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ARTICLE

THE RELATIONSHIP BETWEEN ATTORNEY DISCIPLINE AND ATTORNEY IMPAIRMENT: THE NEED FOR BETTER INFORMATION TO PROTECT CLIENTS AND TO HELP ATTORNEYS

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I. INTRODUCTION

In this brief essay I want to do two things. First, I want to bring to everyone's attention the disparity between the public conversation about the relationship between attorney discipline and attorney impairment and the available data on the relationship between attorney discipline and attorney impairment (which is quite limited), and thereby encourage people to be more circumspect when discussing the relationship between attorney discipline and attorney impairment. Second, I want to strongly encourage the National Organization of Bar Counsel (NOBC) to convene a task force to develop a consistent mechanism that can be implemented across a number of states for gathering information regarding the extent to which attorneys facing discipline also are dealing with some type of substance use and/or mental health impairment so that more accurate and consistent information can be reported publicly about the relationship between attorney discipline and attorney impairment. While there well may be a "problem" to be addressed in terms of the relationship between attorney impairment and attorney discipline, it is hard to know how best to address the "problem" when the scope of the "problem" is not well defined.

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II. THE DILEMMA

How many attorney discipline cases involve attorneys dealing with some type of substance use or mental health impairment? More precisely, how many attorneys who are facing discipline are also dealing with substance use issues or mental health issues that actually impair their ability to fulfill their professional obligations to their clients—to be zealous advocates and to help clients find creative solutions to their problems? The challenge with this set of questions is that we think we know the answers. We can point to any number of statements that appear to answer these questions. Here are some examples:

“A consultant to the State of California Committee on Alcohol Abuse has estimated that 50-60% of disciplinary problems are alcohol related. The Chairman of the New York State Bar Association’s Special Committee on Alcoholism and Drug Abuse has estimated that approximately 80% of disciplinary problems are related to alcohol abuse.”¹

“Surveys taken in New York and in California reveal that as many as fifty to seventy percent of all discipline cases involve alcoholism.”²

“In Oregon, over half of lawyer malpractice suits stem from substance abuse.”³

“The American Bar Association estimates that forty to sixty percent of attorney discipline cases involve substance abuse problems.”⁴

1. Susan E. Morehouse, *In Re Driscoll: Illinois' New Approach in the Discipline of Alcoholic Attorney Misconduct*, 31 DEPAUL L. REV. 433, 435 n.13 (1982) (citing Douglas Lavine, *Liquor and Lawyers*, N.Y. STATE BAR J. 289, 290-91 (1981)).

2. Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is it Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988) (citing STANDING COMM. ON BAR ACTIVITIES AND SERVICES, DIV. OF BAR SERVICES, ABA MAP PROGRAM: ALCOHOL AND DRUG ABUSE PROGRAMS FOR LAWYERS AND JUDGES, Tab 1 Introduction/Overview).

3. Patricia Sue Heil, *Tending the Bar in Texas: Alcoholism as A Mitigating Factor in Attorney Discipline*, 24 ST. MARY'S L. J. 1263, 1265 n.6 (1993) (citing letter from Don Muccigrosso [sic], Loss Prevention Att’y, Alcohol and Chemical Dependency Program, Prof. Liab. Fund, Or. State Bar, to Celene Greene, Executive Director, Or. State Bar (Apr. 1, 1988) (reporting Oregon survey found 62 percent of attorneys with discipline complaints filed against them had chemical dependency problems). Notably, other citations to Don Muccigrosso indicate that the Oregon survey showed that of one hundred lawyers admitted into the lawyer assistance program for alcohol or drug abuse, 61 percent had disciplinary complaints and 60 percent had malpractice suits filed against them. See Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial*, 31 CREIGHTON L. REV. 265, 269 (1997) (citing G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 L. & PSYCH. REV. 113, 118 (1992) (citing DON MUCCIGROSSO, OR. STATE BAR LIABILITY FUND, PROFILE OF LEGAL MALPRACTICE - A STATISTICAL STUDY OF THE DETERMINATIVE CHARACTERISTICS OF THE LAWYERS' PROFESSIONAL LIABILITY FUND (1981)).

4. Blane Workie, *Chemical Dependency and the Legal Profession: Should Addiction to Drugs and Alcohol Ward off Heavy Discipline*, 9 GEO. J. LEGAL ETHICS 1357, 1357 (1996) (citing Linda Himelstein, *Addiction to Legal Drugs*, LEGAL TIMES, Jan. 15, 1990, at 1).

