Professional Clinical Staff Provides:**

- **Direct Crisis Counseling**
- **Clinical Consultations**
- **Interventions**
- **Referral to Assessments, Diagnostics, and Treatment**
- **Comprehensive TLAP Recovery Monitoring**

**TLAP supports long-term recovery and fitness to practice.**

**Access to TLAP's services is unlimited and always free.**

# **Confidentiality and TLAP**

## **T.C.A. 23-4-105**

The records, proceedings and all communications of any lawyers' assistance program shall be deemed confidential and shall not be available for court subpoena. This section shall not prevent the subpoena of business records that are otherwise available through subpoena. Such records are not to be construed as privileged merely because they have been provided to a lawyers' assistance committee.

# Immunity and TLAP

## T.C.A 23-4-101

A person who in good faith reports information or takes **action in connection with a lawyers' assistance program**, or a person who receives information in connection with a lawyers' assistance program, **is immune from civil liability** for reporting the information, taking the action or taking no action; provided, that the person has acted in good faith and without malice.

Allows TLAP, TLAP's Commission, volunteers, members of the profession, and any other "person" to participate effectively in TLAP assistance and interventions

**TLAP IS NOW COMPREHENSIVE**

**TLAP PROVIDES ASSISTANCE WITH  
ALL MENTAL HEALTH ISSUES**

# **PART ONE**

## **Self-Regulated Profession Addressing Impairment-Related Conduct**

**Lawyers: Rule 8.3**

**Law Firms: Rule 5.1(c)(2)**

**Judges: Rule 10, Section 2.14**

# Tennessee Rule 8.3

## Reporting Professional Misconduct

**(a) A lawyer who knows that another lawyer** has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.

**(b) A lawyer who knows that a judge** has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Disciplinary Counsel of the Board of Judicial Conduct.

**(c) This Rule does not require disclosure** of information otherwise protected by RPC 1.6 or information gained by a lawyer or judge while serving as a member of a **lawyer assistance program approved by the Supreme Court of Tennessee** or by the Board of Professional Responsibility.



## RULE 8.3(a) Basics

- lawyer **knows** of another lawyer's **violation**

AND

- raises a **substantial question** about honesty, trustworthiness or **fitness**

THEN

- lawyer **shall inform** licensing authority.

## **RULE 8.3**

Mandatory Reporting of “Substantial” Questions Only



# “Self-Regulation” and 8.3 Reporting Barriers

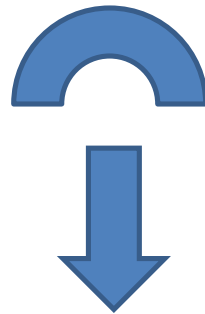
- Lawyers develop an extraordinary ability to professionally weather conflict between clients and opposing counsel.
- Lawyers are much less likely to spark personal conflict that is caused by reporting a peer to discipline.
- Cooperating with disciplinary counsel after making a Rule 8.3 report can be time consuming and divert valuable energy.
- Lawyers who report ethical violations against an opposing counsel can find themselves fending off meritless “counter-claims” of unethical conduct.

**AND THEN THERE'S**

***THIS:***

# The “Tattle Tale” Factor

SHE DIDN'T DO HER HOMEWORK!  
SHE TOOK MY TOY!  
HE TOOK MY CANDY!  
HE SAID A BAD WORD!  
SHE DIDN'T CLEAN HER ROOM!  
HE PULLED MY HAIR!



RAT!  
SNITCH!  
NARC!  
STOOLIE!  
FINK!

AS CHILDREN WE ARE TAUGHT:

**“NO ONE LIKES A TATTLE TALE!”**

***Snitches Get  
Stitches!***



# As a Practical Matter

- Lawyers form a common bond during law school, the bar exam, and in the ongoing “battles” of practicing law thereafter.
- Lawyers are skilled at spotting evidence of **bad character**: missing money; dishonestly; deceptive practices; etc.
- But lawyers are still reticent to report a “bad” lawyer’s violation to Discipline unless they themselves fear 8.3 prosecution for not reporting it.
- A relatively small number of disciplinary complaints emanate from lawyers reporting other lawyers.

# The Punitive versus Restorative Barrier

- Rule 8.3 is primarily seen as a tool to deal with “bad actors”, not for helping people with mental health impairment issues.
- Substantial questions about a lawyer’s fitness, mental health, and competency to practice often go un-confronted by peers.
- Lawyers generally resist acting in any way that might appear to others in the profession as a betrayal or prosecution of a peer.
- Lawyers resist voluntarily involving themselves in any disciplinary proceedings under any circumstances.



