

Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools

**Submitted to the Executive Committee of the Association of American Law Schools
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I. INTRODUCTION

The problem of substance abuse in American law schools is an important issue deserving the attention of legal educators. Among the total American population, for example, it is estimated that as many as 10.5 million people show signs of alcoholism or alcohol dependence, and that another 7.2 million exhibit persistent patterns of heavy drinking that result in impaired health or social functioning.¹

Alcoholism and other substance abuse among practicing lawyers is a particularly serious dimension of this problem. In addition to affecting the lives of the impaired lawyer and his or her family, the impairment affects the quality of the professional services rendered to clients. One study has reported that substance abuse is involved in 50% to 75% of the major attorney disciplinary cases.² A Washington state study concluded that as many as 18% of the lawyers in that state may be alcohol dependent.³

The seeds of substance abuse by lawyers may be sown in law schools. Behavior patterns may be established in law school that lead to problems of addiction or impairment for lawyers later in their practice. In light of the seriousness of the substance abuse problem in the legal profession and the fact that behavior patterns that may lead to substance abuse often begin early in life, it is important that law schools provide their students with education about the problems of substance abuse and information about how to lead healthy and well-rounded professional lives.

In recognition of these facts, the Special Committee on Problems of Substance Abuse in the Law Schools was established by the AALS Executive Committee in the spring of 1990. The Committee was asked to explore the problem of substance abuse in the law schools and to develop recommendations to assist law schools to deal with problems stemming from the abuse of alcohol and other substances. Those serving continuously on the Committee since 1990 are: Assistant Dean Susana Aleman, University of Texas; Professor Edward J. Imwinkelried, University of California at Davis; Dean Robert A. Stein, University of Minnesota, **Chair**; and Dr. Hershel P. Wall, Associate Dean for Student Affairs, University of Tennessee (Memphis) College of Medicine. Professor Michael Distelhorst, Capital University, joined the Committee in 1991, and Professor John A. Sebert, University of Tennessee, (who worked extensively with the Committee while he served as Deputy Director of the AALS) was appointed to the Committee in 1992 after his term as Deputy Director ended.

During the two and one-half years of its existence, the Committee met several times to examine and discuss the problems of substance abuse, and to develop a comprehensive set of recommendations. The Committee reviewed a large amount of literature about substance abuse

1. National Institute on Alcohol Abuse and Alcoholism (NIAA), Seventh Special Report to U.S. Congress on Alcohol and Health from the Secretary of Health and Human Services ix (1990).

2. See B. Reddy & R. Woddruff, "Helping the Alcoholic Colleague," 3 The Professional Lawyer No. 2 (Feb. 1992).

3. G.A.H. Benjamin, E.J. Darling & B. Sales, "The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers," 13 Int'l J. Law & Psychiatry 233-46 (1990).

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and gathered a substantial amount of data about the subject. Committee members also talked with many individuals who are familiar with the problems of substance abuse in the legal and medical professions, including people active with lawyers assistance programs throughout the country and members of the ABA Commission on Impaired Attorneys.

In order to obtain specific and current information about the substance abuse problem in law schools, the Special Committee undertook two major surveys. The first was a survey of law school administrators regarding substance abuse issues and law school policies concerning substance use and abuse. In February 1991, a questionnaire was sent to all 176 ABA-approved law schools. A total of 121 (or 69%) of the law schools responded to the survey. The results of this "Law School Administrators Survey" will be referred to at several points in the report, and a complete analysis of the responses is attached to this Report as Appendix A.

The Committee's second survey was directed to law students and sought to elicit data from the students regarding substance use and abuse in the law schools. Nineteen law schools were asked to participate in the survey and all of them agreed to do so. The schools were selected so that their total student bodies were representative of all 176 ABA-approved law schools in terms of: racial and gender composition of the student bodies; size (large, medium and small) of the law school student body; public and private nature of the law schools; geographic location; and size of the metropolitan area (large, medium and small) in which the law school is located. The survey was distributed to the entire student bodies of the nineteen law schools in November 1991. Completed questionnaires were returned by 3,388 students, representing 24.9% of the total student bodies of these 19 law schools. The Committee believes the responses are sufficiently representative of the total population of 128,000 law students to draw valid conclusions about substance use and abuse by students in American law schools. The responses to this "Law Student Survey" will be reported at many places in this Report, and a full report and analysis of the survey results are set forth in Appendix B of this Report.

In addition to the two surveys, the Committee collected the existing written policies on substance abuse from the nation's law schools. Written policies were submitted by 105 law schools, and these policies and related practices will also be discussed throughout the Report.

Based on the information that it has obtained in the course of its work, the Committee believes the problems of substance abuse by students and faculty in American law schools are very serious. Moreover, there has been a tendency by American law schools to ignore or deny the existence of these problems. One unfortunate consequence of this denial and avoidance by legal educators is that the quality of legal education has been adversely affected. In addition, legal education has contributed to the serious problems resulting from substance abuse by practicing attorneys because the law schools have not done enough by way of preventative education to make their students and faculty aware of the problems of substance abuse or to inform them concerning the possibilities of intervention and treatment. Our study convinces us that, at virtually every law school in this country, there are some students or faculty members who are impaired by substance abuse or at risk of being impaired, and who would benefit personally from a more comprehensive approach to substance abuse education and counseling than exists at most law schools today. This Report is intended as a first step in assisting law

schools to develop more effective policies and programs for dealing with substance abuse problems.

The Report is intended to provide both information and advice. Part II reports information concerning the nature and extent of the substance abuse problem in the legal profession and in the law schools. Part III describes efforts outside the law schools to deal with substance abuse -- particularly the extensive initiatives undertaken by the legal profession and the medical schools to attack similar problems. One of the lessons to be learned from the experience of the bar and the medical colleges is the overriding importance of confidentiality in substance abuse programs. For that reason, Part IV examines the need to assure students of the confidentiality of substance abuse counseling and treatment and to inform them concerning the use of that information in the bar admission process. Part V briefly reviews federal legislation applicable to the problem of substance abuse in the law schools. Part VI reports on existing law school policies and practices concerning substance abuse in general, and specifically on substance abuse by law students. Part VII discusses the problem of substance abuse by law faculty members. Finally, Part VIII contains a set of recommended policies and programs that law schools should consider in order to deal more effectively with the problems of substance abuse.

The Committee's recommendations are intended to provide information and advice that will be useful to every law school in developing its own approach to the problems of substance abuse. The Committee does not believe it necessary or appropriate to recommend any changes in AALS Requirements of Membership (Bylaws or Executive Committee Regulations) to mandate that AALS member schools adopt any particular policies or programs concerning substance abuse. The problems are too complex and the viable approaches to the problems are too varied to adopt a regulatory approach. Rather, the Committee hopes that the ideas set forth in this Report will encourage each American law school to examine the specific situation existing at the school and to develop an approach to the problems of substance abuse that is tailored to the specific needs of the individual institution, its students, and its faculty.

Many members of the staff of the AALS National Office contributed significantly to the work of the Committee, including former Executive Director Betsy Levin, Executive Director Carl Monk, and Deputy Director Alice Bullock. Special recognition is due to the exceptional efforts of Richard A. White, the AALS Research Associate/Data Analyst. Rick did an outstanding job (which involved countless hours of his time) designing and analyzing the surveys that the Committee undertook, and he also contributed significantly in many other ways to the work of the Committee.

II. THE PROBLEM

A. Substance Abuse in General and in Other Professions

According to various national surveys, between one-half and two-thirds of American

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adults use alcohol.⁴ A substantial percentage of those drinkers either use alcohol daily or have experienced problems associated with alcohol use: eleven percent of those who drink use alcohol daily, ten percent admit having been dependent on alcohol during the past year or to losing control while drinking, and eight percent report binge drinking.⁵ Alcoholism is estimated to affect ten million Americans,⁶ and to play a role in ten percent of all deaths in the United States.⁷ Another study reports that only fifteen percent of alcohol dependent individuals ever receive treatment for their condition.⁸

Substance use often has its beginnings well before college or professional school. Data from national studies⁹ indicate that alcohol use among high school students is pervasive. Almost 90% of a representative sample of high school seniors in the class of 1990 reported having tried alcohol. More than 57% of seniors had drunk alcohol in the last month, and 3.7% had done so on a daily basis. Nearly 41% reported having smoked marijuana in their lifetimes, and 2.2% did so on a daily basis. Although use of marijuana, cocaine and PCP among high school seniors has been steadily declining since it peaked in 1978, use of these illicit drugs is still widespread. Among young adults (19 to 32 years old), 28.7% used illicit drugs in the past year and 15.3% did so at least once in the prior month.¹⁰

Chemical dependency not only affects the general citizenry, it is a significant problem in many professions. It is estimated that the prevalence of chemical dependency among health care professionals may be as high as 15 to 20 percent. Similar estimates have recently been made concerning the incidence of alcoholism among practicing attorneys. As noted in Part I of the Report, a study sponsored by the Washington State Bar Association reported that as many as

4. Monthly Report, National Institute on Alcohol Abuse and Alcoholism (NIAA), Department of Health and Human Services (February 1990).

5. *Ibid.*

6. Eckardt, et al., "Health Hazards Associated with Alcohol Consumption," 246 Journal of the American Medical Assn 648-66 (1981).

7. NIAAA, Fifth Special Report to the U.S. Congress on Alcohol and Health [Dept. of Health & Human Services Pub. No. (ADM) 84-1291 (1984)].

8. **NIAA Monthly Report, February 1990, *supra* note 1.** It also has been estimated that at least 20% of adults seeing a physician have at one time had an alcohol problem, and that between 15 and 30% of medical and surgical patients in general hospitals have alcohol problems. Cleary, P.D., et al., "Prevalence in Recognition of Alcohol Abuse in a Primary Care Population," 85 American Journal of Medicine 466-71 (1988).

9. Johnston, L.D., P.M. O'Malley & J.G. Bachman, Drug Use Among American High School Seniors, College Students and Young Adults, 1975-1990 (Rockville, Md.; 1991; National Institute on Drug Abuse, U.S. Department of Health and Human Services) (Pub. No. ADM 91-1835).

10. *Ibid.*

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18% of the lawyers in that state may be alcohol dependent.¹¹ Reports from lawyer assistance programs indicate that 50 to 75 percent of major attorney disciplinary cases nationwide involve chemical dependency.¹²

Because of the wide incidence and significant effects of substance abuse among professionals, particularly in medicine and law, the issue of substance use and abuse among professional students and their teachers deserves attention. The medical profession has been studying the issue for some time. A recent article in the Journal of the American Medical Association reported data gathered in 1987 on substance use by senior medical students at 23 regionally distributed medical schools.¹³ Those who study the use and abuse of potentially addictive substances consider data on the prevalence of substance use within the preceding 30 day period as one of the most reliable indicators of current regular use of a substance. The 30-day use prevalence rates reported by the medical student respondents in the JAMA study were: alcohol, 87.5%; marijuana, 10.0%; tobacco, 10.0%; cocaine, 2.8%; tranquilizers; 2.3%; opiates other than heroin, 1.1%; psychedelics other than LSD, 0.6%; amphetamines, 0.3%; barbiturates, 0.2%; LSD, 0.1%; and heroin, 0.0%.¹⁴ Compared with a national age related comparison group of college graduates, senior medical students reported significantly higher rates for usage of alcohol during the prior month and for usage of tranquilizers and opiates other than heroin during the prior year; previous month and year usage rates for marijuana, tobacco and cocaine were lower for medical students than for other college graduates, and for other substances the usage rates of medical students and other college graduates did not differ significantly.¹⁵

B. Chemical Dependency as a Disease

Alcohol and drug addiction is a disease that, if left untreated, can be fatal, often causing death before the age of 50. Alcoholism, the most common of the chemical dependencies, is considered a primary, chronic disease. Other drug dependencies have similar associations. One extremely important aspect of chemical dependencies is that they tend to be progressive. Thus, a

11. Benjamin, G.A.H., E.J. Darling & B. Sales, "The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers," 13 Int'l J. Law & Psychiatry 233-46 (1990).

12. See B. Reddy & R. Woodruff, "Helping the Alcoholic Colleague," 3 The Professional Lawyer No. 2 (Feb. 1992), for a recent republication of these statistics.

13. Baldwin, et al., "Substance Use Among Senior Medical Students," 265 Journal of the American Medical Association 2074-78 (1991).

14. Results of a survey of fourth-year medical students undertaken in 1986 showed similar, but slightly higher, usage patterns. Eighty-eight percent of the respondents indicated they had used alcohol in the past month, a figure very comparable to that reported in the 1987 JAMA study. For marijuana, however, the 30-day usage in the 1986 study was 17%, compared to 10% in the JAMA study. Cocaine usage was also higher -- in the 1986 study, 6% indicated they had used cocaine during the previous month as compared with 2.8% in the JAMA study. The 1986 study of fourth-year medical students is reported in Conard, et al., "Substance Abuse by Fourth-Year Students at 13 U.S. Medical Schools," 13 Journal of Medical Education 747-57 (October 1988).

15. Baldwin, et al., supra note 10.

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substance abuse problem that during law school manifests itself only in occasional over-indulgence of alcohol is likely to become worse rather than better as the individual becomes older and faces greater pressures in his or her professional career.

Although authorities differ somewhat in their terminology concerning substance use, the following definitions are generally used by professionals working in the area of alcohol and drug research and treatment, and they will be employed in this Report¹⁶:

SUBSTANCE ABUSE is the use of a substance in a manner that produces impairment or the likelihood of impairment. Characteristically, the substance use is continued despite interference with at least one of the following: job, marriage, family, interpersonal relationships, legal rights, or health.

ADDICTION is characterized by compulsive use, loss of control of use, and continued use despite adverse consequences.

IMPAIRMENT refers to any condition, regardless of cause, which interferes with the individual's ability to function as normally expected in his or her profession. Impairment exists in one or in multiple domains including psychomotor activity and skills, conceptual or factual recall, integrative or synthetic thought processes, judgment, attentiveness, demeanor and attitudes as manifested in speech or actions. The following factors may indicate possible impairment: deterioration in the level of function, functioning at a level lower than normally expected under the circumstances, or behavior which might endanger the person or others.

