

Introduction: what is competence?

It almost goes without saying a lawyer must practice law with competence. Rule 1.1 of the Professional Rules of Conduct provides that “[a] lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.”¹

But what is competence and how is it determined? “For purposes of [Rule 1.1], ‘competence’ in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.”²

This article will focus on identifying issues affecting competence and how such issues may be detected.

Identifying & detecting alcohol abuse issues that impair competence

Most lawyers know abuse of alcohol and other substances is unusually prevalent in our profession. The Hazelden Betty Ford Foundation opines that “[w]hether it is a result of long work hours, flexibility in scheduling, a professional network that incorporates alcohol into social events more often, or all of the above, lawyers have been identified as a professional group that uses alcohol and other drugs more often than other occupations.”³

Well, how much more often do attorneys use alcohol than other occupations? The statistics are a bit startling. Information found on the Hazelden Betty Ford website provides that national surveys reveal 36.4 percent of lawyers had scores consistent with problematic drinking on the Alcohol Use Disorders Identification Test, version C (AUDIT-C), compared with only 15.4 percent of surgeons.⁴ Women in legal professions appear particularly vulnerable, with 33.7 percent self-reporting problematic drinking scores on the AUDIT-C, compared to 19 percent of women in the general population.⁵

But at what point does use of alcohol or another substance turn into abuse? The Centers for Disease Control and Prevention (“CDC”) Alcohol Team defines alcohol misuse for women as more than one drink per day on average, and more than two drinks per day on average for men.⁶ Binge drinking is defined as four or more drinks on a single occasion for women, and five or more drinks on a single occasion for men.⁷

The CDC Alcohol Team classifies excessive drinking as involving heavy drinking, binge drinking, or both.⁸ Similarly, it defines alcohol misuse as “...a pattern of drinking that results in

¹ *Id.* at subs. (a).

² *Id.* at subs. (b).

³ <https://www.hazeldenbettyford.org/education/bcr/addiction-research/substance-abuse-legal-professionals-ru-317>.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ <https://www.cdc.gov/workplacehealthpromotion/health-strategies/substance-misuse/index.html>.

⁷ *Ibid.*

⁸ *Ibid.*

harm to one's health, interpersonal relationships or ability to work," and notes that "[a]lcohol dependence, also known as alcohol addiction and alcoholism, is a chronic disease and is associated with experience withdrawal symptoms, loss of control, or alcohol tolerance."⁹

The California State Bar Website provide three self-assessment tests to aid attorneys in determining whether they may have an issue with substance abuse, anxiety, or depression. The Twenty Questions of Drug and Alcohol Abuse Self-Assessment Test is a tool to aid attorneys in identifying whether they are misusing alcohol.¹⁰

Identifying & detecting substance abuse issues that impair competence

The CDC website further explains that "[m]any other substances, both illegal and legal, have the potential for misuse."¹¹ "Common examples include cocaine, ecstasy, heroin, inhalants, marijuana, methamphetamine, PCP/Phencyclidine, and prescription narcotics."¹²

The Journal of Addiction Medicine sampled 12,825 licensed, practicing attorneys with surveys addressing, among other things, "...drug use, and symptoms of depression, anxiety, and stress."¹³ "Of participants who endorsed use of a specific substance class in the past 12 months, those using stimulants had the highest rate of weekly usage (74.1%), followed by sedatives (51.3%), tobacco (46.8%), marijuana (31.0%), and opioids (21.6%)."¹⁴

The Twenty Questions of Drug and Alcohol Abuse Self-Assessment Test mentioned above aids in identifying substance abuse issues, along with alcohol abuse issues as set forth above.

Identifying & detecting mental illness issues that impair competence

But mental health issues such as anxiety and depression can also impact competence. The same research also revealed attorneys suffer mental health issues with disturbing frequency. "The most common mental health conditions reported were anxiety (61.1%), followed by depression (45.7%), social anxiety (16.1%), attention deficit hyperactivity disorder (12.5%), panic disorder (8.0%), and bipolar disorder (2.4%)."¹⁵

"In addition, 11.5% of the participants reported suicidal thoughts at some point during their career, 2.9% reported self-injurious behaviors, and 0.7% reported at least 1 prior suicide attempt."¹⁶

⁹ *Ibid.*

¹⁰ <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program/Resources>.