**Is there a duty under Rule 8.3 to address mental impairment in the profession?**

# ABA Standing Committee on Ethics

## (Formal Opinion 03-431 on Reporting and Impairment)

- “Because lawyers are not mental health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment . . .”
- “Nonetheless, **a lawyer may not shut his eyes to** conduct reflecting generally recognized **symptoms of impairment.**”

# ABA Standing Committee on Ethics

## (Formal Opinion 03-431 on Reporting and Impairment)

ABA Standing Committee: a **PATTERN** of conduct comprised of Rule 1.1 (Competence) and 1.3 (Diligence) shortcomings may be a “Red Flag” that the lawyer is not meeting his or her obligations:

- Missing deadlines;
- Failing to timely file pleadings or complete transactions;
- Failure to complete agreed upon tasks; and,
- Failing to raise issues and advance client’s interests as would be expected by competent counsel.

# ABA Standing Committee on Ethics

## (Formal Opinion 03-431 on Reporting and Impairment)

ABA Standing Committee: a **SINGLE ACT** “Red Flag” of Rule 1.1 (Competence) and 1.3 (Diligence) impairment may include:

- Visibly intoxicated or impaired in court or in a deposition, etc.
- ABA Ethics Committee: “An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”
- ABA suggests consulting mental health experts or your local State LAP . . . **[CALL YOUR TLAP FOR REFERRAL TO AN EXPERT!](#)**

# ABA Standing Committee on Ethics

## (Formal Opinion 03-431 on Reporting and Impairment)

The ABA: “Knowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not itself enough to trigger a duty to report under Rule 8.3”

TLAP view: *“Where there is a lot of smoke there’s usually fire.”*

- A lawyer who is routinely, heavily impaired by alcohol in social settings is likely at risk and will likely exhibit patterns of conduct that include difficulty in meeting obligations and deadlines.
- Even a moderate pattern of decline in diligence may be the “Tip of the Iceberg” of a High Functioning Alcoholic’s illness.

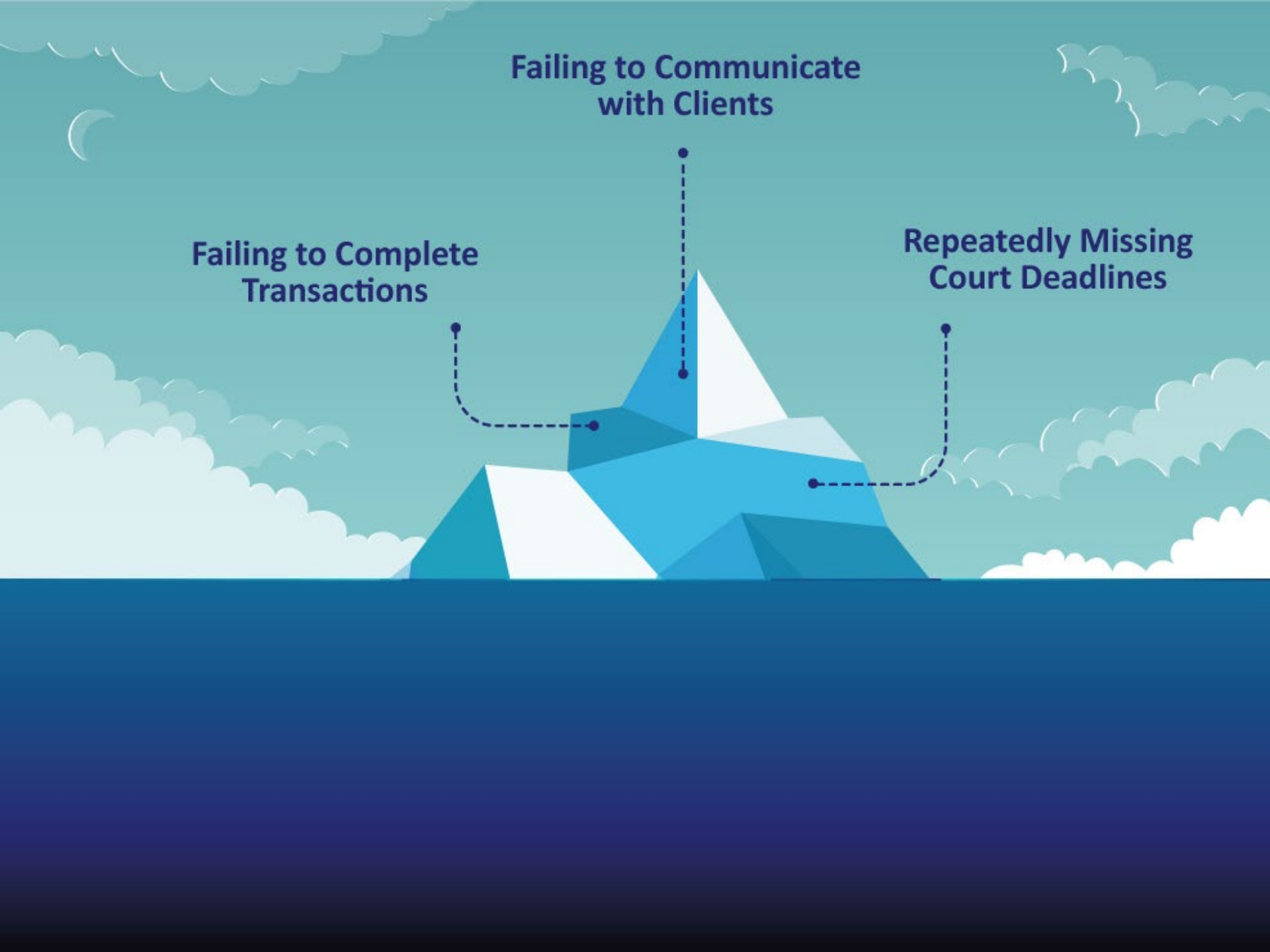
**In Impairment Cases The Profession  
Often Sees Only The**

