

Ethical Issues When Representing Impaired Professionals

Paper by Dan Lype

I. Introduction

In its 2016 National Survey on Drug Use and Health, the Substance Abuse and Mental Health Services Administration (SAMSHA) estimated approximately 20.1 million people in the United States aged 12 or older met the diagnostic criteria for a Substance Use Disorder at some point during that year. This represented approximately 7.5 percent of all persons 12 or older. The same survey estimated 10.4 million adults, representing 4.2 percent of all adults, suffered from some form of serious mental illness. Collectively, 26.7 million adult Americans were estimated by SAMSHA to have experienced a serious mental illness and/or substance use disorder in 2016.¹

Like the general population, licensed professionals can suffer from mental illness and substance/alcohol abuse. In addition to the pressures that can come with working in a demanding field, professionals experience the same type of life stressors and/or genetic predisposition to addiction or mental illness as any other member of the public. Impairment invariably impacts a professional's work product and can raise serious concerns about their ability to safely practice. In the case of health care professionals, these risks are further heightened by easy access to abusable substances and the vulnerability of their patients to mistakes and poor-quality care.

Given their mission to protect the public, administrative licensing agencies understandably have an intense interest in preventing impaired professionals from working absent appropriate intervention and monitoring.² Most Texas licensing agencies have formulated policies for addressing impaired licensees. These policies generally recognize mental illness and substance abuse are medical problems, not the result of individual moral failure, and can be effectively treated through appropriate medical interventions. To this end, many licensing agencies have established sanctioned peer assistance programs and promote the confidential resolution of complaints involving impaired professionals through these entities rather than through the traditional disciplinary process.

Attorneys who represent licensed professionals will almost certainly have occasion to defend an impaired, or potentially impaired, client. It has been my experience representing such clients can be both the most rewarding and discouraging part of my law practice. There are few other settings where a practitioner has such an opportunity to make a positive and lasting impact on a client's life. There are also few other settings where your representation and interactions with a client can be so challenging and frustrating.

Representing impaired professionals poses its own special ethical challenges. These primarily relate to recurrent features of substance abuse and serious mental illness such as denial and dysfunction and their ability to derail the attorney-client relationship. The practitioner will frequently be called on to make difficult ethical

¹ "Key Substance Use and Mental Health Indicators in the United States: Results from the 2016 National Survey on Drug Use and Health," Substance Abuse and Mental Health Services Administration, full report available at www.samsha.gov.

² For purposes of this paper "impaired" and "impairment" will generally refer to both mental illness and alcohol/substance abuse.

decisions such as when to involve outside parties or deciding if and when to withdraw from a client's case if they refuse to seek treatment. Similarly, the practitioner can be placed in the unenviable position of needing to consider whether their representation has crossed the line from effective advocacy to enabling the client's continued disease process.

This paper will discuss several common ethical situations which arise while representing impaired professionals. When possible reference will be made to the Texas Rules of Disciplinary Conduct and how they might help guide the practitioner to an answer. In many instances, however, the Rules provide limited guidance and discussion will instead focus on how the author thinks these ethical situations are best resolved.

Prior to turning to a selection of specific ethical problems, the paper will address several good foundational practices which, although important in any law practice, are particularly valuable in this setting. If followed, these best practices can substantially decrease the odds of an ethical dilemma arising later on in the course of the representation.

But, before turning to the substantive portion of this paper, a quick caveat: the opinions expressed in this paper are solely the author's.

II. Good Practices When Representing an Impaired Professional:

A. Be Educated About Substance Abuse and Mental Illness and Their Diagnosis and Treatment:

As an initial matter, an attorney representing impaired professionals should make sure they have a good working knowledge of substance abuse and mental illness. Your effectiveness as an advocate will in part depend on your familiarity with these conditions and how they are diagnosed and treated.

Since you are defending a licensed professional, it is also critical to educate yourself about their licensing board's policies towards impaired professionals. For example, the attorney must know if the board has an official peer assistance program and, if so, would it be an option for a client to confidentially self-refer to that program rather than face public board action.

This is no different than the need for a tax attorney to have some understanding of accounting concepts or a patent attorney familiarizing themselves with the engineering principles underlying a prospective patent. Unless you have a general grasp of concepts related to impairment and how this is typically addressed by the client's licensing board, your representation will not be as effective as it should be.

B. Importance of the Initial Client Interview:

i. Is the Potential Client Impaired And, If So, Do They Agree?:

While critical when representing any client, the value of a thorough client interview is heightened when representing an impaired, or potentially impaired, client. If nothing else, spending adequate time on the initial client interview can help prevent the occurrence of some of the more difficult ethical scenarios discussed later in this paper.

During the first encounter when both you and the potential client are considering whether to initiate representation, a comprehensive interview should be conducted. Be thorough and focused in your questioning but also allow adequate time for the potential client to speak uninterrupted so they have a chance to relay whatever information they feel is important. Being patient even though you may feel the client is leading the discussion into irrelevant areas is key as it both helps build trust and will frequently reveal information you would not have otherwise discovered.

One of the primary goals of the initial interview is to try and form your own opinion about whether the client is impaired based on the facts available to you at that time. In many instances this will be abundantly obvious and the potential client may even readily admit they have a problem. Unfortunately, there will be many other situations where the answer is unclear.

It is also possible you will simply not have enough information this early on in a case to form a reasoned opinion about the potential client's impairment or lack thereof. It is very likely your only source of information at this point is the potential client. It is a common feature of substance abuse and serious mental illness for the afflicted person to withhold key information and/or lack sufficient self-perspective about whether they are impaired.

Moreover, counsel must keep in mind their professional limitations: We are not health care professionals and are not qualified to make what is ultimately a medical diagnosis. In most professional licensing cases, the final word on whether a client has a diagnosis will be made, and should be made, by an appropriate expert.

Despite these limitations, the practitioner should do their best to arrive at a

preliminary assessment during this initial encounter. Experience and familiarity with the diagnostic criteria for a substance abuse disorder and common mental illnesses are helpful when making this evaluation. As an example, common lines of inquiry the author would pursue during the first meeting in a case involving a possible substance use disorder include:

- What is the likely source of the complaint of possible impairment?;
- If substances are involved, what are they and what is the frequency and typical circumstances of their use?;
- Have you ever gone to work while impaired?;
- Have you ever taken medications from work?;
- What impact, if any, has the alleged impairment had on the client's social and occupational functioning?;
- Have you previously tried to stop the substance and were you successful?;
- Do you ever find yourself using more of the substance than you intend to?;
- Do you suffer withdrawal symptoms if you stop using the substance?;
- Have you ever received any kind of treatment?;

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19th Annual Advanced Texas Administrative Law Seminar session
"Guide to Representing Impaired Professionals"