AT RISK refers to individuals without identifiable impairment or substance abuse whose behavior, background, environment or family history places them at risk for developing impairment or substance abuse.

C. Survey of Law Students Concerning Substance Use

The prevalence of substance use in medical schools and the profession raises the question "What is the situation in law schools?" The AALS Special Committee attempted to answer this question through both the Law Student Survey and the Law School Administrators Survey.

1. Law Student Survey Methodology

In November 1991, a questionnaire on substance use was distributed to the entire student bodies of 19 law schools whose combined JD student population of 13,603 students represented 10.6 percent of the total JD student population of the 176 ABA-approved law schools. The 19 schools were selected so that their total student enrollment was proportional to the national JD

16. These definitions were developed by a member of the Committee, Dr. Hershel P. Wall, after consultation with other experts in addictionology.

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student population on the following six characteristics: race; gender; law school size; geographic region of school; size of metropolitan area; and public or private control of the school.

Completed questionnaires were returned by 3,388 students, almost 25% of the sample surveyed. The survey methodology is more fully explained in Appendix B. As indicated more fully there, the Committee believes that the results of the Law Student Survey are reasonably representative of the overall situation concerning substance use in the total national population of about 129,000 law students.

2. Results of the Law Student Survey

The results of the Committee's survey of law students are reported in detail in Appendix B. Here in the body of the Report, we wish to highlight only the most significant findings.

a. Prevalence and Frequency of Substance Use by Law Students

The following table summarizes the data from the Law Student Survey concerning usage of various substances by the students over their lifetime, and during the prior year and month. It also indicates what percentage of the students reported daily use¹⁷ of a substance. For a more complete discussion of these data, see Appendix B at Table 4.

	<u>Lifetime</u>		<u>Previous Year</u>	<u>Previous Month</u>	<u>Previous Daily</u>	
Alcohol	97.9%	92.5%	81.7%	3.8%		
Marijuana	64.1		20.8	8.2	0.7	
Cocaine	28.8		4.6	1.3	0.1	
Tranquilizers	15.6		4.9	1.2	0.1	
Psychedelics ¹⁸	22.0		3.3	1.1	0.1	
Amphetamines	17.3		1.8	0.9	0.1	
LSD	14.8		2.2	0.8	0.1	
Barbiturates	9.1		1.5	0.6	0.1	
Other Opiates	10.7	3.4		0.5	<0.1	
Heroin	1.9	0.6		0.4	0.1	
Any Illicit Drug	64.9		21.9	8.8	0.8	

Those who study substance use and abuse believe that usage during the previous thirty days is a reliable indicator of regular use of a substance. Almost eighty-two percent (81.7%) of the law students indicated they had consumed alcohol during the previous month, 8.2% admitted to marijuana use during that period, and 8.8% reported that they had used some illicit drug during the prior month. Previous-month usage levels for other drugs were much lower, with the highest being cocaine at 1.3%. Even that relatively low percentage, however, suggests that

17. Daily use is defined as using a substance 20 or more times during the preceding month.

18. Other than LSD.

almost 1,700 law students throughout the country may have used cocaine during the previous month.¹⁹

Previous year and lifetime usage data are also instructive, particularly because there may be a propensity to return to using substances that an individual had tried earlier in life. Again, the lifetime and previous year usage levels were relatively high for alcohol (97.9% lifetime; 92.5% previous year), marijuana (64.1% lifetime; 20.8% previous year), and any illicit drug (64.9% lifetime; 21.9% previous year). Although the previous month usage figures for other individual drugs are low, the relatively high percentage of students who admit to having used some illicit drugs during their lifetime may indicate a risk of increased usage of those substances in the future. For example, 28.8% of the respondents acknowledged using cocaine during their lifetime, and the lifetime usage rates for psychedelics other than LSD (22.0%), LSD (14.8%), and opiates other than heroin (10.7%) also indicate some incipient risk. Note also that for opiates other than heroin the percentage difference between previous year and lifetime usage rate was much less than for other illegal substances.

Frequency of usage provides another important perspective on the problem. Fourteen percent of the law student respondents reported using alcohol ten or more times during the prior month, and 3.8% admitted to daily use of alcohol (use twenty or more times during the prior month). Almost two percent (1.7%) reported using marijuana ten or more times during the previous month. (See Appendix B, Table 9.)

b. Comparison with Substance Use by High School and College Graduates, and by Medical Students

Table 4 of Appendix B reports usage rates for college and high school graduates who are similar in age (23 to 33) to about 90 percent of the respondents in the Law Student Survey.²⁰ The usage rates for the three groups were comparable for many substances, but there were some statistically significant differences. For example, the respondents to the Law Student Survey showed significantly higher usage rates for alcohol and for psychedelic drugs other than LSD for each of three periods (lifetime, past-year and past-month) than did either the high school or college graduate groups. Law students also reported significantly higher usage rates than did the college graduate group with respect to past-year marijuana use, past-year and past-month tranquilizer use, lifetime and past-year LSD use, past-year use of opiates other than heroin, and past-month barbiturates usage.

The most recent data available on substance use by medical students are based on a study

19. Extrapolating from the Law Student Survey data to the total fall 1991 national population of J.D. students, which was 129,850. See American Bar Association, Section of Legal Education and Admissions to the Bar, Review of Legal Education in the United States (1991).

20. The college and high school graduate data were provided by L.D. Johnston, P.M. O'Malley & J.G. Bachman of the Institute for Social Research at the University of Michigan, Ann Arbor, Michigan. The data were taken from the 1991 "Monitoring the Future" Study.

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of senior medical students administered in 1987. See Appendix B, Table 5, which compares the senior medical student usage rates with those reported by all law students and by third-year law students in the AALS Survey. Overall, the reported usage rates for medical and law students are strikingly similar. What differences there are in the data suggest a slightly greater usage by law students of barbiturates, LSD, and psychedelics other than LSD. When the medical student usage rates are adjusted to account for the overall reduction in usage rates reported by college graduates generally between 1987 and 1991, it appears that use of marijuana and cocaine may also be greater by law students than by medical students.

c. Trends in Law Students' Substance Use

The vast majority of law students who reported having used a particular substance indicated that their use of the substance began before their entry into law school. See Appendix B, Table 11. More than 95 percent of the users of tobacco, alcohol, marijuana, cocaine, amphetamines, barbiturates and psychedelics said that their usage began before law school. On the other hand, 9% of tranquilizer users and 6% of users of opiates other than heroin reported that their usage started after entering law school.

There also is evidence that, except for alcohol, a substantial number of law students who used a particular substance prior to law school have not done so (or at least were not willing to report having done so) since beginning law school.²¹ See Appendix B, Table 12. Nonetheless, about one-third of those who reported having used marijuana and tranquilizers during their lifetimes indicated that their most recent usage had occurred after they began law school. Other substances with respect to which a significant percentage of lifetime users reported that they had used the substance since beginning law school included: opiates other than heroin (25.3%), psychedelics including LSD (18.2%), and cocaine (14.3%).

The information obtained in the Law Student Survey provides evidence of increased usage and frequency of usage of some substances as students progress through law school, and also among older law students. See Appendix B, Tables 6 and 7. The pattern is most dramatic with alcohol: When compared with the combined group of first and second-year students, third-year students reported significantly higher alcohol usage rates both for daily and previous-month usage.²² When the data by age groupings are examined, we see that the previous-year and previous-month usage rates for alcohol were highest for the age group 21 to 25; they drop successively for age groups through age 40. However, they begin to rise for the 41-50 age group, and the alcohol usage rate for those in the 51-60 age group is almost as high as that for the 21-25 group. The reported daily use of alcohol, however, rises quite consistently from 2.8% for the 21-25 age group, to 7.0% for those 36 through 40, and to 8.4% for those 41 through 50.²³

21. Because the survey was administered in November, for about one-third of the respondents (the first-year students) the period since entry into law school was no more than three months.

22. The daily usage rate for alcohol also was significantly lower for first-year students than for the combined group of second and third-year students.

23. Twenty-five percent of those 51 through 60 reported daily use of alcohol, but the small number of respondents

d. Substance Abuse by Law Students

The law student respondents were asked whether they had abused various substances during their lifetimes and whether they had done so during law school. (They were instructed that "abuse" should be defined as "to use a substance in a manner that does physical, psychological, or emotional harm to yourself and/or others".) The responses to those questions are set out in Appendix B at Tables 13 and 14. Almost a third (30.9%) of the law student respondents acknowledged that they had abused alcohol at some time during their lives, and 11.7% said they had abused alcohol since they entered law school. Over thirty-four percent (34.1%) said they had during their lifetimes abused some substance other than tobacco. A substantial number reported that they had abused marijuana (10.1%) and cocaine (5.4%) during their lifetime.

When asked about the effects of substance abuse on themselves and their law school classmates, only 3.3% of the law student respondents indicated that they believed they personally needed help in coping with substance abuse. However, 13.2% reported that substance abuse had affected their class attendance, 7.2% indicated it had affected their class participation, and 1.5% said that substance abuse had affected their performance on examinations. See Appendix B, Table 20 and accompanying text. Moreover, almost one-third of the respondents (32.2%) admitted to having driven under the influence of alcohol or drugs during the past year, and three percent said they often drove under the influence. See Appendix B, Table 19.

e. Impaired Students and Faculty

Respondents to the Law Student Survey were asked whether, in their judgment, there were students or faculty members at their law school whose performance as a student or faculty member was impaired by substance use. For the purpose of the question, "impairment" was defined as "having the use of a substance seriously diminish personal well-being, ability to interact socially, and/or academic/occupational aptitude". Thirty-seven percent of the respondents indicated that there were impaired students at their school, and almost one-seventh (13.8%) of that 37% estimated that four percent or more of their classmates fell into that category.²⁴

Twenty-one percent of the law student respondents believed that there was at least one faculty member at their school whose performance was impaired by use of alcohol or drugs. The responses ranged from one school where only 8.3% of the students indicated there was at least one impaired faculty member to four schools at which over 30% of the students said there were one or more impaired faculty members. See Appendix B, text accompanying Table 20. Overall, the students' perceptions on the issue of impaired faculty were quite similar to those of law school administrators, for 26.3% of the respondents to the Law School Administrators Survey

(20) in this age cohort make the validity of these data questionable.

24. See Appendix B, at 31.

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indicated that they considered at least one of their faculty members impaired by use of alcohol or other drugs. It is interesting to note that while only 11.7% of first-year students reported impaired faculty, a significantly higher percentage of second year (24.2%) and third year (27.7%) students did so.

3. Implications from the Law Student Survey Data

At one level, some of the drug use data reported in the Law Student Survey are encouraging. They show, for example, that many law students who at one time in their lives had at least experimented with illicit drugs had not used those drugs in the past year. The marijuana use figures, in particular, show a marked decline from a very high percentage for lifetime use (64.1%) to more modest usage over the past month (8.2%).

On the other hand, some of the data must be viewed as extremely disturbing and indicative of a continuing problem that demands attention. Over eleven percent (11.7%) of the respondents self-reported that they had abused alcohol since they entered law school. (See Appendix B, Table 14.) Almost twenty-one percent (20.8%) of the respondent law students admitted to having used marijuana at least once in the past year, and 8.2% indicated they had done so in the past month. Overall, 21.9% of the responding students said they had used some illicit drug in the past year, and 8.8% indicated they had done so in the past month. Almost four percent (3.8%) of the respondents admit that they are already in the habit of essentially daily use of alcohol. See Appendix B, Table 4.

These data show that a large number of law students in this country are very frequent users of alcohol or have recently used illicit drugs. The Fall 1991 Review of Legal Education in the United States reports that there were 129,850 J.D. students enrolled at ABA-approved law schools in the fall of 1991. Extrapolating from the data in the Law Student Survey, there may be as many as 4,900 (3.8%) law students nationally who are already using alcohol on essentially a daily basis, and over 15,000 (11.7%) may have abused alcohol at some time since entering law school. Over 10,600 (8.2%) may have used marijuana within the past 30 days, and almost 1,700 (1.3%) may have used cocaine during the same period. Over 2,400 (1.9%) may have used psychedelic drugs (including LSD) during the previous month. Overall, there may be more than 11,400 law students nationally (8.8%) who have used some illicit drug during the past month.

Thus it would be a mistake to dismiss the data from the Law Student Survey as showing primarily that the percentages of recent illicit drug use among current law students are relatively low. The data also establish that substantial percentages of current law students are very frequent users (and at least occasional abusers) of alcohol and that somewhat lower but still significant percentages of law students are recent users of illicit drugs. The percentages and overall numbers are such that it would be the most unusual -- and most fortunate -- law school that did not have several current students whose lives are affected by alcohol or drug abuse.

The information in the Law Student Survey on the reasons law students use substances suggest that some law students may be developing behavior patterns that may eventually become problematic later in their professional careers. For example, over 62% of the respondents who

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reported that they had used alcohol during the previous year indicated that one reason they drank was "to relax or relieve tension"; almost half of those who used marijuana listed relaxation or tension release as one of the reasons they did so. Lower but still significant percentages of users reported that getting away from problems was one reason that they used a particular substance: alcohol (12.1%); cocaine (16.2%); marijuana (10.9%). (The data on the reasons for use of various substances are reported in Appendix B, Table 10 and accompanying text.) These data indicate that there are a substantial number of law students who are using various substances as means for relief of stress or tension, and those law school behavior patterns may foreshadow even more significant problems for these individuals as they face the pressures and tensions of the practice of law.

Similar implications may be drawn from the data indicating that third year law students had significantly higher alcohol usage rates (both daily and previous month usage rates) than did the combined group of first and second-year students. (See Appendix B, Table 6.) Although the survey results indicate that, for the vast majority of law students, the use of alcohol or other substances has not yet reached the level of impairment or frequent abuse, the self-reporting of increased alcohol usage by third-year students (and by older students) again suggests the possible beginnings of patterns of behavior that will be problematic in the long term. This is especially true because of the widespread recognition that chemical dependencies, particularly alcoholism, tend to be progressive diseases. Thus there is a substantial likelihood that many of those law students who report regular use of a substance (but with relatively low frequency) during law school will increase their usage as they get older and face the mounting pressures of professional life. The available data on the incidence of alcohol dependence among practicing attorneys lends strong support to this hypothesis.