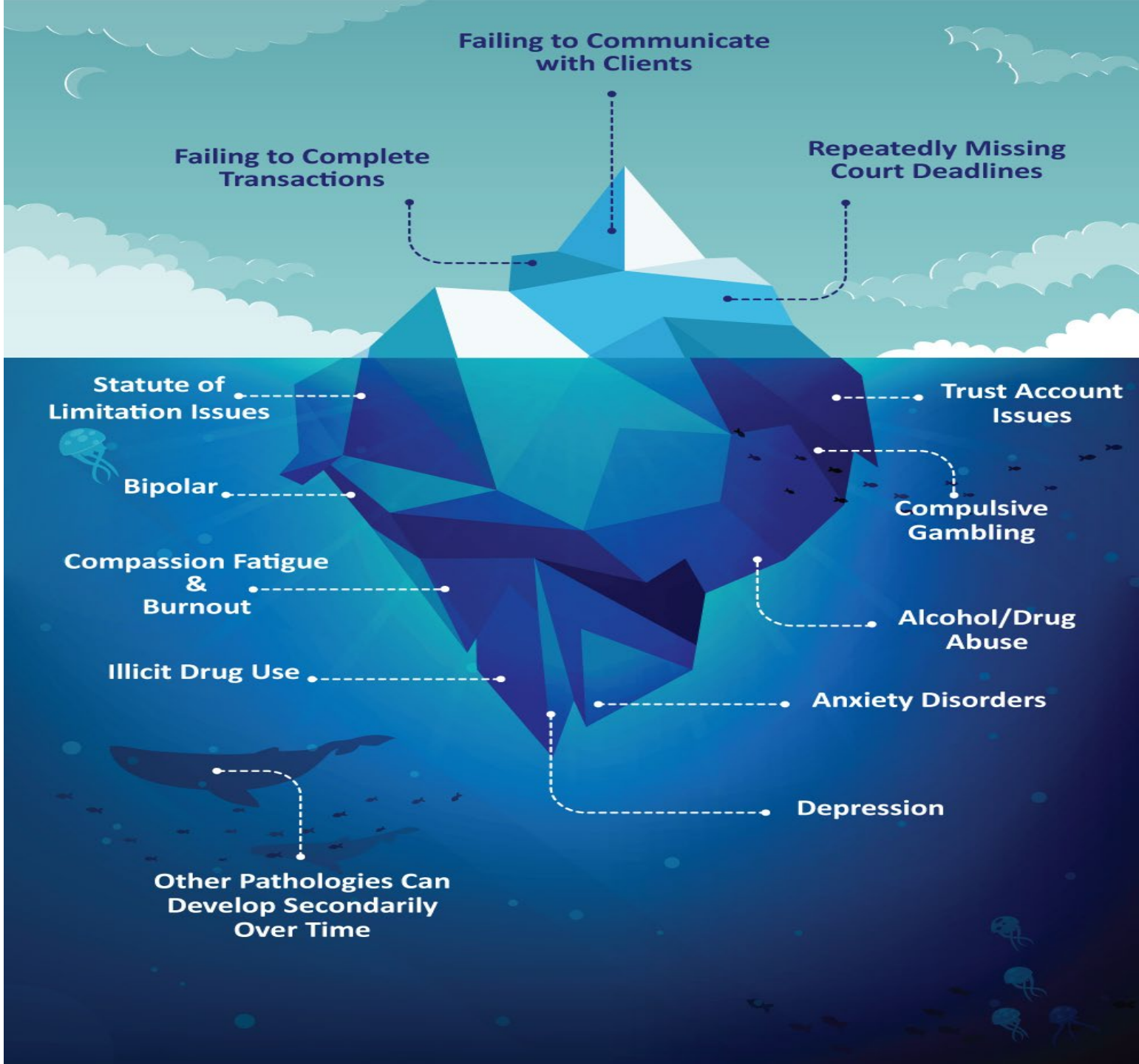
***“Tip of the Iceberg”***

# Failing to Communicate with Clients

Failing to Complete Transactions

Repeatedly Missing Court Deadlines





**Failing to Communicate with Clients**

**Failing to Complete Transactions**

**Repeatedly Missing Court Deadlines**

**Statute of Limitation Issues**

**Trust Account Issues**

**Bipolar**

**Compulsive Gambling**

**Compassion Fatigue & Burnout**

**Alcohol/Drug Abuse**

**Illicit Drug Use**

**Anxiety Disorders**

**Depression**

**Other Pathologies Can Develop Secondarily Over Time**



# Tennessee Rule 5.1(c)(2)

## Law Partners; Supervising Lawyers

- A partner in a law firm, or together with other lawyers possesses comparable managerial authority in a law firm . . .
- A lawyer having direct supervisory authority over another . . .