“30% to 40% of the California bar’s discipline cases involve substance abuse in some way.”⁵

“Substance abuse plays a role in 40 percent to 70 percent of all disciplinary proceedings and malpractice actions against lawyers.”⁶

“At least one author suggests that 40 to 70 percent of disciplinary proceedings and malpractice claims against lawyers involve substance use or depression, and often both.”⁷

Notably, none of these quotes involve references to actual data. They frequently are described as estimates or involve citations to others who relied on estimates. In fact, it is very difficult to find specific information related to the relationship between attorney discipline and attorney impairment. I have only been able to find three states that have published information relating to the percentage of disciplined attorneys who had some type of substance use/addiction and/or mental health impairment—Illinois, Minnesota, and South Carolina.

The Illinois Attorney Registration and Discipline Commission (ARDC)⁸ has published Annual Reports since 1998 with fairly detailed information regarding the number of disciplined attorneys who had an impairment relating to substance use/addiction and/or mental health.⁹ The format for presenting this information was consistent in the reports from 1998 to 2007 and from 2013 to 2017, with impairment information provided in Chart 21D in the ARDC Annual Report.¹⁰ Over those fifteen years, an average of 28 percent of attorneys who faced discipline were indicated to be dealing with some type of impairment relating to substance use/addiction and/or mental health.¹¹

5. Fred C. Zacharias, *Reform or Professional Responsibility as Usual: Whither the Institutions of Regulation and Discipline?*, 2003 UNIV. ILL. L. REV. 1505, 1519 (2003) (citing Alex Gronke, *The State Assembly OKs Bar-Funded Rehab for Lawyers Health*, L.A. TIMES, at B8 (June 22, 2001)).

6. Martha Middleton, *Big Trouble: Experts Say Substance Abuse and Mental Health Issues are a Growing Problem for the Legal Profession*, 101 ABA J. 63, 64 (2015) (attributing statement to Patrick Krill).

7. NATIONAL TASK FORCE ON LAWYER WELL BEING, *THE PATH TO LAWYER WELL BEING*, 8 (Aug. 2017) (citing D. B. Marlowe, *Alcoholism, Symptoms, Causes & Treatments*, in *STRESS MANAGEMENT FOR LAWYERS* 104–130 (Amiram Elwork ed., 2d ed., 1997) (cited in MARJORIE A. SILVER, *NEW YORK STATE LAWYER ASSISTANT TRUST, SUBSTANCE ABUSE, STRESS, MENTAL HEALTH AND THE LEGAL PROFESSION* (2004)).

8. For information about the Illinois ARDC, see ILL. ATT’Y REGISTRATION & DISCIPLINARY COMM’N, <https://www.iardc.org/orginfohtml>.

9. The impairment information generally is reported in Chart 21D in these ARDC Annual Reports. For example, see ILL. ATT’Y REGISTRATION & DISCIPLINARY COMM’N, *ANNUAL REPORT OF 2017*, 39 chart 21D (2018).

10. See, e.g., *id.* For the intervening years, data was reported in a slightly different manner that precludes consistent comparisons with the preceding years and the following years.

11. Calculation of averages compiled by the author.

Please note that the indication of impairment in the Illinois ARDC Annual Reports is not reflective of a specific finding that the attorney was being disciplined because the impairment caused the conduct that resulted in disciplinary action. Rather, the indication reflects a correlation—among attorneys being disciplined an average of 28 percent were indicated to be dealing with some type of impairment. Please also note that this percentage may understate the number of disciplinary cases that involve some type of impairment as there is not a systemic effort to gather data relating to impairment. Thus, these cases reflect situations in which the impairment was raised by the attorney being disciplined or where the nature of the impairment was evident from the factual information generated in the disciplinary investigation even in the absence of a systemic effort to gather such information.

More recently, starting in 2014, the South Carolina Commission on Lawyer Conduct began reporting similar information in its Annual Report.¹² Over this six-year period, an average of 13.7 percent of the complaints that were not dismissed involved situations in which substance use and/or mental health impairments were brought to the attention of the Office of Disciplinary Counsel.¹³ Again, as noted above with respect to the Illinois data, the South Carolina data reflects only a correlation and may also understate the frequency with which attorney impairment in fact is correlated with attorney discipline.