In the judgment of the Committee, it is extremely likely that virtually every law school in this country has some current students (and possibly some faculty members) who are impaired by the use of alcohol or other substances, or who more than occasionally abuse alcohol or drugs. It is also highly probable that virtually every law school has current students (and possibly current faculty members) whose present behavior indicates a substantial risk that they will in the future suffer from the effects of substance abuse. Thus the problem of substance abuse is one to which every law school should devote attention.

III. EFFORTS OUTSIDE THE LAW SCHOOLS TO DEAL WITH PROBLEMS OF SUBSTANCE ABUSE

A. American Bar Association Commission on Impaired Attorneys

As a response to the high incidence of alcoholism and chemical dependency in the legal profession, and because of the serious implications these problems have for the profession and the public, the Board of Governors of the American Bar Association created the American Bar Association Commission on Impaired Attorneys in 1988.²⁵ The work of the Commission has

25. The recently revised mission statement for the Commission indicates that its mission is "to educate the legal

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included two reports with recommendations to the American Bar Association's House of Delegates. The first was "Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines," adopted at the 1990 ABA Annual Meeting. The second was "Guiding Principles for a Lawyer Assistance Program," adopted at the 1991 Mid-year Meeting of the ABA.

The first report, "Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines" (Model Personnel Policy), is important because it reflects the ABA's current approach to the problem of substance abuse in the context of a law firm. The underlying philosophy is one of help and treatment for the disease of chemical dependency rather than condemnation and punishment. The Model Personnel Policy emphasizes methods by which a firm can assist impaired lawyers or other personnel.

This paramount objective to provide assistance is achieved through early intervention, counseling, treatment, and rehabilitation, in cooperation with qualified treatment agencies, lawyer assistance programs, and employee assistance programs. The Model Personnel Policy observes that its success depends on all personnel in the firm being committed to "identifying and helping impaired persons." The Policy acknowledges the importance of self-referral by impaired persons but also recognizes the need for action when impairment is perceived and observed by others in the firm. The Policy stresses the importance of confidentiality throughout the process of identification, counseling, treatment and rehabilitation. Disclosure is permitted only when an overriding legal or professional requirement to disclose is present, and even then disclosure is allowable only if the information has not been obtained through some form of privileged communication.

The Model Personnel Policy underscores the dangerous consequences that substance abuse poses for a law firm: (1) substance abuse can lower the quality of legal services provided; (2) it can increase the risk of malpractice liability; (3) it can cause violations of standards of professional conduct; (4) it can contribute to a poor work environment; and (5) it can result in loss of respect by the public and the legal community. Despite these potential consequences, the overall spirit of the Policy is that firms should provide opportunities for assistance before resorting to discipline or condemnation.

In the second report, "Guidelines for the Creation of State-wide Lawyers Assistance Programs" (the Guidelines), the ABA Commission found that the various state and local lawyer assistance programs were facing a variety of common problems: inadequate funding; public and professional ignorance or apathy; and inconsistent responses by various bar associations and courts to such issues as confidentiality and discipline of members afflicted with the disease. The Guidelines address each of these problem areas.

The Guidelines recommend that every state have a state-wide lawyer assistance program, and that each program should include representatives of the judiciary, practicing bar, and legal

profession concerning alcoholism and other forms of chemical dependency and to assist and support all bar associations and lawyer assistance programs in developing and maintaining methods of providing effective solutions for recovery."

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education who share the goal of guiding impaired judges, lawyers and law students into recovery. Furthermore, they encourage state-wide lawyer assistance programs to maintain close ties to the recovering community (including recovering lawyers, law students, and lay persons) and the sponsoring bar association. An important element of the program is education in substance abuse issues. The Guidelines suggest that this education should begin in law school professional responsibility classes and be regularly included in continuing legal education programs.

Like the Model Personnel Policy, the Guidelines emphasize confidentiality -- both for those who have not yet committed a disciplinary offense and for those whose condition has already deteriorated to the point of an actual professional infraction. Indeed, both ABA reports stress that confidentiality is essential when encouraging impaired persons to seek help before they incur professional or disciplinary difficulties. A person who fears that his or her chemical dependency will be reported to disciplinary authorities as a transgression *per se* is less likely to seek the needed help before a major professional or disciplinary problem occurs.

With regard to the impaired lawyer who has already experienced disciplinary problems, the Guidelines address both the duty to help the impaired individual and the duty to protect the public. Most state disciplinary agencies have viewed impairment as a mitigating circumstance when dealing with lawyer discipline. The Guidelines suggest that the local and state assistance programs and the disciplinary agencies should together establish a system for referring lawyers to the lawyer assistance programs. They endorse creation of a system for monitoring impaired attorneys who have come to the attention of disciplinary agencies -- a system in which early, less serious, complaints about an impaired attorney might be handled in such a way that the lawyer can be helped before more serious trouble results from continued substance abuse. For the more serious case, the Guidelines contemplate permitting the impaired attorney to use his or her entry into a recovery program as a mitigating factor in a disciplinary proceeding if the recovery program results in continuing sobriety and there is an adequate monitoring system.

Another issue addressed in the Guidelines is the need for immunity from civil suit for those who work with the impaired lawyer system. Fellow professionals who try to intervene in an impaired person's life may face legal action or threat of legal action, which could reduce the effectiveness of assistance programs. The Guidelines urge a qualified immunity for actions taken in good faith in such attempts to intervene.

Cumulatively, these various initiatives undertaken by the bar are impressive. Today, there are impaired lawyer assistance programs in every state jurisdiction as well as the District of Columbia. The network of local and state organizations has grown to include over 100 committees or programs. Most of these programs have implemented the Guidelines or are in the process of doing so. The ABA Commission on Impaired Attorneys continues to initiate, assist and coordinate efforts by these state and local lawyers assistance programs.

B. Related National Efforts by the Bar

Upon the recommendation of the ABA Standing Committee on Professional Discipline

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and the ABA Commission on Impaired Attorneys, in February 1992 the ABA House of Delegates approved two significant changes relevant to chemical dependency in the ABA Standards for Imposing Lawyer Sanctions. The changes represent an attempt to balance the imperative of maintaining appropriate standards of professional competence and responsibility with the need to treat chemical dependency as a disease.

Standard 9.22, which specifies factors that may be considered as aggravating circumstances in disciplinary cases, was amended to add the following factor: "(k) illegal conduct, including the use of controlled substances." At the same time, Standard 9.32(i) was added to indicate when substance abuse should be deemed a mitigating factor:

(i) mental disability or chemical dependency including alcoholism or drug abuse when:

- (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
- (2) the chemical dependency or mental disability caused the misconduct;
- (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
- (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

A review of the reported attorney disciplinary cases reveals an increasing tendency to view alcohol abuse as a mitigating factor, at least when factors such as those set forth in Standard 9.32 are present. E.g., In re Hankin, 804 P.2d 30 (Wash. 1991); In re Evans, 804 P.2d 344 (Kan. 1991). Some jurisdictions refuse to consider drug abuse or addiction in mitigation because of the illegal conduct involved. See, e.g., In re Zauber, 583 A.2d 1140 (N.J. 1991). Other states, however, have indicated a willingness to consider drug addiction as a mitigating factor, at least when accompanied by a strong showing of rehabilitation and (sometimes) additional sympathetic factors. E.g., In re Leardo, 53 Cal. 3d 1, 805 P.2d 948 (1991); Landford v. Georgia State Bar, 260 Ga. 408, 396 S.E.2d 228 (1990); In re Winston, 528 N.Y. Supp. 2d 843 (App. Div. 1988).²⁶

Educational efforts on the national level have included a 1991 video tape, "Lawyers, Alcoholism, and the Intervention Process," produced by the American Bar Association Center for Professional Responsibility and Special Coordinating Committee on Professionalism. This video portrays an intervention on an alcoholic judge being conducted by colleagues, family, and friends. It is available for use in law school classes and continuing education programs. Numerous other national organizations have offered substantial programs in the areas of alcoholism and chemical dependency: the ABA Standing Committee on Lawyer Competence; the National Conference of Bar Examiners; the Alcoholism and Drug Law Reform Committee of

26. For a general description of the approaches of various jurisdictions to the problem of the impaired attorney, see ABA/BNA Lawyers' Manual on Professional Conduct, Chapter 101 (1991).

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the Individual Rights Section of the ABA; Special Committee on the Drug Crisis; Ad Hoc Drugs Committee of the Criminal Justice Section of the ABA; Attorney Impairment Committee of the Young Lawyers Section of the ABA; ABA Task Force on Impaired Law Students of the Law Student Division; and Commission on Partnership Programs.

C. Efforts on the State and Local Level Through Lawyer Assistance Programs

Although efforts of the ABA Commission on Impaired Attorneys have brought a new organization and cohesion to the national impaired lawyer assistance effort, most of the work of helping individual lawyers and judges with substance abuse problems emanates from the state and local lawyer assistance programs found in every state and the District of Columbia. These programs have grown over the years in both resources and sophistication and will no doubt continue to be the primary source of help for the impaired attorney. The activities of these programs are relevant to the law schools both because they can provide help for law students and law faculty in their jurisdictions, and because their efforts can provide some useful models for law school programs.

There are several organizational formats currently in use by lawyer assistance programs (LAPs). In some states, the LAP is an informal association of recovering lawyers and judges. In others, the program is a separate non-profit corporation or is a formal committee of the state bar association. In still other states, the organizational structure is some combination of the above. Regardless of the organizational structure, however, the most effective lawyer assistance programs have implemented many or all of the ABA Commission's Guidelines. A typical LAP emphasizes three areas for action: (1) education; (2) assistance with diagnosis, intervention, and treatment; and (3) assistance with after-care and recovery.

LAPs regularly sponsor continuing education programs or provide speakers on the causes, prevention, detection and treatment of alcoholism and chemical dependency in the legal profession. In several jurisdictions, these organizations provide law schools with speakers who are attorneys having experience dealing with substance abuse. These speakers bring into law school classes such as legal ethics and professional responsibility issues concerning substance abuse by attorneys and issues involved in dealing with clients who have a substance abuse problem. In some states LAPs have initiated joint educational efforts involving judges, attorneys and legal educators.

Although these educational efforts are valuable, the key to dealing effectively with substance abuse and chemical dependency is the ability to respond in individual cases with help in the diagnosis, intervention, treatment, and after-care needed to facilitate recovery. It does little good to educate the legal community about substance abuse problems, or to convince them of their professional duties to impaired lawyers, judges, law faculty, and law students, without providing practical answers to the question of "what to do." For this reason, most LAP's offer confidential advice from a full-time program director or committee members who can organize and lead actual interventions and then participate in supervising the after-care of an impaired lawyer.

A typical Lawyer Assistance Program (integrating the three functions of education, intervention, and after-care) follows this general model:

A provider of continuing legal education that wants to offer information about substance abuse as part of a planned CLE program would call the LAP and obtain information about the speakers and materials available. Presentations would be structured both to heighten substance abuse awareness and to provide an answer of "what to do" for those in the audience who might seek help for themselves or someone about whom they are concerned.

If, as a result of the presentation, a member of the audience decides to seek help for himself or another, he or she could call the LAP confidentially. Many LAP's maintain a confidential, toll-free, "hotline" for just this purpose. The caller can speak with a lawyer experienced in substance abuse issues, a chemical dependency professional, or a physician who could give advice and help organize whatever level of intervention might be needed. The object is to get the impaired person into contact with a professional in the field of chemical dependency who can accurately diagnose the problem and advise as to the appropriate level of out-patient or in-patient treatment.

On completion of the appropriate treatment, the LAP helps the recovering person initiate an after-care program that will ensure continued sobriety and long-term recovery. This after-care process shows the impaired person how to develop and follow a life-long recovery program. Such a recovery plan will normally include attendance at support groups (such as Alcoholics Anonymous meetings) and other after-care in groups led by professional after-care counselors.

To this point, the model presupposes that the attorney comes to the attention of the LAP before his or her substance abuse and impairment leads to disciplinary action. Frequently, however, denial -- one of the hallmark symptoms of dependency -- prevents the impaired lawyer or judge from obtaining assistance until the progressive nature of the disease leads to a professional mistake or misconduct. In such cases, the disciplinary authority may refer the case to the LAP and ask them to participate in a plan for monitoring recovery. The impaired party may receive mitigation in the disciplinary action if he or she acknowledges the substance abuse problem and agrees to work with the LAP to prevent its recurrence.

The essence of the model just described could easily be adapted to a law school setting. In some states, in fact, law schools and law faculty members already are using LAP resources to provide education on matters of substance abuse and as sources for help in the diagnosis, treatment, and after-care of impaired students or faculty members. Among other advantages of using the LAP is the fact that LAP activities are frequently covered by provisions guaranteeing confidentiality that can apply to proceedings involving law students and faculty as well as to those dealing with judges and attorneys.

There are still elements of the ideal LAP that have not yet been fully implemented in all

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programs. Work continues in matters related to: (1) confidentiality of communications between the impaired person and the program; (2) qualified immunity for those participating in interventions with an impaired person (although approximately 16 states now have such provisions); (3) the role of the LAP in bringing mitigating information to the disciplinary process; and (4) the LAP's role in after-care monitoring of sobriety. Despite these areas for possible improvement, the LAP movement has achieved significant progress over the past decade; LAP programs are now readily accessible to the vast majority of attorneys throughout the United States.²⁷

D. Medical School Programs

Like the bar, the medical colleges have gone to great lengths to combat substance abuse. The first organized effort to establish a structured program dealing with substance abuse in medical schools was undertaken in 1982 at The University of Tennessee College of Medicine in Memphis. That effort, begun by students, faculty and the college administration, culminated in what is now the Aid for Impaired Medical Students (AIMS) Program. This program has been duplicated, in large part, in 30 medical schools across the country which have come together in a Consortium for Student and Professional Well Being. The AIMS Program was modeled after impaired physician programs, which have been adopted by all 50 state medical societies.