**(c)(2) shall be responsible for another lawyer's violation if the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and **knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.****

- “Avoided or mitigated” suggests **duty to act before a violation.**

# Law Partners; Supervising Lawyers (cont'd)

- All calls from any source to TLAP are confidential.
- Confidential assistance is available to both the firm and lawyer.
- TLAP referral and compliance satisfies Firm's duty per the Rules.
- Law Firm and impaired lawyer are supported/protected.
- TLAP compliance generates reliable "fitness to practice".
- All parties benefit; public is protected.
- Disciplinary involvement is averted, if successful in TLAP.

## **Judges and Impairment: Rule 10 Section 2.14**

“A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.”

## **Rule 10 Section 2.14; Comment [1]**

[1] “Appropriate action” means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

## Rule 10 Section 2.14; Comment [2]

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. *See* RJC 2.15.

# The Ticking Time Bomb

- Subtle declines in competency and diligence seen on the surface can signal a serious progression of an underlying impairment such as alcoholism, addiction or depression.
- The profession abides the “tolerable inconvenience” that is caused by low levels of incompetency and lack of diligence that do not meet the “substantial question” trigger of Rule 8.3.
- Often, by the time impairment driven behavior triggers Rule 8.3 reporting, the public and the profession are already damaged.
- **Missing or co-mingled trust funds; client matters irreparably harmed; malpractice claims; and, disciplinary charges.**

# ***“WE KNEW SOMETHING WAS WRONG”***

- Lawyers and judges calling TLAP “early on” *in their eyes* for confidential help for a colleague are often stunned by the underlying behavior and damage that has already occurred.
- In solo practitioner cases, peers who initially planned to confidentially rally behind and cover cases for the impaired solo lawyer under Rule 8.3(c) can uncover a hornet’s nest of severe ethical violations in some cases.
- The damage is sometimes so profound that the helpful peers see no way to continue to help under 8.3(c) and call Discipline.

## ***“We Should Have Called TLAP Sooner”***

In the wake of mental health impairment cases, coming confidentially through TLAP or via disciplinary referral to TLAP, judges and peers routinely declare:

***“We honestly did not realize things were that bad.”***



## ***In cases of suspected mental health impairment***

- Can we trust that applicable Court Rules are health-related restorative tools for reliable reporting that saves lives and careers in impairment cases?
- Can we see beyond the discomfort that these Rules may feel intrusive to some, or raise “Tattle Tale” eyebrows, and instead be confident that helping an impaired peer is an act of love and support, not condemnation and prosecution?
- Can we believe the Rules as to TLAP do something wonderful FOR a peer rather than something terrible TO a peer?

# **PART TWO**

## **INTERVENTION:**

### **Overcoming the Addicted Brain Myths of Addiction and *“Enablers”***

***“It’s better to apologize than eulogize.”***

# The Addicted Brain (a disease, not a moral failing)

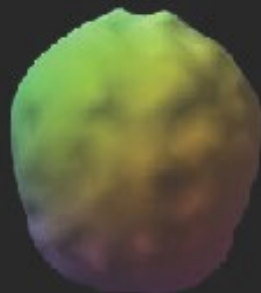
- New information via CT, PET, MRI and SPECT imaging has allowed science to better understand how the disease of addiction impacts the brain.
- Alcohol compromises the brain system responsible for problem solving, memory, arranging things in order, and doing multiple tasks simultaneously.
- It can take up to two years of abstinence for a brain to heal from severe alcohol abuse and in some cases there is **permanent damage**.

# The Addicted Brain, cont'd

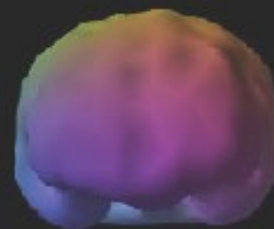
- Methamphetamines and cocaine inhibit the building of communication networks in the brain.
- Research suggests that resulting impairment lasts well into sobriety.
- If used in large amounts over prolonged periods, the damage can be irreversible.
- EARLY Intervention is the key to mitigating harm and reducing the risk of permanent brain damage.