¹¹ <https://www.cdc.gov/workplacehealthpromotion/health-strategies/substance-misuse/index.html>.

¹² *Ibid.*

¹³ Journal of Addition Medicine: January/February 2016, Vol. 10, Iss. 1, pp. 46-52;

https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/the_prevalence_of_substance_use_and_othe_r_mental.8.aspx.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

The Anxiety Assessment and Depression Assessment Tests mentioned can help identify potential mental health issues that can interfere with competence.¹⁷

Identifying & detecting age-related issues that impair competence

Additionally, there are age-related issues that can impair an attorney's competence. The State Bar of California provides a Wellness Guide for Senior Lawyers and Their Families, Friends, and Colleagues ("Wellness Guide") on its website.¹⁸ The Wellness Guide explains that aging can "...trigger a decline in our ability to think, changes in our behavior or personality, or problems with our mobility, function, and other conditions that affect our ability to work."¹⁹ "It can show up as a noticeable decline in mental abilities, including memory and thinking skills."²⁰

The Wellness Guide describes a "silver tsunami" of aging lawyers whose numbers will only increase in coming years. The State Bar's 2020 demographic survey showed there are 189,971 active attorneys in the state, with an average age of 50 and that "...more than 16 percent are over the age of 65."²¹ "[T]he good news is there will be an increase of experience, insight, and wisdom that can be shared with new attorneys, but the bad news is there will be an increased risk of attorneys with age-related impairment and insufficient preparation for transitioning away from practice before a crisis occurs..."²²

What are the first signs that an attorney may be losing competence to practice law as a result of age-related issues? "According to the Mayo Clinic, mild cognitive impairment ("MCI") is the stage between the expected cognitive decline of normal aging and the more serious decline of dementia...[and] can involve problems with memory, language, thinking, and judgment that are greater than normal age-related changes."²³

An attorney who is suffering MCI "...may be aware that [their] memory or mental function has 'slipped.'"²⁴ Attorneys with MCI may be at increased risk of "...developing dementia caused by Alzheimer's disease or other neurological conditions..."²⁵

Dementia is "...a set of symptoms triggered by a loss of brain function that can affect memory, thinking, language, judgment, and behavior."²⁶ "An individual may not be able to do normal activities, such as getting dressed or eating."²⁷ "They may be quick to anger or forget things they just learned."²⁸ "A person with dementia may show signs of confusion and

¹⁷ <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program/Resources>.

¹⁸ <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Senior-Lawyers-Resources/Publications/Wellness-Guide>.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

personality changes. As it gets worse, they may become lost, have difficulty doing basic tasks, and see things that aren't there.”²⁹

“A person in the early stages of dementia or Alzheimer’s disease may seem healthy, but is actually having more and more trouble making sense of the world around them.”³⁰ “Family members are often the first to sense that something is wrong...[t]hey may notice that their loved one has difficulty paying bills, gets lost often, or repeats questions during conversation.”³¹

If a professional colleague is experiencing symptoms of mental decline, the Wellness Guide advises to “...urge them to contact a health professional, such as a personal physician or a neurologist, and schedule a complete evaluation.”³²

“For a legal professional with signs of cognitive impairment, early diagnosis affords the attorney an opportunity to participate in decisions, such as appointing a successor attorney or closing the law practice, rather than waiting until such arrangements become the responsibility of colleagues or family members.”³³

“A lawyer with more severe forms of dementia may want to consider limiting or ending their law practice while they are still capable of doing so.”³⁴

Duty to identify and detect competence issues

Rule 5.1 of the Rules of Professional Conduct mandates that a lawyer with individual or shared managerial authority in a firm, or any lawyer who directly supervises another lawyer whether as an employee or not, is charged with making “reasonable efforts” ensure all those subject to supervision comply with the Rules of Professional Conduct and the State Bar Act.³⁵

“A lawyer shall be responsible for another lawyer’s violation of these rules and the State Bar Act if: (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”³⁶

Applying Rule 5.1 to Rule 1.1 regarding competence, it is clear that a supervising attorney must keep watch and identify issues with subordinates that may cause them to fall short of the competence required to practice law. Rule 5.3 of the Rules of Professional Conduct

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Rules of Professional Conduct, Rule 5.1, subs. (a), (b).