Finally, starting with its Annual Report in 2018, the Lawyers Professional Responsibility Board in Minnesota started reporting some information about the number of attorneys on probation with some type of impairment.¹⁴ For the 2017 year, four of thirty-one new probations (12.9 percent) involved attorneys with some type of mental health issue and/or substance use issue.¹⁵ For the 2018 and 2019 years, roughly 28 percent of the new probations involved attorneys with some type of mental health issues and/or substance/alcohol use issue.¹⁶

12. See OFF. OF DISCIPLINARY COUNS., ANNUAL REPORT OF LAWYER DISCIPLINE IN SOUTH CAROLINA 2013–14, <https://www.sccourts.org/discCounsel/CLC2014.pdf>.

13. Calculation of averages compiled by the author.

14. See LAWYERS PRO. RESP. BD., ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD (2018), <http://lprb.mncourts.gov/AboutUs/Documents/2018%20Annual%20Report.pdf>.

15. *Id.* at 13.

16. See LAWYERS PRO. RESP. BD., ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD 13 (2020), <http://lprb.mncourts.gov/Pages/2020%20LPRB%20LPR%20Annual%20Report.pdf>. Note that Minnesota reports only the percentage of attorneys on probation who are dealing with an impairment, not the percentage of all attorneys who are disciplined who are dealing with an impairment. Moreover, the notation of an impairment is not derived from a systemic effort to gather this information, but as a result of self-reporting by attorneys as part of the disciplinary process. See E-mail from Keshini Ratnayake, Senior Assistant Dir., Off. of Lawyers Prof. Resp., to Jerome Organ, Bakken Professor of L. and Co-Dir. of the Holloran Ctr. for Ethical Leadership in the Professions, Univ. of St. Thomas School of L. (Aug. 17, 2020) (on file with author).

Notably, the percentages reflected in the data from Illinois, Minnesota, and South Carolina regarding attorney discipline cases that involved impairment associated with substance use and/or mental health are far lower than the percentages contained in the quotes set forth above.

This presents the dilemma that we face. There is a belief reflected in the quotes set forth above that a significant percentage of attorney discipline cases, if not a majority of attorney discipline cases, involve impairment of some sort, whether substance use, mental health, or both. But in the only three states that have collected and reported data, the data suggests a much smaller percentage of attorney discipline cases that implicate impairment associated with substance use and/or mental health.

Is there a way to reconcile these seemingly inconsistent story lines? There are a couple of possibilities. First, one way to think about reconciling these inconsistent data points involves a willingness to make some assumptions. While there is not a great deal of explicit information provided by Illinois, Minnesota, and South Carolina regarding what resulted in the notation of an impairment, it appears that impairments are noted only in the context in which the attorney facing discipline affirmatively disclosed or raised the issue of impairment or in situations in which the nature of the impairment is somehow a part of the factual record of the case.¹⁷ This could mean a significant underreporting of cases in which attorney impairment is noted, as there well may be cases in which the factual record didn't indicate impairment and the attorney chose not to bring forward evidence of an impairment.

Second, and relatedly, there may be a number of "signals" suggesting attorney impairment in attorney discipline cases in which the attorney does not raise or disclose an impairment, but the disciplinary officer has reason to believe that the attorney, in fact, is suffering from an impairment associated with substance use/addiction and/or mental health. This might give rise to estimates of attorney impairment in discipline cases that far exceed the available published data reflecting the prevalence of attorney impairment in discipline cases.

But frankly, this manifests the inconsistency between what "appears to be known" about the relationship between attorney impairment and attorney discipline and what is actually known and documented. What the available evidence tells us about the relationship between attorney impairment and attorney discipline suggests that those discussing these issues should be more measured or more circumspect with respect to how they discuss these issues. Until much better information is available and is collected in a consistent manner across a number of states, I would urge everyone to be more

17. Interview with Jim Grogan, Ill. Att'y Registration & Disciplinary Comm'n (Aug. 2018). See, e.g., OFF. OF DISCIPLINARY COUNS., *supra* note 12.

cautious when discussing the relationship between attorney discipline and attorney impairment.

III. A POSSIBLE SOLUTION

If we want to address the “problem” of attorney discipline cases in which the attorney is dealing with some type of impairment, we need more, better data about the relationship between attorney discipline and attorney impairment so that we can accurately assess and understand the scope of the “problem.” If we were to discover that attorney impairment does have a profound correlation with attorney discipline, as many believe and assert,¹⁸ then we should be doing more to support attorneys dealing with some type of substance use/addiction and/or mental health impairment to minimize the situations in which such impairment results in harm to the clients these lawyers serve.