# NORMAL 3-D BRAIN SPECT IMAGES

Top-  
down  
surface  
view



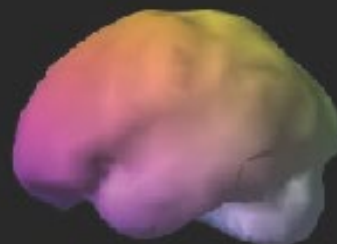
Front-on  
surface  
view



Underside  
surface  
view



Side  
surface  
view

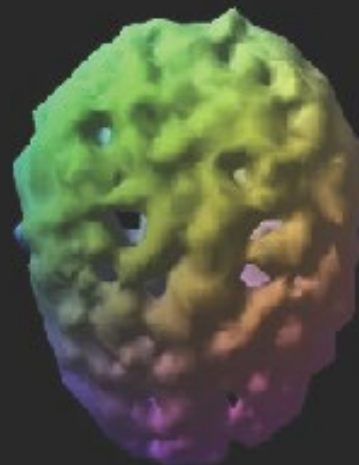


COCAINE



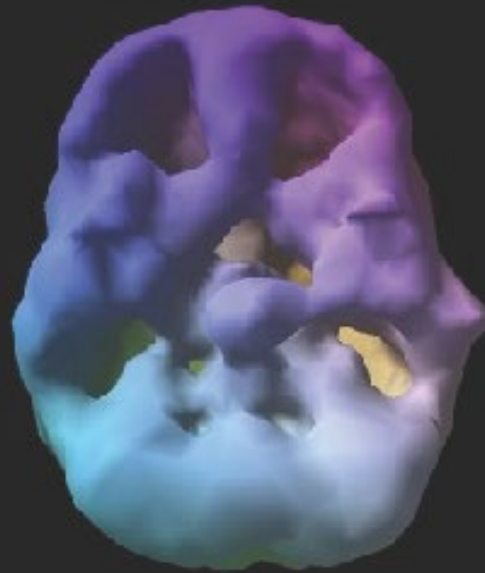
Twenty-four year old.  
Using two years frequently.

METHAMPHETAMINE



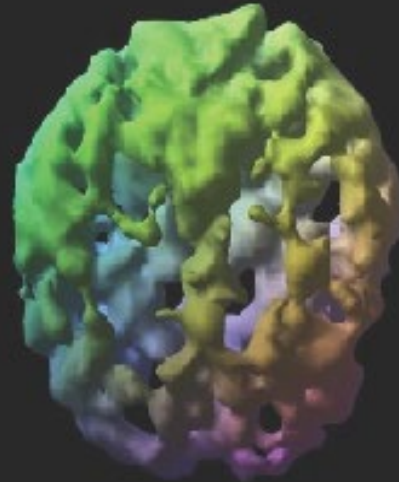
Twenty-eight year old.  
Eight year heavy use.

## MARIJUANA



Eighteen year old.  
Using 3 years.  
Four times week.

## OPIATES

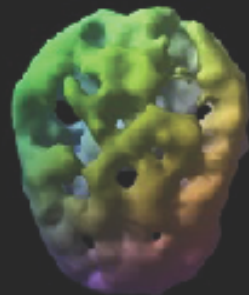


Forty year old.  
Methadone 7 years.  
Previously, heroin 10 years.