The general goals of the AIMS Program are: (1) to provide assistance to impaired students before they are irreversibly harmed; (2) to provide help in a way that fully protects the impaired students' right to receive treatment in strictest confidence; (3) to assure that recovered students can continue their medical education without stigma or penalty; and (4) to protect patients and others from the harm that impaired students may cause. The purpose of the program is to prevent and treat chemical dependency that becomes manifest in medical school, whether or not that dependency begins during medical school. Those experienced with AIMS programs recognize that there is some tension between the goal of aiding chemically dependent persons and the objectives of protecting the integrity of the profession and guarding the welfare of patients. The design and implementation of AIMS programs require a constant balancing of those interests.

The essential elements of the AIMS Program include prevention, identification, early intervention, evaluation, treatment and monitoring. Those experienced with treatment programs consider it ideal if individuals at risk recognize that they are coping poorly with stress and seek assistance on their own initiative before they become seriously impaired. To encourage the early recognition of potential substance abuse problems, many professional schools include in their new student orientation programs sessions on stress and stress management. Information concerning resource individuals and services available to those who seek help is presented in

27. The AALS Special Committee has obtained information concerning the operation of a number of LAP's. Because of the limitations of time and resources, no attempt has been made to be exhaustive or comprehensive in this effort. The materials in Appendix C, however, indicate the approaches taken by the bar in several states to deal with chemical dependency and substance abuse. More complete information may be obtained from the ABA Commission on Impaired Attorneys, 541 N. Fairbanks Court, Chicago, Illinois 60611-3314.

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those sessions. Increasing numbers of medical schools are establishing peer counselor systems in which student volunteers interested in helping other students are trained to make appropriate referrals. Many medical schools also are establishing curricula in substance abuse, teaching that substance abuse, including alcoholism, is a complex medical problem influenced by genetic, biochemical, physiologic and environmental factors.

More often than not, a person's peers are the first to identify the early signs of substance abuse. Changes in behavior toward peers as well as deterioration of formerly healthy life styles are characteristic signs of substance abuse. Significant declines in one's academic performance and attitude toward professional responsibilities, although often appearing only at relatively late stages of dependency, also can be important indicators.

The early intervention process used in medical schools involves meeting with the individual to discuss his or her impairment in a helpful and supportive way. The medical school experience suggests that this interview should be conducted with the participation of individuals with whom the student has a close relationship and that it be led by a professional who is knowledgeable and experienced in the intervention process. The purposes of the interview are to help the individual recognize that a problem exists, to express a commitment to help, and to explain the available evaluation and treatment resources.

The evaluation normally includes a complete medical as well as a behavioral assessment. Treatment programs must be tailored to the specific needs of the impaired individual. These may involve intensive therapy on an inpatient hospital basis. Other successful programs may include outpatient therapy. Long-term monitoring is likewise tailored to the individual situation and should be supervised by knowledgeable and experienced professionals.

Studies of programs for impaired physicians in four different states show that between 78 and 93 percent of participating physicians progress sufficiently to be able to continue in active practice.²⁸ The relatively low recidivism has been due largely to the dedication of the state programs for impaired physicians. These programs are in turn successful because of the cooperation between Boards of Medical Examiners and State Medical Associations under which many impaired physician programs operate.

Confidentiality of communicating with students, and of a student's response to treatment, has been of utmost importance to the success of AIMS programs. These programs depend on student trust and confidence, and those involved in AIMS programs recognize that a breach of confidentiality may compromise this trust and render the program ineffective. With this in mind, the AIMS program is designed to protect the confidentiality of both the impaired student and those students who report an impaired colleague.

28. B.S. McCrady, "The Distressed or Impaired Professional: From Retribution to Rehabilitation," 19 J. of Drug Issues 337-49 (1989). Information provided to Committee member Dr. Hershel P. Wall by Dr. David Dodd, President of the Federation of State Physicians' Health Programs, reconfirms the high recovery rate of physicians participating in impaired physicians' programs.

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Although endorsed and supported by medical school administrations, the councils or committees that supervise AIMS programs are established separate from the administration. The councils typically are composed of elected representatives from the medical school classes and an equal number of professionals from the faculty and community appointed by the Dean. At most institutions these councils function independently in identifying at risk students, intervening, evaluating the problem, and supporting the treatment and monitoring programs. Impaired students are not officially identified to the college administration unless they fail to enter or complete the recommended treatment program.

A key element of an AIMS program is its linkage to state programs for impaired physicians. A student who is found to be impaired and who subsequently enters a treatment program ordinarily is reported to the state program for impaired physicians. In many states recovering physicians in the community (Cadauceus Organizations) are utilized in the intervention process and then later serve as monitors in the after-care program. The moral and professional (and sometimes financial) support provided by these state programs has been very important. The advocacy role that these state programs play on behalf of recovering individuals is crucial since these programs make recommendations concerning participants in the programs. These recommendations assist those recovering from substance abuse problems at the time of graduation from medical school to obtain admission to post graduate residency training programs and licensure. State programs for impaired physicians are commonly closely linked to state licensure boards. Given the state of medical knowledge and appreciation for the disease process, state licensure boards have been quite willing to license recovering physicians who have followed appropriate treatment plans.

The application forms of most state medical licensing agencies inquire about the applicant's present and past use or abuse of alcohol and other substances. In the normal situation, a medical student who participates in an AIMS treatment program will indicate on the licensure application that he or she is recovering from a substance abuse problem. The applicant asks the AIMS or impaired physician program to contact the licensing authority in the jurisdiction where the applicant is applying for a license and to support the student's application. There is no independent exchange of information concerning impaired physicians among AIMS or state impaired physician programs, however. Thus there remains some risk that a physician with a chemical dependency could obtain a license in a jurisdiction without the licensing authorities' being aware of the applicant's history of chemical dependency.

Although the AIMS Program began in colleges of medicine, other health care professions are initiating their own student programs. At the University of Tennessee Health Science Center, the Colleges of Dentistry, Nursing and Pharmacy have active programs for assisting impaired students. Other health science schools around the country are developing similar programs.

IV. THE CENTRAL ISSUE OF CONFIDENTIALITY

A. Introduction

One of the lessons to be learned from the experience of the medical colleges and the bar is the absolute necessity for confidentiality in a substance abuse program. The issue of

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confidentiality has been recurrent and pervasive in dealing with the impaired lawyer. The dilemma is the seeming contradiction between the need to protect the public from impaired attorneys (see Model Rule of Professional Conduct 8.3 and Code of Professional Responsibility DR 1-103) and the need for confidentiality to encourage the substance abuser to self-refer and seek treatment.

Both the ABA "Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines" and the ABA "Guiding Principles for a Lawyer Assistance Program" address the issue of confidentiality. The Guidelines assert that confidentiality is essential to a successful lawyer assistance program. The Model Personnel Policy provides for confidentiality except when there is some overriding professional or legal necessity for disclosure. The Model Personnel Policy recognizes only a few overriding circumstances requiring disclosure; and even in those circumstances there presumably is no obligation to disclose information covered by an evidentiary privilege.

The most important recent statement on the subject of confidentiality of information learned in the course of the activities of lawyer assistance programs is found in the American Bar Association's 1991 Amendment to Model Rule 8.3(c):

This rule does not require disclosure of . . . information gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

At least 17 jurisdictions have adopted similar rules, and more than 30 states provide confidentiality of one sort or another for information obtained in connection with lawyers assistance programs.²⁹ Other sources assert that when confidentiality issues have arisen, most states (either by case law or legislation) have resolved the conflict in favor of confidentiality.³⁰

29. Joanne Pitulla, "Abusers Anonymous," 78 A.B.A.J. 108 (June 1992).

30. ABA/BNA Lawyers' Manual on Professional Conduct 101:3302 (1991).

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Confidentiality is just as essential in substance abuse programs serving law students as it is in programs designed for practitioners. Part B summarizes the information that the Committee has gathered concerning confidentiality in the law school setting. The question then arises as to how to assure an increased level of confidentiality. One possibility is to designate as the law school substance abuse counselor a person covered by an existing evidentiary privilege. Part C and Appendix D describe the pertinent evidentiary privileges. Another possibility is to obtain assurances from bar admission authorities that information about applicants' substance abuse problems will not be generally circulated and that applicants recovering from substance abuse problems will not be denied admission solely on that basis. Part D describes how various bar admission authorities obtain and treat information concerning substance abuse by bar applicants. Part E contains the Committee's present conclusions concerning these issues.

B. Confidentiality in the Law School Setting

The issue of confidentiality of information concerning a law student's substance abuse problems arises primarily in connection with character and fitness inquiries by many bar admission authorities concerning applicants' present and past substance abuse problems. A student considering referring himself or another for treatment sometimes will ask a law school administrator about the consequences of such a step on an individual's ability to be admitted to the bar. Because of the varied practices of different bar admission authorities, it often is very difficult to provide accurate advice to a student as to the confidentiality of information concerning law student substance use. In a typical situation, a student asks whether the law school counselor, dean, or faculty member whom he or she has consulted for help will keep all communications regarding the student's problem confidential. Unfortunately, the law school counselor, dean, or faculty member frequently cannot definitively tell the student what may or must be communicated to bar admission authorities.

In addition, many bar admission applications require the applicant to disclose information concerning substance abuse problems or treatment received for substance abuse. In that situation, the student often turns to law school officials for advice as to how the local bar investigates and responds to such information. In the current state of affairs in many jurisdictions, this advice is difficult to provide with any degree of certainty. This uncertainty itself may cause the student not to reveal the substance abuse problem or to seek the needed treatment. Rightly or wrongly, the student may calculate that if he or she does not tell anyone about the problem, does not have it diagnosed, and avoids treatment, there is no obligation to disclose anything to a bar admission authority.

The results of surveys undertaken by the Committee show that confidentiality is a great concern. In the Law Student Survey, students were asked whether they would seek assistance from a law school or university substance abuse program if they believed that they had a substance abuse problem. Only 10% answered an unqualified yes. However, 41% responded that they would seek assistance if they were assured that bar officials would not have access to the information. Another question asked students whether they would refer to counseling or treatment a fellow law student whom they considered to have a problem. Only 19% indicated an unreserved yes, but another 47% answered yes if assured that bar officials would not have access

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to the information. (See Appendix B, at 32.) These answers, together with considerable anecdotal evidence, indicate that law students' concerns about confidentiality probably reduces significantly not only the number of students willing to self-refer but also the number who would report an impaired colleague.

The Law School Administrators Survey also inquired about confidentiality in relation to bar admissions authorities. The results of this survey bear out the law students' concerns about confidentiality. The respondent administrators were asked whether bar admission authorities specifically ask law schools to disclose information concerning a student's substance abuse in the schools' reports on general character and fitness. Nearly 29% percent said that a specific request was always or often made, and nearly 38% percent indicated that requests were sometimes made.³¹ (See Appendix A at 36.)

Law school administrators were then asked whether the schools had an obligation to report unsolicited information about substance abuse. Nearly 46% said always or often, and 38% said sometimes. The respondents were also asked to comment on their obligation to report. Some schools noted that such information would be reported only if it had become a part of an individual's formal record. Others felt that any information about substance abuse definitely should be reported -- especially, as one indicated, when there is illegal drug use. Several others, however, were concerned about the possible conflict between counseling the student and having a reporting function to bar authorities. Some indicated they believe there is a greater obligation to report an individual who has an ongoing problem and has not sought recovery than there is to report a "recovering" alcoholic or addict. (See Appendix A, at 37.)

When the administrators were asked to respond to capsule scenarios, 64% said reporting should be permitted when a student had been informally counseled about a substance abuse problem. When asked about a student who has been referred to treatment for substance abuse but has refused treatment, 50% thought that reporting should be required, and another 45% said reporting should be permitted. When asked about students who are referred to and accept active treatment, 55% said reporting should be permitted but not required, and 30% said that it should be mandatory.³² (See Appendix A, at 37-40.)

These responses by students and administrators indicate that, while confidentiality is a vital consideration to the law school student contemplating referring himself or another, the current system does not assure confidentiality. Many schools believe that divulging such information should be permitted, and a significant percentage believe that disclosure should be required at least in some circumstances. Presumably, these beliefs rest on the feeling that the public must be protected from attorneys with untreated substance abuse problems. However,

31. Regional stratification of the data suggests that schools in the west and the southeast were more likely to receive such a request while schools in the southwest were less likely. However, the majority of schools reported that authorities at least sometimes asked for such information.

32. Responses varied significantly by region. Very few schools in the northeast felt reporting should be required while the majority of schools in the southwest and one half the schools in the west felt it should.

there also appears to be substantial sentiment among law school administrators that the disclosure is not for the purpose of keeping the recovering person out of the profession, but rather for policing active substance abusers.

The present situation results in differential treatment of the admitted attorney and the bar applicant who have substance abuse problems. In many states, an admitted attorney with a substance abuse problem can be assured that his or her situation will not come to the attention of disciplinary authorities if he or she successfully participates in a treatment program. A law student with a similar problem, however, cannot be given comparable assurances that information about participation in a treatment program will not reach bar admission authorities. A substantial number of law school administrators feel that there is an obligation to disclose to bar admission authorities information concerning a student's substance abuse problems, even if the student is actively undergoing treatment. Thus law students who participate in substance abuse treatment programs may be unable to obtain assurances of confidentiality similar to those available to practicing attorneys in many states. Moreover, even if a student's substance abuse problem is not reported by others, the student may have to self-disclose on the bar admission application.