Here, our desire to protect clients and our desire to support the well-being of lawyers both can be served by developing a different approach to assessing the extent to which attorneys facing discipline are dealing with some sort of impairment and by reporting what we learn about the relationship between attorney discipline and attorney impairment.

As early as twenty years ago, one author noted that “complete statistics on the part that impairment plays in lawyer disciplinary proceedings are not available because many state and county bar associations do not determine the causes for the lawyers’ infractions.”¹⁹ This remains the problem today. Neither state disciplinary offices nor professional liability insurers are consistently gathering and reporting the extent to which attorneys facing discipline and/or malpractice claims actually are dealing with impairments associated with substance use and/or mental health.²⁰ Indeed, it is not clear that even the three states with reported data—Illinois, Minnesota, and South Carolina—necessarily are compiling and reporting impairment information associated with discipline in consistent formats given that there is no systematic effort to gather the information.

18. See Morehouse, *supra* note 1; Heil, *supra* note 3; Allan, *supra* note 3; Workie, *supra* note 4; Zacharias, *supra* note 5; Middleton, *supra* note 6; NATIONAL TASK FORCE ON LAWYER WELL BEING, *supra* note 7.

19. George Edward Bailly, *Impairment, the Profession and Your Law Partner*, 15 ME. BAR J. 96, 97 (2000).

20. While this essay is focused primarily on the correlation between attorney discipline and attorney impairment, similar concerns permeate the malpractice insurance environment. See Workie, *supra* note 4; NATIONAL TASK FORCE ON LAWYER WELL BEING, *supra* note 7; see ILL. ATT’Y REGISTRATION & DISCIPLINARY COMM’N, *supra* note 8. I have had informal conversations on multiple occasions with attorneys working with professional liability insurers and have consistently heard that this information regarding attorney impairment is not gathered in the context of investigating and resolving malpractice insurance claims.

Given the increased attention paid to well-being in the legal profession and in law schools,²¹ it is a travesty that we have inconsistent data being publicly disseminated regarding the extent to which attorneys facing discipline have corresponding impairments associated with substance use and/or mental health. There is a problem when the public discourse suggests a very significant prevalence of impairment among attorneys facing discipline, but when the actual available data paints a different picture—with impairment present in only half as many cases or perhaps one-third as many cases as the public discourse suggests. While I am very open to suggestions regarding efficiency and functionality, as well as concerns about confidentiality and privacy, as a general matter, I think there should be some process implemented for consistently gathering information regarding impairments in all attorney discipline cases that are not dismissed.

In most states, a significant percentage of complaints are dismissed for a wide variety of reasons.²² There is no reason to spend time, money, and energy gathering information about impairments in cases that are dismissed. But for the subset of cases that proceed to further investigation, and particularly for those that result in some type of sanction or discipline, it would be very helpful if the office of disciplinary counsel for all states, or at least for the vast majority of states, would gather information on a consistent basis regarding the extent to which attorneys who were disciplined were dealing with some type of impairment.²³

Having a consistent approach to gathering and reporting this data would be helpful for three reasons. First, from the standpoint of protecting clients, if an attorney who is disciplined has an underlying impairment that contributed to the behavior resulting in the discipline, a failure to identify the underlying impairment and encourage the attorney to seek help to address the impairment means that the attorney likely remains more susceptible to repeating the behavior resulting in the discipline. Second, from the standpoint of promoting well-being in the profession, a failure to identify the underlying impairment and encourage the attorney to seek help to address the impairment means the disciplinary office is not promoting well-being as much as it could be. Third, by gathering on a consistent basis evidence of the extent to which an attorney who is disciplined has an underlying impairment, we would have much better data available about the

21. See NATIONAL TASK FORCE ON LAWYER WELL BEING, *supra* note 7; Jordana Alter Confino, *Where Are We on the Path to Law Student Well-Being?: Report on the ABA CoLAP Law Student Assistance Committee Law School Wellness Survey*, 68 J. LEGAL EDUC. 650 (2019).

22. See ABA STANDING COMM. ON PRO. REGUL., 2018 SURV. ON LAW. DISCIPLINE SYS. (S.O.L.D.), chart 1 pt. B (2020). In 2018, over 53,000 cases were investigated across the country, with nearly 32,000 being closed or dismissed after investigation—roughly 60 percent. *Id.*

23. From the standpoint of practicality and efficiency, it probably makes sense just to focus on those cases in which the attorney is charged after a probable cause determination. In 2018, this would have represented slightly over 6,000 cases across the country. See *id.*

scope of the “problem,” and would be much better situated to make informed policy decisions for addressing the “problem.”