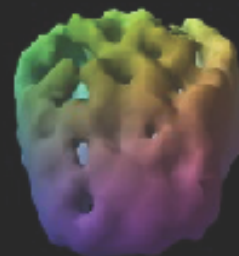


# ALCOHOL - 17 YEARS OF HEAVY WEEKEND USE

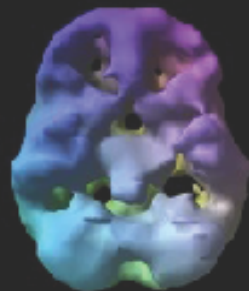
Top-  
down  
surface  
view



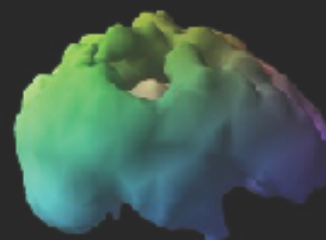
Front-on  
surface  
view



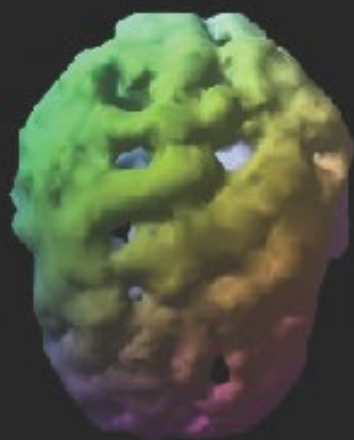
Underside  
surface  
view



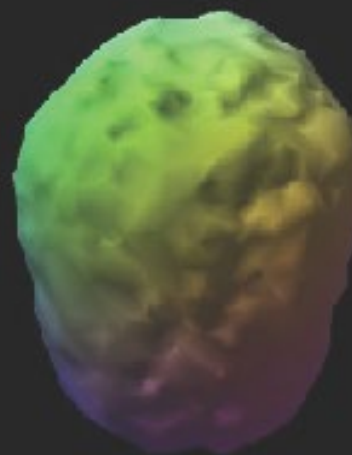
Side  
surface  
view



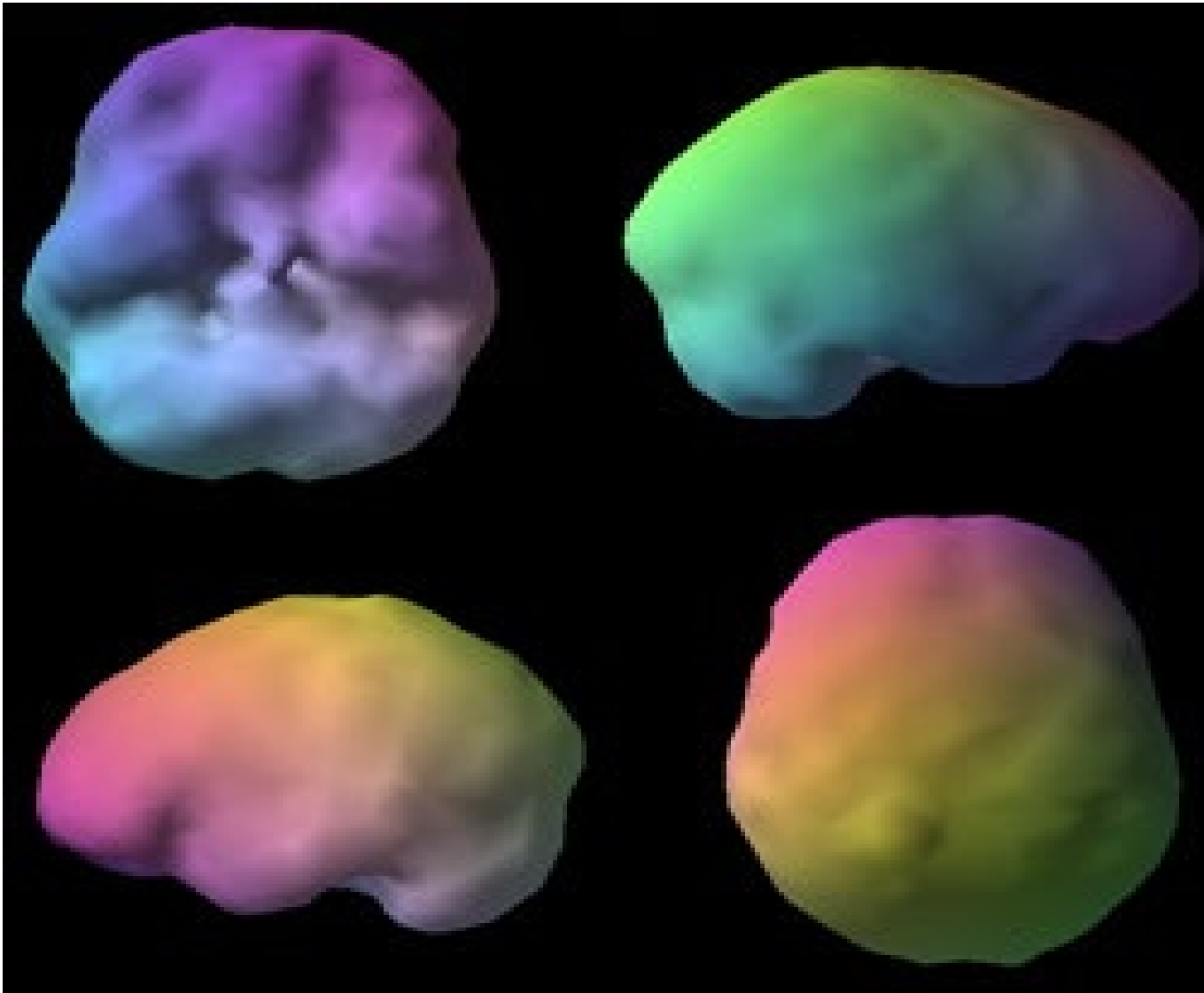
# BEFORE & AFTER RECOVERY



Top down surface view  
during substance abuse.



Same view after one year  
alcohol and drug free.



**NORMAL BRAIN**

# Myths of Addiction (Lack of Insight)

- Historically, going back centuries and into the present, society has largely misunderstood alcoholism and addiction.
- Myths and misinformation abound.
- Early Intervention is often blocked by these myths and misinformation.
- **Intervention cannot be successfully initiated unless the true severity of the substance use problem is acknowledged.**

## TRUE OR FALSE?

*“An alcoholic or addict must be ready for help before he or she can be helped.”*

***FALSE***

A Hazelden Foundation study found:

**70 percent of its patients did not come to treatment on their own** but rather because a family member, friend, or employer or co-worker intervened.