C. Evidentiary Privileges Protecting Confidentiality

As previously noted, one method of assuring confidentiality to law students seeking substance abuse counseling might be to designate as counselors persons covered by existing evidentiary privileges. To a degree, current federal and state laws protect the confidentiality of information obtained in law school substance abuse programs. Appendix D contains an overview of relevant federal and state evidentiary privileges. As the appendix demonstrates, however, the protection is limited. To begin with, if an associate or assistant dean were designated as the counselor, there would be no applicable privilege except in the unlikely event that the dean also happened to be a physician or psychotherapist covered by a privilege. Moreover, although some courts construe federal statutes, such as 42 U.S.C. §§290dd-ee, as creating a privilege for communications between patients and certain alcohol and drug abuse clinics, other courts reject that privilege. Even the courts which construe the statutes as creating a privilege recognize that the privilege is qualified; even when the privilege attaches, the court may order disclosure when there is "good cause."

The protection under state law is similarly limited. A fifth of the states do not recognize any medical privilege. While statutory medical privileges exist in 40 states, most statutes specifically provide that they do not apply in criminal cases. In short, neither federal nor state law presently ensures confidentiality to the participants in a law school substance abuse program.

Another possible method for insulating law school officials from an obligation to disclose to bar admission authorities information concerning a student's substance abuse problem might be to associate the law school's substance abuse counselor with the Lawyers Assistance Program in the jurisdiction. As noted above, a number of states provide at least some protection for the confidentiality of information obtained in connection with the activities of lawyers assistance

D. Bar Admission Authorities' Use of Information Relating to Substance Abuse

Since confidentiality cannot realistically be assured by the simple expedient of designating counselors covered by existing evidentiary privileges, it becomes critical to determine whether bar admission authorities will give sufficient assurances of confidentiality to eliminate disincentives for law students to participate in substance abuse programs. The American Bar Association, the National Conference of Bar Examiners, and the Association of American Law Schools together have formulated a Code of Recommended Standards for Bar Examiners. This Code, as published in the 1992 AALS Handbook, lists several forms of conduct which ". . . should be treated as cause for further inquiry before the bar examining authority decides whether the applicant possesses the character and fitness to practice law" Included in this list is "evidence of drug or alcohol dependency."

These standards encourage local jurisdictions to ask about drug or alcohol dependency. Through the efforts of the AALS Committee on Bar Admissions, the Special Committee obtained information concerning bar admission practices from a sampling of jurisdictions around the country to determine whether local jurisdictions in fact ask such questions. Appendix E summarizes the information obtained for individual jurisdictions. The Committee also studied the standard form prepared by the National Conference of Bar Examiners (NCBE).

Based upon this review of the practices of some jurisdictions and the NCBE recommended bar admission application form, two generalizations can be made: (1) In one way or another, many jurisdictions seek information about the candidate's possible chemical dependency -- sometimes using the bar admission application, sometimes employing the law school certificate, and sometimes both. (2) In one way or another, most jurisdictions look only for evidence of ongoing problems and will admit recovering applicants either fully or conditionally.

33. See Part IV.A., supra, at note 29.

E. Conclusion

After reviewing the bar admission practices described in Appendix E and discussing the situation with several representatives of bar admission authorities, the Committee concluded that it is unlikely that many bar admission authorities will agree to cease inquiring whether an applicant had a substance abuse problem or had undergone treatment for such problems. The admission authorities with whom the Committee spoke, however, were very willing to consider guidelines concerning the appropriate use in the bar admission process of information about substance abuse and treatment for substance abuse.

In the Committee's view, it may be sufficient for the student contemplating referring himself or a fellow student to be assured that seeking treatment would not unduly delay or prevent the student's admission to the bar. If the applicant has that assurance, plus some guarantee that the information revealed to the bar will not be publicly circulated, the need for confidentiality may be satisfied. It should be noted that even the successful AIMS programs in medical schools do not guarantee medical students that medical licensing authorities will not learn about a student's treatment for substance abuse; instead, the objective of the AIMS programs has been to assure that information concerning a student's substance abuse problem is not widely circulated and that licensing agencies respond positively to evidence that an individual is successfully recovering from a substance abuse problem. (See Part III.B., supra.)

The Committee has therefore concluded that the best solution for law schools in the area of confidentiality would be to obtain from bar admission authorities assurances that will be sufficient to avoid creating a disincentive for students to seek counseling and treatment. Many, if not most, jurisdictions will probably continue to require some disclosure concerning substance abuse problems and treatment in order to enable bar admission authorities themselves to make informed judgments concerning admission to practice. The Committee recommends, however, that bar admission authorities limit their inquiries concerning an applicant's substance abuse problems or treatment for such problems to reasonably current information.³⁴ Instead of asking whether the applicant had ever undergone treatment or counseling for substance abuse, for example, the inquiry might be limited to treatment or counseling during the past five years. In addition, bar admission authorities should be asked to provide assurances that the mere fact of past substance abuse will not lead to automatic denial of bar admission and that applicants presenting sufficient evidence of recovery will be admitted in some regularized way. The public has at least as great a need to be protected from impaired physicians as it does to be protected from impaired attorneys; and if medical licensing boards have granted that assurance, bar admission authorities should do likewise.

V. FEDERAL LEGISLATION AFFECTING LAW SCHOOLS' SUBSTANCE ABUSE PROGRAMS AND POLICIES

34. For a discussion of the District of Columbia Court of Appeals' recent direction that questions to D.C. bar applicants concerning substance abuse, treatment or counseling be limited to events occurring within five years prior to the period of application, see Part VI, infra, at notes 35-36.

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The most significant federal legislation concerning the use or abuse of alcohol or drugs by law school students or employees is the Drug-Free Schools and Communities Act Amendments of 1989, Pub. L. No. 101-226 (December 12, 1989). Most of the provisions of that Act became effective October 1, 1990. That Act added a new section on Drug and Alcohol Abuse Prevention (20 U.S.C. Section 1213) to Title XII of the Higher Education Act of 1965. This section requires that, as a condition of receiving federal funds or participating in federal student loan programs, each institution of higher education must certify that it has adopted and implemented a program to prevent the use of illicit drugs and the abuse of alcohol by students and employees.³⁵

In order to comply with the Drug-Free Schools and Communities Act, institutions must annually distribute a statement in writing to each employee and student. That statement must contain at least the following:

- * standards of conduct clearly prohibiting the unlawful possession, use, or distribution of illicit drugs and alcohol by students or employees on the institution's property or as any part of the institution's activities;
- * a description of the applicable legal sanctions under local, state or federal law for the unlawful possession or distribution of illicit drugs and alcohol;
- * a description of the health risks associated with the use of illicit drugs and the abuse of alcohol;
- * a description of any drug or alcohol counseling, treatment, rehabilitation, or re-entry programs that are available to students or employees; and
- * a clear statement that the institution will impose sanctions on students and employees for violating the institution's standards concerning drugs and alcohol, together with a description of those sanctions (which, under the Act, may include completion of an appropriate rehabilitation program and may also include expulsion, termination of employment, and referral for prosecution).

The Drug-Free Schools and Communities Act Amendments of 1989 also require that each institution biennially review its drug and alcohol abuse prevention program to assure its effectiveness, to implement any necessary changes, and to ensure that the sanctions for violation of the required standards are consistently enforced. The Department of Education's regulations implementing these requirements are published at 34 CFR Part 86.

As indicated in more detail in Part VI, the majority of law schools rely on their parent universities to assume responsibility for compliance with the Drug Free Schools and Community

35. This section of the Report draws substantially upon material provided by the National Association of College and University Attorneys.

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Act. It is extremely important, however, that law schools without university affiliations assure that they are in compliance with these requirements. Failure to comply may jeopardize the school's rights to receive federal funds and, most significantly, to participate in federally guaranteed student loan programs.

The Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4304, requires all recipients of federal grants, or federal contracts valued at \$25,000 or more, to certify that they maintain as a drug-free workplace any area of the institution where the grant or contract work is performed. The Act applies to grants and contracts entered into after March 18, 1989, and a certification of compliance with the Drug-Free Workplace Act will ordinarily be required in conjunction with any federal grant or contract. The requirements of this Act are generally similar to those of the Drug-Free Schools and Communities Act Amendments of 1989, but specific details concerning compliance requirements should be obtained from the federal agency administering the particular grant or contract.

Federal legislative protection for disabled persons may also affect the actions that law schools may take with respect to faculty and students who suffer from dependence upon alcohol or drugs. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, prohibits discrimination against otherwise qualified disabled individuals in programs receiving federal assistance. Under the Americans with Disabilities Act of 1990 (hereinafter ADA), 42 U.S.C. Section 12101 *et seq.*, the protection for disabled persons has been considerably expanded to include (in Title I) a prohibition of discrimination in employment against "a qualified individual with a disability." Section 102(a), 42 U.S.C. Section 12112(a). Under Title II of the ADA, a "qualified individual with a disability" may not be discriminated against by a public entity; nor may such a person be excluded from participation in or denied the benefits of a public entity's services, programs or activities because of the person's disabilities. Section 202, 42 U.S.C. Section 12132.

The term "disability" under the ADA is generally defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. Section 12102. The implementing regulations make it clear that "physical or mental impairment" includes drug addiction or alcoholism, but excludes "psychoactive substance use disorders resulting from current illegal use of drugs". E.g., 28 CFR Section 35.104.

The ADA contains more specific treatment of drug use. Section 510, 42 U.S.C. Section 12210, states that the term "individual with a disability" does not include "an individual who is currently engaging in the illegal use of drugs". The section goes on to provide, however, that individuals who have successfully completed supervised drug rehabilitation programs, or who are participating in supervised rehabilitation programs, and who are not currently engaged in the illegal use of drugs are not excluded from the definition of "individuals with a disability." Thus, while the ADA does not prohibit discrimination based upon an individual's current illegal use of drugs, an individual who is participating in or has successfully completed a supervised drug rehabilitation program is generally protected by the ADA. See, e.g., 28 CFR Section 35.131.

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There is no similar exclusion for alcoholism. Thus impairment caused by use of alcohol ordinarily will be considered a disability within the ADA and the Rehabilitation Act of 1973. The primary question with respect to alcoholism under those acts is whether, despite the effects of alcohol use, the individual is "qualified" for employment ("can perform the essential functions of the employment position" -- 42 U.S.C. Section 12111) or "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities" 42 U.S.C. Section 12115.

Although the ADA thus provides some protection against discrimination based upon alcoholism or past use of illegal drugs, the ADA clearly authorizes covered entities to prohibit the illegal use of drugs and the use of alcohol in the workplace, and to require employees to conform to the requirements established by the Drug-Free Workplace Act of 1988. 42 U.S.C. Section 12114(c). That same section of the ADA provides that a covered entity "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory job performance or behavior is related to the drug use or alcoholism of such employee"

Various provisions of the ADA indicate that an entity may institute reasonable policies or procedures, including drug testing, to assure that an individual who had completed or was participating in a drug rehabilitation program is no longer engaging in the illegal use of drugs. Beyond that, the ADA is neutral on the issue of drug testing, specifically providing that the Act shall not otherwise "be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs." 42 U.S.C. Section 12210.

Finally, and of particular relevance to law schools and law students, the ADA may possibly require modification or elimination of some of the questions that bar admission authorities currently ask applicants for admission to the bar.³⁶ Late in 1991 a public interest group petitioned the District of Columbia Court of Appeals to force the bar admission committee for the District of Columbia to cease using or modify three questions on the D.C. bar application form, including Question 27: "Have you ever been addicted to or treated for, or counseled concerning the use of any drug, including alcohol?"³⁷ The argument, in part, was that the ADA prohibits government licensing bodies, including bar admission authorities, from inquiring whether an individual has a disability or a history of disability. In response to that challenge, the D.C. Court of Appeals issued an internal directive to the Committee on Admissions ordering that any questions concerning treatment of or counseling for alcohol or drug use or addiction be limited to a period of five years before the date of the application.³⁸

36. There is authority squarely holding that the A.D.A. applies to state bar examiners. *D'Amico v. New York Board of Law Examiners*, 813 F. Supp. 217 (W.D.N.Y. 1993).

37. The description of this challenge is taken from Charles L. Reischel, "The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health," 61 *The Bar Examiner* 10 (No. 3, August 1992).

38. The court also ordered the complete elimination of any question concerning prior treatment or counseling for mental, emotional or nervous disorders or conditions, and it limited questions concerning institutionalization for

The application of the Americans with Disabilities Act is beyond the scope of the Committee's charge and expertise, and thus the Committee offers no specific judgment concerning the application of the ADA either to law schools or to the bar admission process. The D.C. Court of Appeals' internal directive is not an interpretation by that court of the ADA. Rather, it must be viewed as a policy judgment by that court concerning the appropriate nature of inquiries in the bar admission process, and we have no basis for inferring the extent to which the court may have believed that its policy determination was compelled by the ADA. At a minimum, however, it seems clear that there are legitimate questions concerning whether the ADA applies to the bar admission process and, if so, whether and to what extent questions concerning an applicant's past treatment or counseling for substance abuse are permissible under the ADA. Law schools should monitor this situation as court decisions and regulations continue to interpret the ADA.

VI. EXISTING LAW SCHOOL POLICIES AND PRACTICES CONCERNING SUBSTANCE ABUSE -- IN GENERAL

In the Law School Administrators Survey, all but 6 of the 121 responding schools reported that either the law school or its parent university had a substance abuse policy that applied to law students. However, only 25 of the 107 university-affiliated law schools had substance abuse policies specifically tailored to the law school. (See Appendix A at 3.) Thus over three-quarters of the university-affiliated law schools rely on the substance abuse policy promulgated by the university to which they are affiliated.

In response to a separate request by the Committee, early in 1991 we received copies of substance abuse policies from 105 institutions. Consistent with the results of the Law School Administrators Survey, in the vast majority of cases the policies submitted were university policies rather than ones developed specifically for the law school. The format and content of the policies varied substantially. For example, 12 schools submitted policies that were extremely short -- sometimes less than a page in length. Despite the variations, a review of the policies permits some generalizations and offers some instructive examples.