³⁶ *Id.* at subs. (c).

applies a similar standard to non-lawyers “...employed, retained by or associated with a lawyer.”³⁷

Conclusion

It is clear that misuse of alcohol or other substances, mental health issues, and age-related issues can impair a lawyer’s ability to practice law with competence as required by Rule 1.1 of the Professional Rules of Conduct. It is also clear that lawyers supervising other lawyers or non-lawyers associated with their practice can be found responsible for conduct of others which falls short of the competence standard.

For all these reasons, and given the prevalence of alcohol and substance abuse issues, along with mental health and age-related competence issues, it is crucial that all attorneys take a hard look at themselves and those around them in their professional environment to ensure compliance with Rule 1.1 – or pay the price.

Sarah M. Lewers is a trial attorney at Abbey, Weitzenberg, Warren & Emery, P.C., representing plaintiffs in a wide variety of matters.

Issues Impacting Competence — Self-Study MCLE Credit

HOW TO RECEIVE ONE HOUR OF SELF-STUDY MCLE CREDIT Below is a true/false quiz. Submit your answers to questions 1-20, indicating the correct letter (T or F) next to each question, along with a \$25 payment to the Sonoma County Bar Association at the address below. Please include your full name, State Bar ID number, and email or mailing address with your request for credit. Reception@SonomaCountyBar.org • Sonoma County Bar Association, 111 Santa Rosa Ave., Ste. 222, Santa Rosa, CA 95404

³⁷ Rules of Professional Conduct, Rule 5.3.

MCLE T/F TEST (20 QUESTIONS)

1. Rule 1.1 of the Rules of Professional Conduct requires that a lawyer perform legal services with competence.
2. “Competence” as defined by Rule 1.1 includes, but is not limited to, application of the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.
3. Lawyers use alcohol at a rate consistent with the non-lawyer population.
4. In a recent study, 36.4 percent of lawyers had scores consistent with problematic drinking on the Alcohol Use Disorders Identification Test, version C (AUDIT-C), compared with only 15.4 percent of surgeons.
5. The CDC Alcohol Team defines alcohol misuse for women as more than four drinks per day on average.
6. The CDC Alcohol Team defines alcohol misuse for men as more than five drinks per day on average.
7. The CDC Alcohol Team advises that excessive drinking only occurs when standards for binge drinking are met.
8. The CDC Alcohol Team defines alcohol misuse as drinking that makes others uncomfortable, but has no effect on the drinker.
9. Attorneys who abuse non-alcohol substances are more likely to abuse stimulants than other substances.
10. Mental health disorders such as anxiety and depression can impair an attorney’s ability to practice law with competence

11. Research conducted by the Journal of Addiction Medicine found the most common mental health issue suffered by attorneys is anxiety.
12. Research conducted by the Journal of Addiction Medicine found 45.7 percent of attorneys included in the sample were affected by depression.
13. Research conducted by the Journal of Addiction Medicine did not find that 11.5 percent of attorneys experienced suicidal thoughts at some point during their career.
14. There are no age-related health issues that can impair an attorney's ability to practice law with competence.
15. Aging can trigger a decline in an attorney's ability to think, changes in behavior or personality, or problems with our mobility, function, and other conditions that affect an attorney's ability to work.
16. Age-related competence issues can surface as a noticeable decline in mental abilities, including memory and thinking skills.
17. The initial signs of age-related cognitive decline such as problems with memory, language, thinking, and judgment never impair an attorney's ability to practice law with competence.
18. An attorney developing dementia may be quick to anger or forget things they just learned.
19. The State Bar's 2020 demographic survey found that the average age of a practicing attorney in the State of California is 65 years old.
20. An attorney supervising another attorney or a non-attorney employee may be found responsible for violations of the Rules of Professional Conduct committed by the supervisee pursuant to Rules 5.1 and 5.3 of the Rules of Professional Conduct.