# TRUE OR FALSE?

*“You can’t be an alcoholic if you don’t drink daily.”*

***FALSE***

Patterns of alcohol or drug use vary widely from person to person.

While one alcoholic may drink daily, another may only binge once every few months.



# TRUE OR FALSE?

*“You can’t be an alcoholic or addict if you have a good job and never miss a day of work.”*

# ***FALSE***

When someone has a problem with drugs or alcohol, they're also out to prove to themselves and others that they are not addicted, and one of the commonly accepted signs of addiction is absenteeism from the job.

Alcoholics often diligently go to work while their personal and family lives increasingly suffer.

# TRUE OR FALSE?

*“Alcoholism and addiction are actually diseases, not choices, and these diseases can’t be successfully controlled by willpower.”*

# ***TRUE***

Substance Use Disorder diseases are complex and they affect the person physically, mentally, emotionally, and spiritually.

Willpower is no more an effective therapy for addiction than it would be for cancer, diabetes, or heart disease.

Addiction happens at a physiological and physical place that is *beyond the reach of the will.*

# TRUE OR FALSE?

*“As long as my doctor is prescribing the drugs to me, then I am safe and there is no danger that I might become a drug addict.”*

# ***FALSE***

While prescription mood-altering drugs have an important role to play in medicine, some people using those drugs will become addicted to them.

Drug-seeking behavior is a marker for prescription drug addiction:

- Taking more than prescribed
- Doctor-shopping for multiple prescriptions
- Buying drugs off the street when prescription runs out early
- Being secretive about use of the drug(s)

# TRUE OR FALSE?

*“Addiction and alcoholism is the addict’s and alcoholic’s personal problem and is not my problem or the profession’s problem.”*

***FALSE***

**Alcoholism and Addiction affects families:**

Every person who is an addict or alcoholic personally impacts eight other people around them on average.

**Alcoholism and Addiction affects the profession:**

At least fifty percent (50%) of disciplinary complaints are rooted in whole or part in some type of substance use or other mental health disorder that impaired the professional.



# What is “*Enabling*” In Addiction?

- Every practicing alcoholic and addict has established a network of family, friends and co-workers who unknowingly enable the addiction.
- Enabling is the act of bailing out the alcoholic or addict when they get into scrapes as a result of their drinking or drug use.
- Families and friends often underestimate the sheer power of alcoholism and addiction and genuinely believe that the alcoholic or addict will have “learned their lesson” after being bailed out of an arrest or other problem.

# Examples of Enabling:

- Loaning money
- Taking over responsibilities
- Making up alibis for missed work or failed responsibilities
- Covering up or minimizing the problem
- Shielding the alcoholic or addict from consequences
- “Fixing” DUI, illegal drug, or other substance-related arrests
- Allowing the alcoholic to manipulate them
- Doing things to “keep the peace” rather than confront the issue
- Continuing to simply deny the problem at all cost

# Stages of Enabling

- **Innocent Enabling**: a combination of **love and denial** results in the enabler helping the alcoholic or addict out of scrapes. Unwittingly this type of “help” actually hurts and is like fertilizer that helps grow the alcoholism or addiction disease.
- **Desperate Enabling**: a combination of **reality and fear** sets in and the family knows there is a problem but refuses to demand that the loved one seek treatment and instead go to any length to continue to support the alcoholic or addict, thinking that they can save him or her and that things will get better one day.
- These efforts prevent consequences that are often necessary before the alcoholic or addict will consider surrender and help.

# Challenges of Intervention

A professional, *Love First*, intervention takes on the challenge to:

- Educate the participants and dispel myths to help them muster courage to end enabling and set hard and fast “bottom lines.”
- Prepare them to interact productively with an alcoholic or addict who may be in fierce denial, does not want help, and has chemical “holes in their head.”
- Focus all effort on meticulously planning and preparing an intervention based upon specialized communications aimed at the heart and soul of the alcoholic and addict.

# Early Action Saves Lives and Careers

Whether it be by confidential referral to TLAP or via reporting impairment-related conduct to discipline and a formal referral to TLAP, early intervention is key.

**REMEMBER: per the ABA Standing Committee on Ethics: “lawyers may not shut their eyes to conduct reflecting generally recognized symptoms of impairment.”**

Our self-regulated profession cannot be an “enabler” or turn a “blind eye” toward alcoholism, addiction, or other mental health issues in our peers because to do so harms the person, the person’s family, our profession, and can ultimately place clients and the public at risk.

# **PART THREE**

## ***“JUDGES AT RISK”***

### **WHAT YOU NEED TO KNOW**

# Judicial Stress and Burnout

- Long hours and a selfless dedication to work – to the exclusion of self-care – can lead to burnout.
- In a North Carolina bar survey, 36 percent of judges and lawyers surveyed had not taken even a one-week vacation in the previous year.
- Learning how to manage stress and improve self-care is critical to preventing burnout.