The first portion of this part of the Report discusses the informational sections of the policies. In these sections, the policies describe the health risks of and legal sanctions for substance abuse. The second segment addresses the portions of the policies that describe the institution's program to combat substance abuse. The program components include education, counseling, the disciplinary system, and publicity for the school's substance abuse program. The third portion of this part discusses the reviewed policies' compliance with pertinent federal legislation. Throughout this part of the Report, reference is made to "Figures" containing examples of law school policies or materials that law schools distribute to students. Those figures are reproduced at the end of this part of the Report.

such conditions to the period of five years prior to the application.

A. General Information About Substance Abuse

Health risks. Most of the policies contain a relatively detailed description of the health risks posed by substance abuse. Seventeen schools incorporated a chart on substance abuse into their policies. **Figure 1** is a copy of that chart, which any school is free to incorporate into its own policy on substance abuse.

Only one policy submitted, that of Albany Law School, discusses the impact of these health risks on the legal profession. We are informed that, as part of the Legal Profession course at Albany, students receive excerpts from several articles discussing that impact. For example, the distributed materials include an article by John Keegan (a member of the ABA Commission on Impaired Attorneys) which states:

Alcohol and drug abuse have had a profound impact on our disciplinary system. Unfortunately, in many instances the disciplinary agencies do not look behind the violation to determine the core cause. But when they do investigate, they find that the culprit in more than 50 percent of the cases turns out to be alcohol and drug abuse.

For example, the figure reported by one disciplinary agency in New York was 65%. And, an in-house survey of major cases in a New England state revealed that each and every one of them was drug or alcohol related.³⁹

It seems useful to distribute this type of data to law students. The statistics serve as an attention-getter, and they also explain why avoiding substance abuse should be a special concern for anyone planning to enter the legal profession.

Legal sanctions. The schools have generally done a good job of describing the legal sanctions in their policies. Most policies are content to summarize the federal and state penalties. One policy also mentions the sanctions in a number of foreign countries, and 17 schools allude to sanctions under local municipal ordinances.

We doubt that it will prove effective to try to scare law students into avoiding substance abuse. For that reason, the treatment of legal sanctions in most existing policies is probably more than adequate. Seventeen schools abbreviated their discussion of sanctions by incorporating a chart from the Code of Federal Regulations into their policies. **Figure 2** is a copy of that chart. Schools may wish to include this or a similar chart in their own substance abuse policy statement.

B. Programs Designed to Combat Substance Abuse

Educational Programs. It is clear from the university policies that many universities have

39. John W. Keegan, "The Guiding Principles", 15 Bar Leader No. 6, 12 (Jan./Feb. 1991)

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well-organized educational programs focused on substance abuse. At one school, a substance abuse educational program is part of the orientation for all freshmen in the undergraduate school. Another institution includes the program in its Freshman Focus. A third sponsors an Alcohol and Substance Abuse Awareness Week. At still another school, the University Health Center periodically offers sessions devoted to substance abuse.

A few law schools have undertaken modest efforts in this direction. The materials submitted by Albany, Dickinson, and Fordham indicate that they include a discussion of substance abuse problems in the regular Legal Profession or Professional Responsibility course. Other schools, such as New England School of Law, cover the topic in their orientation for first-year law students. In the Law School Administrators Survey, however, only 24.4% of the respondents indicated that they cover the topic of substance abuse during orientation. (See Appendix A at 4.) Some schools make literature on substance abuse available to their students. For example, Western New England distributes a bibliography of references on substance abuse to all its law students. Toledo has established a lending library of such materials for its law students.

Law schools can obviously do much more in the area of preventative education. They could do a better job of publicizing the educational offerings available to all university students, and they could develop more in-house programs. The Law School Administrators Survey found that only 28.3% of the responding schools offer educational programs on substance abuse.

Counseling and Treatment Programs. Most university and law school policies provide no information about financing counseling and treatment programs. However, some policies (such as Connecticut's) specifically indicate whether there is a fee at a particular treatment center. Albany Law School has arranged for free psychiatric counseling services for its students at Albany Medical College. Other policies, such as Duke's, indicate the extent to which treatment is covered by insurance available through the university. Law schools definitely should publicize the cost and financing terms for the treatment programs that they describe. Otherwise, a student who contacts a counseling or treatment center and learns at that point that the center's services are prohibitively expensive may, out of frustration, decide against seeking necessary counseling and treatment.

Most policies refer to two types of programs: off-campus programs and programs available on parts of the campus other than the law school. In the Law School Administrators Survey, referral to off-campus counseling was the most common type of assistance mentioned, but eight schools indicated they have their own arrangements for at least initial counseling on-site. At some schools, the counseling is the responsibility of an administrator, often an associate or assistant dean. At other schools, there is a mental health consultant who periodically visits the school.

The 1989 Report of the N.Y.U. Senate Commission on the Use and Abuse of Alcohol and Other Drugs Among Students stresses the need for decentralization of university counseling and treatment services. However, some students would probably prefer to obtain counseling off campus, or at least outside the law school, so as to reduce the likelihood that other law students will learn of the student's substance abuse problem. Thus whether it is best to provide

counseling on-site at the law school or through some centralized counseling facility normally should be determined by the context and resources of a particular institution.⁴⁰

Confidentiality for Counseling and Treatment Programs. For the most part, the confidentiality sections of the law school substance abuse policies are disappointing. Perhaps the most disappointing fact is that 39 of the policies say absolutely nothing about confidentiality of counseling or treatment. On the other hand, some policies are explicit concerning the lack of confidentiality. One policy flatly declares that if a law student's substance abuse results in reprimand, suspension, or expulsion, the misconduct will be "reported to bar authorities." Another policy states that "violations of the Law School's substance abuse policy could reflect negatively on a law student's character and result in denial of admission to the Bar in some states." The policy at another school goes into greater detail:

Every student desiring admission to the New Hampshire Bar (as well as other state bars) must be approved by the Committee on Character and Fitness. In New Hampshire, the Law Center is asked whether school records show anything adverse to the candidate's honesty, integrity or general conduct; whether she was disciplined at all while in attendance; and to state any factor unfavorable to the applicant which the committee should know in connection with its duty to determine whether the applicant is worthy of the highest trust and confidence. Chronic abuse of illicit drugs and/or alcohol while in attendance at law school may well lead to a negative assessment of the candidate, jeopardizing her admission to the bar and ability to practice her profession. In addition, some states (not NH) specifically ask whether a student is addicted to drug and/or alcohol.

At the other end of the spectrum, 46 policies contain broad assurances that the student can obtain confidential assistance. One policy qualifies the assurance of confidentiality by adding "except as required by law." The following assurance, set out in another school's policy, is one of the most sweeping:

The Counseling Center maintains strict confidentiality of records and counseling relationships. No information regarding a counseling relationship is shared with anyone inside or outside the University unless a written release to do so is provided by the . . . student.

Section IV and Appendix D of this Report discuss the extent to which federal and state law accord legal protection to the confidentiality of substance abuse programs. Read literally, the above assurance overstates the extent to which the law of privilege protects the information in question. It also ignores the fact that many bar admission authorities ask bar applicants or their law schools for information concerning the applicant's substance abuse or treatment for

40. Of course, law schools that are physically distant from their central campus would need to provide counseling on-site. For instance, McGeorge Law School is located in downtown Sacramento while the principal campus of its affiliated university, the University of the Pacific, is in Stockton. Understandably, McGeorge has its own counseling service for its law students.

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substance abuse. Thus an assurance as sweeping as the one quoted above is potentially misleading. Perhaps worse still, if law students recognize the overstatement, they may adopt a generally skeptical attitude toward the law school's substance abuse program.

In the middle of the spectrum, there are a few policies that attempt to describe accurately the confidentiality of substance abuse counseling and treatment. For example, the policies submitted by Albany, University of California at Davis, North Dakota and Tulsa contain assurances for the confidentiality of hospital and psychiatric treatment protected by a medical privilege. More importantly, the Albany and Detroit policies attempt to define the degree of confidentiality that the State Bar will accord. In the Albany Legal Profession course, students receive both a description of the New York State Bar's Lawyer Assistance Program and a copy of New York State Bar Ethics Opinion 531, which states that members of lawyer assistance committees who learn of professional misconduct by attorneys in the course of their work with the LAP are not obligated to report that misconduct to bar disciplinary authorities. The students are told that they can avail themselves of the Lawyer Assistance Program and that their revelations to the program are then confidential under the opinion. Detroit's policy includes the following statement:

Any student who believes that he/she might have an alcohol/substance abuse problem is encouraged to utilize the State Bar of Michigan Lawyers and Judges Counselling Program for confidential assistance

Law schools should consider including such information in their policies if they are situated in a jurisdiction where the State Bar has instituted a confidential program and made it available to law students as well as practicing attorneys.

Disciplinary Sanctions. Most policies merely state that if the student commits a disciplinary offense involving drugs or alcohol, the student can be subjected to the normal range of sanctions under the university disciplinary system. However, there are some innovative policies.

To begin with, several policies mention different sanctions tailored to substance abuse. For example, the Nebraska policy states that a behavioral requirement can be imposed as a sanction. The Syracuse policy indicates that the potential sanctions include mandatory participation in a treatment program. The Oklahoma City policy expressly states that the student can be required to submit to periodic drug screening. After listing the obvious sanctions such as suspension and expulsion, Mississippi's policy reserves the university's right to impose "creative sanctions" specially suited to substance abuse.

Other policies indicate that the sanctions will "normally" or "ordinarily" be imposed for specified substance abuse offenses. The Alabama policy states that, for an initial possessory offense, a student will usually be referred to a rehabilitation program. More serious offenses often lead to more substantial sanctions. Thus, for example, the Loyola (New Orleans) and Oklahoma City policies indicate that dismissal is typically the appropriate sanction when the student engages in drug trafficking on campus. North Dakota's policy states that dismissal is the

sanction for the illegal sale, distribution, or manufacture of illicit drugs on campus.

Some schools (such as Alabama, California Western, Capital, Duke, Pepperdine, Southern Illinois, and Suffolk) have adopted a system of graduated sanctions. We have included copies of Capital's scheme of sanctions (**Figure 3**) and Duke's system for alcohol offenses (**Figure 4**). Every school may not wish to develop a set of graduated sanctions. However, such a system can be a way of sending students a message that the institution regards drug offenses more severely than alcohol offenses or that the institution finds drug trafficking more abhorrent than possession. A given institution might want to send one of those messages to its student body, and the adoption of these types of policies would help the institution convey that message.

Publicizing the Program. When asked if their law school or university has a substance abuse program, approximately one quarter (24.5%) of the students responding to the Law Student Survey indicated that their institution had a program. But over two-thirds (68.2%) of the students reported that they did not know whether such a program existed. (See Appendix B at 32.) Obviously, the campuses that do have substance abuse programs must do a better job of informing law students that such help is available. The high percentage of those who indicated they did not know whether a substance abuse program existed may be attributable to law schools often being self-contained and isolated. This results in law students not interacting with the rest of the campus and being unfamiliar with the resources available in the university generally.

C. Compliance with Federal Legislation

Section IV. of this Report describes the pertinent federal legislation. In the course of our research, we reviewed several memoranda on the legislation from the National Association of College and University Attorneys. One memorandum, entitled "Notes: NACUA Session on Drug Free Schools Act," states that the Act requires "individualized distribution" of the substance abuse policy. The memorandum takes that position that "[p]roviding notice that the policy/material can be picked up is not sufficient. This is one of the least flexible aspects" of the legislation.

On their face most policies submitted are silent on this aspect of compliance with the federal legislation. Two policies simply indicate that copies of those policies are to be made available to students and employees. Nine policies explicitly state that a copy is to be distributed to each student. In the Law School Administrators Survey, only 59.5% of the respondents indicated that they distribute a copy of the school's substance abuse policy to all students; even fewer (46.3%) responded that they furnish a copy to each faculty member. (See Appendix A at 3.)

Five institutions have developed forms for their employees to sign acknowledging receipt of a copy of the substance abuse policy, and one policy contains an analogous form for students. The use of such a form may facilitate any later disciplinary action against a student allegedly guilty of substance abuse, since it would be very difficult for a student who had signed the form to claim lack of notice of the school's policies. On balance, however, it is questionable whether the use of such a form is advisable. There is little to be gained from the use of the form, and

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there may be much to be lost. Even without the form, a student could rarely rely on lack of notice as a successful defense in a disciplinary action. But after the university requires the student to execute the form, the student may come to regard the university as an arm of law enforcement, and the student may be skeptical of the university's announced intent to assist students with substance abuse problems and consequently less inclined to seek counseling and treatment.

D. Conclusion

In sum, the record of the law school community in dealing with student substance abuse is mixed. At a small percentage of schools, the programs in place are as sophisticated as the programs the bar and medical colleges have developed for their constituents. At most schools, however, it would be more accurate to characterize the efforts as very modest. Many schools have been content to do little more than barely comply with federal legislation, and at some the programs may fall short of even the minimum federal standards. Overall, law schools do not appear to be attacking the problem of substance abuse as aggressively as either the bar or the medical colleges.

VII. EXISTING LAW SCHOOL POLICIES AND PRACTICES CONCERNING SUBSTANCE ABUSE BY FACULTY

Though much of the Committee's focus has centered around law students with substance abuse problems, the Committee's work would be incomplete without addressing substance abuse by faculty. This is especially so because both the Survey of Law School Administrators and the Law Student Survey confirm that law school faculty also suffer impairment and the consequences of chemical dependency and substance abuse. Twenty-six percent of the schools responding to the Law School Administrators Survey stated that, within the last five years, they have had faculty whom they considered impaired by alcohol or other drugs. At twenty-one of these schools, teaching performance was affected; at eighteen, the substance abuse impacted faculty members' other institutional responsibilities; and in fifteen schools scholarship suffered. Additionally, it was reported that at eighteen schools faculty members experienced related general health problems, and seventeen schools reported a negative impact on personal appearance.