The following two subsections discuss two different approaches to gathering more and better data about the extent to which attorneys facing discipline also are dealing with some type of substance use or mental health impairment.

A. Broader Gathering and Reporting of Information about Impairment that Disciplined Attorneys Voluntarily Disclose

One possibility would be for the office of disciplinary counsel in many more states to create a record or make a notation in every file involving attorney discipline indicating whether the factual record for the case contains evidence of substance use and/or mental health impairment or whether an attorney facing discipline affirmatively and voluntarily brought forward evidence of impairment associated with substance use and/or mental health as a factor for consideration in evaluating culpability or sanctions. This approach would generate a broader set of data to compare with the data from Illinois, Minnesota, and South Carolina. The ABA could support this endeavor by adding a question to the Survey on Lawyer Discipline Systems that addresses the extent to which attorneys facing discipline provided information about an impairment associated with substance use and/or mental health or had information about impairment presented as part of the factual information contained in the file for the case.

While this would be helpful information in the sense that the “sample” would represent a broader number of states, it still would be incomplete information and might continue to foster underreporting for the reasons noted in the discussion above. For example, there may well be situations in which an attorney is dealing with an impairment that has been a contributing factor in the allegations set forth in the complaint that gave rise to discipline, but in which the attorney still is in denial about the impairment or is not interested in publicly acknowledging the impairment in the context of the disciplinary proceeding. If a state office of disciplinary counsel only gathers information about impairment that has been voluntarily shared by attorneys facing discipline, these situations in which the attorney is in denial or is disinterested in acknowledging the impairment would not be captured. This not only would mean an underreporting of impairment associated with disciplined attorneys, it also would mean that the undisclosed impairment is likely to continue to manifest itself in circumstances that may result in further discipline. If the disciplinary process is supposed to both sanction and remediate the problematic behavior, the failure to affirmatively seek out information about possible impairments in cases that have resulted in attorney discipline likely will result in continued underre-

porting of impairments and may result in future problems that give rise to additional complaints against the disciplined attorney.²⁴

If a state office of disciplinary counsel were to embrace Recommendation 22.4 from *The Path to Lawyer Well Being* and decide to offer a diversion program for those attorneys facing discipline who are dealing with some type of impairment, it would need to have a mechanism for gathering information regarding eligibility for the diversion program.²⁵ The existence of the diversion program might provide a sufficient incentive for attorneys facing discipline to self-disclose the issue of impairment associated with substance use and/or mental health. Thus, one informational benefit of a diversion program could be that the existence of the diversion program might reduce underreporting in a system in which information is gathered only when voluntarily disclosed by the attorneys facing discipline.

A more widely adopted system of gathering and reporting information about attorney impairment that attorneys facing discipline voluntarily disclose in the context of attorney discipline would provide a much larger sample from which to assess the extent to which attorneys facing discipline present issues associated with substance use and/or mental health impairment. Nonetheless, such a voluntary system of gathering and reporting data still risks underreporting the extent to which attorneys facing discipline are dealing with some type of impairment.

B. Affirmatively Assessing the Extent to which Attorneys Facing Discipline are Dealing with an Impairment

Accordingly, I would suggest the creation of an NOBC Task Force that could work specifically on developing the parameters for implementing an assessment process for attorneys who are charged after a probable cause determination. This subset of attorneys (roughly 3,000–6,000 in recent years), who have been charged after a probable cause determination, represent a subset who merit particular attention.²⁶

24. One worthwhile research project might be to evaluate the extent to which repeat offenders in the disciplinary process might be dealing with an impairment that was not disclosed and addressed in the initial disciplinary proceeding.

25. Recommendation 22.4 in *The Path to Lawyer Well Being* states “that regulators adopt alternatives to formal disciplinary proceedings that rehabilitate lawyers with impairments. Diversion programs are one such alternative, and they have a direct and positive impact on lawyer well-being. Diversion programs address minor lawyer misconduct that often features an underlying mental health or substance use disorder.” See NATIONAL TASK FORCE ON LAWYER WELL BEING, *supra* note 7, at 29.