# Stress and Burnout Symptoms

- Obsessive thoughts
- Feelings of inadequacy
- Difficulty concentrating
- A sense of worry and/or impending danger
- Sleep disturbances
- Heart palpitations
- Sweating, fatigue, and muscle tension



# Holmes Rahe Stress Inventory

## The American Institute of Stress:

The **Holmes and Rahe Stress Scale** is a well-known tool for measuring the amount of stress you've experienced recently.

Taking the test can help you determine if you are at risk of illness due to the combined level of stress you face.

Available online at: [\*\*\*www.stress.org\*\*\*](http://www.stress.org)

## The Holmes-Rahe Life Stress Inventory

### The Social Readjustment Rating Scale

**INSTRUCTIONS:** Mark down the point value of each of these life events that has happened to you during the previous year. Total these associated points.

Life Event	Mean Value
1. Death of spouse	100
2. Divorce	73
3. Marital Separation from mate	65
4. Detention in jail or other institution	63
5. Death of a close family member	63
6. Major personal injury or illness	53
7. Marriage	50
8. Being fired at work	47
9. Marital reconciliation with mate	45
10. Retirement from work	45
11. Major change in the health or behavior of a family member	44
12. Pregnancy	40
13. Sexual Difficulties	39
14. Gaining a new family member (i.e.. birth, adoption, older adult moving in, etc)	39
15. Major business readjustment	39
16. Major change in financial state (i.e.. a lot worse or better off than usual)	38
17. Death of a close friend	37
18. Changing to a different line of work	36
19. Major change in the number of arguments w/spouse (i.e.. either a lot more or a lot less than usual regarding child rearing, personal habits, etc.)	35
20. Taking on a mortgage (for home, business, etc..)	31
21. Foreclosure on a mortgage or loan	30
22. Major change in responsibilities at work (i.e. promotion, demotion, etc.)	29
23. Son or daughter leaving home (marriage, attending college, joined mil.)	29
24. In-law troubles	29
25. Outstanding personal achievement	28
26. Spouse beginning or ceasing work outside the home	26
27. Beginning or ceasing formal schooling	26
28. Major change in living condition (new home, remodeling, deterioration of neighborhood or home etc.)	25
29. Revision of personal habits (dress manners, associations, quitting smoking)	24
30. Troubles with the boss	23
31. Major changes in working hours or conditions	20
32. Changes in residence	20
33. Changing to a new school	20
34. Major change in usual type and/or amount of recreation	19
35. Major change in church activity (i.e.. a lot more or less than usual)	19
36. Major change in social activities (clubs, movies,visiting, etc.)	18
37. Taking on a loan (car, tv,freezer,etc)	17
38. Major change in sleeping habits (a lot more or a lot less than usual)	16
39. Major change in number of family get-togethers ("")	15
40. Major change in eating habits (a lot more or less food intake, or very different meal hours or surroundings)	15
41. Vacation	13
42. Major holidays	12
43. Minor violations of the law (traffic tickets, jaywalking, disturbing the peace, etc)	11

**Now, add up all the points you have to find your score.**

**150pts or less** means a relatively low amount of life change and a low susceptibility to stress-induced health breakdown.

**150 to 300 pts** implies about a 50% chance of a major health breakdown in the next 2 years.

**300pts or more** raises the odds to about 80%, according to the Holmes-Rahe statistical prediction model.

# Compassion Fatigue

- Different than Burnout (it's about content, not frequency)
- Cumulative effect of viewing types of disturbing evidence
- Highest risk in **Domestic and Criminal Cases**

## Symptoms:

- ✓ Indecisiveness
- ✓ Anxiousness
- ✓ Procrastination
- ✓ Alienation from others

# Burnout vs. Exhaustion

## **Burnout at Work Isn't Just About Exhaustion; It's Also About Loneliness.\***

Close to 50% of people say they are exhausted due to work.

The more people are exhausted, the lonelier they feel.

The loneliness is due to exhaustion and burnout, not isolation.

Greater human connection can be key to solving burnout.

*\*Harvard Business Review, Seppala and King, 2017*



*Helping* **JUDGES**  
**JUDGES**

The Judicial Assistance Initiative:  
RESOURCES & EDUCATION

Hon. Sarah Krauss, Chair

Nancy Stek, Vice-Chair

Hon. William Dressel, Education Subcommittee Chair

Hon. Robert L. Childers  
ABA CoLAP Chair  
2010

 Commission on  
Lawyer Assistance Programs

***If you THINK a colleague is  
at risk . . .***

***Don't wait . . .***

# ***CALL TLAP!***

- ✓ ***It's Free!***
- ✓ ***It's Anonymous!***
- ✓ ***It's Confidential!***

# THE GOAL OF TLAP



**Healthy Lawyers and Judges at Their Best!**



# ***THANK YOU!***

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