Responses from law students about faculty were provocative. Twenty-one percent of the students who responded indicated that there were faculty members at their schools whom they considered impaired by alcohol or drugs. Most said that there were one or two such faculty; but 20% of those who believed that their school had impaired faculty considered three to five faculty to be impaired, and 7.2% asserted there were more than five. (See Appendix B at 31.) Although some of the reported student perceptions could be mistaken, it is highly unlikely that the collective observations of such a large number of law students would be grossly erroneous. Moreover, whether mistaken or not, student perceptions that the school has impaired faculty members may undermine the effectiveness of the school's commitment to deal with substance abuse.

How are the problems of faculty substance abuse being addressed by the law schools? Eighty-eight percent of the responding schools reported that either their law school or their university had taken the first step and had implemented a faculty substance abuse policy. (All of the 14 unaffiliated respondent schools in this group reported having such a policy.) Both the law school policies and the university-wide policies covered the following subjects, in descending order of frequency: possible disciplinary actions; counseling; assistance programs; substance abuse as a health issue; educational and/or awareness programs; wellness programs; and, with significantly less frequency, drug screening.⁴¹ Almost 94% of the respondents to the Law School Administrators Survey said that the policy allowed faculty to take leave to participate in a prescribed treatment program with the understanding that they could return after completing it. Only 46%, however, indicated that a copy of the policy is distributed to faculty. (Those schools that distribute a written substance abuse policy generally indicated doing so once a year.) Only 80% of faculty health plans cover extended treatment for substance abuse.

41. For detailed information on the percentages of responding schools whose substance abuse policies included each of the listed topics, see Appendix A, at 7-9.

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In some respects, law schools tend to address the problem of faculty substance abuse even less systematically than they do that of substance abuse by students. For example, law schools are less likely to have a designated administrator for faculty substance abuse problems than for abuse involving students. (Larger schools are more likely to have this designated administrator for faculty than are smaller institutions). At 66% of the schools that have a designated administrator for faculty substance abuse problems, it is the Dean; at 20% of the schools, it is the Associate Dean for Academic Affairs. (See Appendix A at 9.)

In response to other questions in the Law School Administrators Survey, over one-half of the schools indicated that alcohol is always or often served at faculty receptions, and 30% reported that it sometimes is. Eighty-three percent indicated that alcohol is served with varying degrees of frequency at joint student-faculty gatherings. Thirty-two percent reported, however, that this practice has decreased over the last ten years at faculty functions, and 36% reported a decrease at joint student-faculty affairs. Only a very small group reported an increase. (See Appendix A at 9-10.)

How did the responding law schools deal with cases of faculty substance abuse? Of the thirty schools that indicated that they had problems with impaired faculty, fourteen said that the law school had taken action in one case and four stated that the school had taken action in two cases. The most common form of action was informal intervention and counseling by a faculty member, dean, or other administrator, combined with suggested referral to counseling or treatment. Seven schools had used mandatory treatment. Three schools had employed early retirement. Only one school had resorted to disciplinary action, but at another school a faculty member's substance abuse problem became a factor in a tenure or promotion decision. There also is some suggestion in the responses that the use of illegal substances (especially cocaine) is considered more serious, and more likely to result in adverse action by the school, than is dependency or impairment resulting from a legal substance such as alcohol. (See Appendix A at 22-23.)

While some law schools recognize that impaired faculty need help and encourage them to seek counseling or treatment, a substantial number of schools do not follow through. Nine schools reported taking no action when confronted with an impaired faculty member. Some schools reported allowing the situations to resolve themselves without intervention, through retirement, general health failure, waiting for a faculty member's independent decision to seek treatment, or not renewing a faculty member's contract (though there was no report of termination for cause). All of these latter responses are contrary to the current weight of professional opinion as to the appropriate way to deal with a colleague in trouble. Professionals in the field of dependency treatment state that ordinarily neither punishment nor an approach of denial and avoidance is helpful. Admitting and identifying the problem, followed by some form of intervention and insistence on appropriate treatment for the impaired person, is the only approach that is both caring and effective.

Given the incidence of substance abuse among the bar, and the progressive nature of the disease, it is reasonable to assume that there are considerably more schools with one or two faculty who are impaired or at risk than the thirty that reported in the Law School Administrators

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Survey that they had had impaired faculty within the past five years. A number of law school faculty are probably in jeopardy of their health because of substance abuse even though they have not yet reached a point of manifest impairment. If the pattern observed in the practicing bar is replicated, these faculty members will continue to be at risk as the disease progresses and becomes more pervasive in their lives. Such persons are unlikely to get early treatment and help unless the law school is willing and able to take some constructive action, including intervening before the faculty member has reached the point of serious personal or professional difficulty.

In light of the statistics on substance abuse in the profession and the information obtained through the Committee's surveys, many more law schools should adopt an integrated model for dealing with faculty substance abuse. Such a model would have a substance abuse policy that is clearly and regularly communicated, includes provisions for appropriate leave for necessary treatment, and has a health care/insurance plan providing extended treatment when necessary.

Law schools responding to the Law School Administrators Survey indicated a willingness to adopt a more proactive stance. Respondents were asked what the policy should be for a faculty member who occasionally uses, is dependent on, or is impaired by alcohol, marijuana, cocaine, other illegal drugs, and prescription drugs. (See Appendix A at 28-35.) Eighty-seven percent of the responding schools thought no action should be taken for occasional use of alcohol, 31% felt the same about marijuana, 11% for cocaine, and 10% for other illegal drugs. On the other hand, with regard to a faculty member with a drug or alcohol dependence, less than 1% thought that no action was the appropriate response in any case except that of dependence upon prescription drugs, in which case about 8% thought no action was necessary. In the drug or alcohol dependence situation, twenty to twenty-seven percent felt that counseling or warning were appropriate depending on the substance, 46% to 56% felt required treatment was the proper response for such dependence, and a substantial group felt suspension during treatment or termination was appropriate. The law school respondents were most likely to choose suspension during treatment, or termination, as the appropriate institutional response in the cases of dependence on cocaine and other illegal drugs.

With regard to impaired faculty members, the results were similar, but there was a substantial shift in the responses from counseling or warning to required treatment with suspension during treatment. The number of respondents who considered termination the appropriate response also increased somewhat. In general, private and church-related schools took more severe positions than did public or non-church related institutions.

Overall, the data evidence a growing appreciation that more can be done proactively at the dependence stage before the person becomes impaired. When intervention occurs at earlier stages, the law school respondents indicate that warning, counseling, and treatment may suffice without job-related sanctions such as suspension or forced leaves. This approach is in line with the position taken by the American Bar Association Commission on Impaired Attorneys and the consensus of expert opinion in the fields of chemical dependency treatment and addictionology.

These responses suggest the desirability of closer cooperation between the law schools and lawyer assistance programs. Several deans reported (independent of the survey per se) that

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they have successfully employed the expertise of a lawyers assistance program in organizing and leading interventions for one or more law faculty. In such cases, the dean confidentially contacted the local lawyer assistance program for information about substance abuse, and received advice and help in managing individual faculty cases. As lawyers and judges who receive adequate and timely care are fully restored to personal and professional health, so are most faculty members.

From a more legalistic perspective, alcoholism and chemical dependency are covered as disabilities under both Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. Although those acts may not require special treatment for alcoholic or drug dependent parties who are unable to perform the duties of their jobs, the approach of intervention and treatment for the afflicted faculty member would most likely protect all parties involved while minimizing possible conflicts with these laws.

VIII. RECOMMENDATIONS

The preceding parts of this Report have argued that law schools should address the problems of substance abuse by students and faculty much more actively than most law schools have to date. This Part sets forth the Committee's specific recommendations concerning substance abuse programs for both law students and law faculty. The first section focuses on general recommendations for law school programs with particular emphasis on policies designed to serve the needs of students. The section includes recommendations for internal law school programs and external relations with the bar. The second section contains recommendations for programs specifically designed for law faculty.

As indicated in the Introduction to the Report, the Committee's recommendations are not intended to provide the basis for regulation by accrediting agencies. Rather, our recommendations are intended to provide assistance and advice to law schools in adopting and implementing substance abuse policies and programs. We reiterate our strong hope that every law school will adopt a comprehensive substance abuse policy, and that every school's policy will be thoughtfully tailored to the particular needs of that school and the context in which the school operates.

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A. Law School Programs for Law Students

1. Internal Law School Policies

RECOMMENDATION 1: Even if its affiliated university has a substance abuse policy, a law school should promulgate its own supplementary written policy. A review of the 105 substance abuse policies submitted to the Committee makes it evident that many law schools have not developed their own separate substance abuse policy. Rather, they rely exclusively on the policies promulgated by their affiliated university. In the Law School Administrators Survey, only 25 schools reported having policies in addition to those of their affiliated university.

A university policy could conceivably be so comprehensive and well-written that it obviates the need for a separate law school policy. For several reasons, however, the Committee believes that a law school at least should adopt its own supplementary policy. The existence of a separate law school policy sends the student body a message that the law school administration and faculty are concerned about the problem of substance abuse. Moreover, most university policies overlook issues that should be discussed in an ideal law school policy. For example, the law school policy should highlight the strong correlation between substance abuse by practicing lawyers and the likelihood that they will become involved in disciplinary proceedings. Law students also need a more detailed exposition of the confidentiality issue than is found in most university policies. In particular, a law school substance abuse policy should include a frank discussion of the use in the bar admission process of information concerning an applicant's past or present substance abuse.

Although it is not the Committee's intent to prescribe a model policy, a well-organized, comprehensive policy might include the following topics:

GENERAL INFORMATION ABOUT SUBSTANCE ABUSE

- Health risks
- Federal, state, and local sanctions

PROGRAMS DESIGNED TO COMBAT SUBSTANCE ABUSE

- Designation of coordinator
- Educational and wellness programs
- Early intervention
- Counseling and treatment programs
- Information regarding the cost and financing of such programs
- Confidentiality for counseling and treatment programs
- Disciplinary standards and sanctions

Recommendations 2-9 discuss essential factors that a school should consider in drafting or revising its own substance abuse policy.

RECOMMENDATION 2: The law school should designate at least one person as substance abuse coordinator and highly publicize that designation. A person with a substance abuse problem may be reluctant to seek help. Similarly, a person who fears that a peer has a substance abuse problem may be reticent to discuss those fears. In either case, if it is at all difficult for a person to contact a representative of the program, the person may resolve his or her doubt in favor of doing nothing. Moreover, it may be critical to contact the coordinator on short notice when a substance abuse problem creates a health emergency. Thus it is imperative that the identity of the program coordinator be a matter of common knowledge at the law school and that the coordinator be readily accessible.

Preferably, the designated coordinator should be neither a dean nor a member of the dean's immediate staff. The medical school experience suggests that students are far more likely to report a substance abuse problem to a designee who is not in the dean's office. In selecting the designee, the law school should consider the following factors, inter alia:

(a) Is this the same person who submits certification to the state bar board of examiners? In response to the Law School Administrators' Survey, several law school administrators commented that they sometimes found themselves in a dilemma because they both counseled students about substance abuse and signed the law school certifications to the bar admission authorities.

(b) Is this person covered by an existing state or federal privilege, such as the physician-patient privilege? Designating a person covered by such a privilege maximizes the possibility that the confidentiality of a student's counseling or treatment for substance abuse can be maintained. Given the state of evidentiary privileges in most jurisdictions, however, it is unlikely that any law faculty or staff member will be covered by a traditional evidentiary privilege. A more promising vehicle for clothing a law school substance abuse counselor with a privilege might be through establishing a relationship with a lawyer assistance program. If the jurisdiction's evidence law or the state bar treats the proceedings of lawyer assistance programs as confidential, it might be possible to make the law school coordinator an ex officio member of the local assistance program and thereby obtain the benefit of the confidentiality associated with those programs.

(c) Are students likely to be comfortable contacting the substance abuse coordinator and discussing difficult personal problems with that person? Again, as a practical matter, students may be more likely to come forward if the designated coordinator is a regular faculty or staff member outside the dean's office.

The Committee's review of the existing law school substance abuse policies indicates that many schools designate a single coordinator or contact person for the program. Some schools, particularly larger ones, may want to designate a team of program coordinators. Using a team can help spread the workload of the substance abuse program at a large school. Furthermore, using a team (including faculty or staff who are not part of the administration) and dividing

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functions among the team members may facilitate screening the administration from certain substance abuse information. If students realize that that information will be screened from the dean's office, they may be more willing to self-report their own substance abuse problems or report suspected substance abuse by other students.

RECOMMENDATION 3: The law school should institute an educational program about the consequences and treatment of substance abuse. If resources permit, the school should seriously consider also implementing a general wellness program.

The Law Student Survey indicates that there may be thousands of law students abusing alcohol or other substances. Moreover, because substance abuse is a progressive disease, those data understate the magnitude of the problem that the legal profession eventually will face. Many law students are at risk of substance abuse even though the symptoms will not become manifest until much later in their legal careers. These students may not presently abuse or be addicted or impaired, but they may turn to substance abuse as they encounter the increasing pressures of law practice. Since the symptoms of students at risk may not materialize until later, the law schools cannot be content to work only with students who are already addicted or impaired. Students at risk will benefit the most from assistance if they receive the assistance before the addiction or impairment stage.

At the very least, as a preventive measure a law school should have an educational program designed to combat substance abuse by law students. In the Committee's view, a law school should include education about substance abuse as part of the orientation program for first-year students (or early in the first semester) to alert them to the problem and the law school's concern. Other possible components of a comprehensive substance abuse education program might include:

- Integrating education about substance abuse into the curriculum as a component of various courses, including in particular those dealing with professional responsibility and ethics as well as practicums and clinical courses;
- Cooperating with local and state lawyer assistance programs in offering educational seminars to students about the problem;⁴² and
- Involving faculty and student bar associations in the planning and implementation of substance abuse programs, such as by asking the student bar to accept partial or full responsibility for organizing the orientation programs and later meetings or guest lectures.