26. Compare STANDING COMM. ON PRO. DISCIPLINE OF THE ABA CTR. FOR PRO. RESP., 2016 SURVEY ON LAWYER DISCIPLINE SYSTEMS chart 1 pt. A (2018) (showing that 3,017 lawyers were charged after a probable cause determination across all reporting jurisdictions), and STANDING COMM. ON PRO. DISCIPLINE OF THE ABA CTR. FOR PRO. RESP., 2017 SURVEY ON LAWYER DISCIPLINE SYSTEMS chart 1 pt. A (2019) (showing that 6,033 lawyers were charged after a probable cause determination across all jurisdictions).

As part of the disciplinary process, those who are charged after a probable cause determination could be invited to share information about possible substance use and/or mental health impairments, but also could be asked to go through an assessment process using screening resources to identify possible substance use/addiction and/or mental health impairments that merit attention for the health of the attorney and for the protection of clients. This type of assessment process might give rise to confidentiality or privacy concerns and would need to be designed to be efficient and functional so that it does not result in an undue burden on the lawyers or the office of disciplinary counsel. That is why I am recommending an NOBC Task Force to develop the parameters for this type of impairment assessment process for lawyers who have claims against them that have advanced through the disciplinary process to the point of charges having been filed after a probable cause determination. Those who have been in the trenches and understand the nuances of the disciplinary process are best situated to think through in a circumspect manner all of the potential challenges that would need to be navigated in designing and implementing such an impairment assessment process.

The benefit of this process is that it would provide the most accurate picture of the extent to which attorneys facing discipline have an underlying impairment associated with substance use and/or mental health. While this process would not be foolproof, it would be much more likely to constrain underreporting and would assure that mechanisms used across states are the same. This would mean that the data generated from this process likely would be more accurate and more consistent than data generated in a voluntary reporting system.

This essay is not intended to provide a specific solution. I leave it to the experienced attorneys in the NOBC, who understand the nuances of the disciplinary process, to identify the appropriate point in time for implementing an “impairment assessment” process in a way that addresses possible issues of confidentiality, privacy, effectiveness, and functionality. I also leave it to the NOBC to work with psychologists and others associated with the ABA Commission on Lawyer Assistance Programs and state lawyer assistance programs to identify the appropriate assessment resources that could be utilized in this “impairment assessment” process.

I am well aware that Lawyer Assistance Programs generally do not want to be affiliated in any way with state disciplinary offices because the Lawyer Assistance Programs do not want to discourage lawyers from seeking assistance due to concerns about lack of confidentiality or possible discipline. Those concerns should not be implicated in this context as the CoLAP personnel are simply consulting with the NOBC Task Force regarding appropriate assessments. In addition, the nature of the referral process here is completely different, in that it is the disciplinary offices referring

impaired lawyers to the lawyers' assistance programs for further assistance.²⁷

IV. CONCLUSION

I appreciate that there may be many challenges to successfully developing and implementing the type of impairment assessment process contemplated in this essay. That is why I hope the NOBC will appoint a task force to develop a workable approach that addresses the challenges.

If, as many believe, attorneys dealing with impairments are more likely to be involved in attorney discipline cases, then there are many clients who would be better protected if such an impairment assessment process were in place in the vast majority of states and there are many lawyers who would be aided in seeking the help they need to address an impairment associated with substance use or mental health if such an impairment assessment process were in place.

But the simple reality is that we need much better information to understand the scope of the problem before we can figure out the best approach to addressing the problem. Even without an NOBC Task Force, there is no reason that the state offices of disciplinary counsel could not be working purposefully to gather and report information about impairment associated with substance use or mental health that attorneys facing discipline voluntarily disclose or that is contained within the factual information that is part of the case file. There also is no reason that the ABA Survey on Lawyer Discipline Systems could not add a question to the survey to prompt gathering and reporting of attorney impairment among those cases in which an attorney has been charged following a probable cause hearing.

It is my great hope that those involved in the NOBC will undertake to create a task force to explore ways to gather and report better information about the relationship between attorney discipline and attorney impairment. But in the absence of such an effort by the NOBC, it is my hope that a larger number of states will begin gathering and reporting information about the extent to which attorneys facing discipline also are dealing with some impairment associated with substance use and/or mental health, and that states will coordinate their efforts to generate data that is reported on a consistent basis across jurisdictions. Taking these steps to generate better information would allow us to better understand the scope of the problem and would position us to take appropriate steps to help lawyers, the legal profession, and the clients we serve.

27. Note that Recommendation 22.3 in *The Path to Lawyer Well Being* also recommends "one-way" reporting of concerns about impairment from regulators to lawyer assistance programs. See NATIONAL TASK FORCE ON LAWYER WELL BEING, *supra* note 7, at 29.