A wellness program would also be desirable. As part of their orientation program for incoming students, many medical schools now devote time to discussing stress management and the maintenance of fitness and wellness in students' daily lives. For many medical students, a

42. Lawyer assistance programs are often eager to provide guest speakers for law school classes.

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wellness program involves changes in behavior and in coping mechanisms for handling stress. Law schools could profit from the positive medical school experience with wellness programs. The Committee realizes, however, that some law schools may lack the financial resources or the technical expertise needed to implement a comprehensive wellness program. If that is the case, the Committee recommends that the law school first concentrate its efforts on establishing a meaningful substance abuse education program. Law schools should be cognizant, however, of the potential resources for implementing wellness programs that may be available to the schools at little or no cost -- particularly resources within their affiliated universities. For example, members of university counseling center staffs may be willing to conduct a series of programs for law students on stress management.

RECOMMENDATION 4: The law school should be prepared to intervene early to assist students with substance abuse problems. In the case of some students, unfortunately, it is too late for preventive measures such as educational or wellness programs. It would, of course, be ideal if students recognized that they are coping poorly with stress and seek assistance before they become impaired. However, the impaired student often does not voluntarily seek help, and then detection and referral by classmates, friends, or faculty becomes essential. In order to facilitate detection and referral, the school's substance abuse education program should inform students and faculty of some of the most common signs of substance abuse. In addition to the more obvious behavioral symptoms, depression and a sudden, unexplained decline in academic performance may also be signs of substance abuse.

The concerned classmate or faculty member must know to whom to voice their concerns. Thus adequate publicity concerning the availability of professional substance abuse counseling is essential, and peer counseling programs (such as those developed at some medical schools) may be useful.

For the seriously impaired student, early intervention may be life saving. This intervention should be performed by individuals who are trained to protect the safety and welfare of the impaired student. Their training should include familiarization with all the available counseling and treatment resources. Recovering peers or colleagues commonly participate in this intervention encounter, along with the family and friends. The purpose of the intervention is to bring the individual to a recognition that a problem exists, to express a commitment to help, and to explain the evaluation and treatment resources available.

The substance abuse program coordinator(s) should plan in advance for interventions. Potential intervention group leaders should be identified, and specific procedures and protocols for intervention should be developed. Intervention must sometimes be undertaken on short notice in a crisis situation, and then it may be too late for planning.

RECOMMENDATION 5: Following intervention, a medical evaluation should be completed and the student should be advised regarding appropriate counseling and treatment. A professional evaluation should quickly follow intervention. Counseling and treatment programs may be costly, but they are critical to the outcome of this disease process. There are well recognized programs specifically designed for professionals. There are clinical facilities, inpatient as well as outpatient, for persons with substance abuse problems on a number of major

university campuses. State programs for impaired physicians and lawyers also can be of valuable assistance in identifying appropriate facilities.

At a minimum, the law school should assure that free, resident or non-resident, counseling services are available for students. These services often can be provided through existing university counseling resources, and comprehensive counseling services might be modeled after an Employee Assistance program. The school also may wish to consider establishing peer counseling systems and encouraging the formation of support groups.

For many persons with substance abuse problems, counseling is only the initial step on the road to recovery; active treatment by professionals with expertise in alcohol and drug programs is also necessary. Whenever feasible, law schools should assist law students with substance abuse problems in obtaining necessary treatment. Student health insurance policies ought to cover both inpatient and outpatient treatment. Inpatient programs vary widely, but a typical program may cost up to \$10,000 in the initial month. The average cost of a four-month inpatient program is approximately \$22,000. The school should endeavor to offer meaningful health insurance coverage to ensure that necessary treatment is accessible at a minimal cost. Although this expense is substantial, the experience of the medical profession demonstrates that the prospects for eventual recovery are excellent.

The law school also should have administrative policies that permit and encourage students to take medical leaves when necessary for more extended treatment. Students who enter treatment should not have to terminate their enrollment to do so; the lack of a leave policy creates another--and unnecessary--disincentive for the student considering treatment.

RECOMMENDATION 6: The law school should consider adopting an alcohol policy. The Law Student Survey indicates that, by a wide margin, alcohol is the substance most frequently abused by law students. Law school policies should reflect a realization of that fact. In August 1992, the American Council on Education released a White Paper entitled "Institutional Liability for Alcohol Consumption." Section VII of the White Paper contains a detailed discussion of university alcohol policies. Some of the issues that might be addressed in law school alcohol policy include:

- the kinds of law school events or functions at which it would or would not be permissible to serve alcohol;
- the types of alcohol that may be served (e.g., only beer and wine, or distilled spirits as well);
- any requirement for providing non-alcoholic alternatives;
- the basis of the availability of alcohol (e.g., should single price admissions with open bars be permitted); and
- the training of bartenders and other supervisory personnel to recognize and deal with

individuals who have over-consumed or who are on the verge of doing so.

RECOMMENDATION 7: Whatever disciplinary sanctions the law school adopts for substance abuse should be consistent with a disease model emphasizing counseling and treatment.

Because substance abuse is now widely recognized as a disease susceptible to successful treatment, the Committee recommends that law schools normally exhaust the counseling and treatment possibilities before invoking the disciplinary system. In general, the disciplinary system should be employed in substance abuse cases primarily for three purposes: (1) to reinforce the evaluation or treatment process (as by requiring counseling or treatment as a condition of continued enrollment); (2) to impose suspension pending necessary treatment in appropriate circumstances (such as when the student does not voluntarily apply for medical leave); and (3) to impose sanctions on students who refuse to participate in a treatment process, or who continue their substance abuse despite participation in treatment. Law schools should review existing disciplinary codes to assure that they provide the flexibility necessary for a treatment-centered approach to substance abuse.

RECOMMENDATION 8: The law school should highly publicize its substance abuse programs to students, faculty, and staff. Almost 66% of the respondents to the Law Student Survey indicated that they do not know whether their school has a substance abuse policy. (See Appendix B at 32.) Law schools should not only mention but highlight the program in their orientation for first-year students. During that orientation, students should receive detailed information about the educational, intervention, counseling, treatment, and disciplinary components of the program. Students should likewise be informed of the financial arrangements to pay for such components. To ensure compliance with applicable federal legislation, the school should distribute a copy of the university policy and its own supplementary policy to all students, faculty, and staff. In the case of students, the distribution should be on an annual basis.

RECOMMENDATION 9: The law school should review the Americans with Disabilities Act (ADA) to ensure that the school's policies and practices comply with the requirements of the Act. Under the ADA, alcoholism and at least some forms of chemical dependency are covered as disabilities. While the ADA does not require special treatment for alcoholics and chemically dependent persons who are unable to perform the duties of their jobs, an approach emphasizing counseling and treatment (such as that endorsed by the ABA Model Personnel Policy) is one which is most likely to benefit the affected faculty member and comply with legal requirements.⁴³

2. External Relations with the Bar

43. For a very helpful discussion of disabilities issues in the law school setting, see the Report of the AALS Special Committee on Disabilities Issues, reprinted in AALS, Proceedings of the 1992 Annual Meeting, pp. 293-406 (1993).

RECOMMENDATION 10: The law schools should consider coordinating their internal substance abuse programs with relevant lawyer assistance programs. The law school might arrange for a law school administrator or a faculty member to serve as a liaison member with the local or state lawyer assistance committee. Ideally, this person would be the coordinator of the law school's internal program.

RECOMMENDATION 11: Law schools should endeavor to persuade the relevant state bar admission authorities to agree that:

(1) the authorities will maintain the general confidentiality of substance abuse information divulged to them;

(2) any inquiries that bar admission authorities make concerning an applicant's history of substance abuse or treatment for substance abuse will be limited to reasonably recent events (such as over the past five years); and

(3) otherwise qualified applicants who are recovering from substance abuse will be admitted to practice.

As Part IV of the Committee's Report indicates, there is little likelihood that law schools will be able to assure students with substance abuse problems that information concerning their condition will not eventually become known to a bar admission authority. Even if the law school may be able to limit its obligation to disclose information concerning a student's condition and treatment in some manner, many students would have to self-disclose that information in response to questions asked on bar application forms. Moreover, bar admission authorities have a legitimate interest in protecting the public from the risk of attorneys impaired by the effects of substance abuse. Thus there is the dilemma framed by the bar admission authorities' legitimate need for information, on the one hand, and the risk that the fear of disclosure of this information to bar admission authorities will create a serious barrier to a student's seeking counseling and treatment for substance abuse.

In attempting to resolve this dilemma, the law schools can benefit from experience of the medical schools, which have worked closely with their state licensing agencies. The medical schools disclose information about their graduates' substance abuse problems to state programs for impaired physicians. However, these programs maintain the confidentiality of the information, and licensing agencies have assured the medical colleges that an otherwise qualified graduate will obtain licensure if he or she has successfully completed a rehabilitation program and is in recovery. Law schools should seek similar assurances from relevant bar admission authorities. A number of jurisdictions have already developed special guidelines and procedures, including conditional admission and probationary licenses, for bar applicants with substance abuse problems. Law schools should urge their state authorities to follow the example of these jurisdictions.

Law schools should urge relevant bar admission authorities to establish and publicize policies that will provide the type of assurances described above. In addition, bar admission

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authorities should be urged to give public assurances that any information they obtain concerning an applicant's substance abuse problem will be held in the strictest confidence, and that information that the bar examiners seek about an applicant's history of or treatment for substance abuse will be limited to relatively recent information. The combination of these policies, if well publicized, should reduce significantly the present disincentives to a student's disclosing and seeking treatment for his or her substance abuse problem.

Even if a state bar is unwilling to give a firm assurance that participants recovering from substance abuse problems will not be denied admission solely on that ground, the law schools should encourage the bar to formalize and publicize its policy for such applicants. Law students' uncertainty about the use of substance abuse by the state bar may deter some students from seeking necessary assistance, and the enunciation of a clear policy by the bar might eliminate some of that uncertainty.

RECOMMENDATION 12: At the national level, the Association of American Law Schools should cooperate with the American Bar Association Section of Legal Education and Admission to the Bar, and with the National Conference of Bar Examiners, to urge bar admission authorities to provide assurances that otherwise qualified applicants who are recovering from substance abuse will not be denied admission to practice.

Experience suggests that the most effective way to encourage change in the policies of bar admission authorities in each state may be through the cooperative efforts of the law schools whose students are the primary applicants for admission in that jurisdiction. It is important, however, that the efforts of the individual law schools in this regard be supported by concurrent efforts by the national organizations most directly concerned with legal education and admission to practice.

RECOMMENDATION 13: A law school should inform its students of the substance abuse policies of the bar examiners in the jurisdictions where the students most frequently apply. The Committee's research indicates that bar admission authorities in various jurisdictions have adopted different policies as to whether they seek information about an applicant's substance abuse and as to the use of that information. As previously stated, students' uncertainty about these policies sometimes deters students from obtaining necessary counseling and treatment. Law schools should collect information about the policies of the bar examiners in the states where their students most commonly apply and make that information available to their students.

B. Law School Programs for Faculty

Law schools must no longer ignore, deny or avoid the problem of faculty members impaired by substance abuse. When a faculty member is impaired, there are significant negative consequences for the students and for the law school: the quality of the education provided at the school is often lessened, and an impaired faculty member is unlikely to contribute significantly to scholarship, to public or university service, or to the life of the law school community. Moreover, ignoring the problems of substance abuse by faculty members sends entirely the wrong message to students concerning the appropriate response of members of the

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legal profession to substance abuse in the profession. Finally, on a humanitarian level, to ignore a colleague's substance abuse problem may be to pass up the last realistic opportunity the colleague has to avoid the personal and professional disasters that can come to those who are dependent upon alcohol or drugs.

The Committee's specific recommendations concerning law school policies and programs regarding substance abuse by faculty members are set forth below. They are presented in summary fashion because these recommendations are fundamentally similar to those that the Committee has made for policies directed at substance abuse by students.

RECOMMENDATION 14: The law school or affiliated University should have a written policy regarding faculty substance abuse. That written policy should adopt the general approach set forth in the ABA Model Personnel Policy and emphasize education, counseling, treatment, and rehabilitation.

RECOMMENDATION 15: The written faculty policy should be communicated on a regular basis to faculty members. It should be distributed more often than just at the time of the faculty member's appointment; ideally, it should be distributed to faculty annually.

RECOMMENDATION 16: The law school should have a plan for dealing with an impaired faculty member. This plan should be a subject of discussion between the dean and members of the faculty.

RECOMMENDATION 17: A person should be identified as responsible for implementing the faculty substance abuse policy. The school should decide whether that person should be the dean, an associate dean, or a faculty member. It may be preferable to have a faculty member serve as the person responsible for implementing the policy so as not to imply a disciplinary threat when the dean approaches a faculty member about a suspected substance abuse problem. The intervention may be more effective if it is initiated by a faculty colleague.

RECOMMENDATION 18: The plan in the law school should provide for early, informal intervention. Sources of assistance should be communicated to the impaired faculty member, and the treatment options should be brought clearly to his or her attention. The plan should include a follow-through so that the faculty member will get involved in a treatment program.

RECOMMENDATION 19: The health insurance program for law school faculty should be reviewed to ensure that it covers treatment of substance abuse problems. It is particularly important that the insurance provide substantial coverage for the expenses of extended treatment.

RECOMMENDATION 20: Disciplinary action should be employed only as a last resort in the plan, as a sanction to ensure the faculty member participates in a treatment program.

RECOMMENDATION 21: The law school should develop a close relationship with lawyer assistance programs that are available in the locale. These programs make available

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valuable services that law schools could use in planning and conducting both educational programs and interventions with impaired faculty.

C. Conclusion

The foregoing recommendations emerge from the more than two years that the Committee has spent studying the problem of substance abuse in law schools. It would certainly be an exaggeration to state that there is a substance abuse crisis in American law schools today. It also would be inaccurate to claim that the law schools are doing nothing about the problem. The information that we have gathered in our work, however, convinces us that the substance abuse problem in law schools is greater than many, if not most, law school administrators have acknowledged. Like the impaired person who refuses to confront his or her disease, many law schools are "in denial." For that reason, they have not done as much as they can or should to assist students and faculty afflicted by substance abuse.

We hope that this Report will motivate law schools to confront the problem. More specifically, we hope that the law schools will find our recommendations useful in helping the students and faculty who genuinely need their assistance.