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ETHICS FOR IN HOUSE COUNSEL

**Recognizing & Addressing
Substance Abuse Issues in the
Workplace**

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Akron Bar Association

Lawyers Assistance Committee

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Ethics for In House Counsel

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1. Substance abuse in and outside the workplace affects an employer.

a. Substance abuse that affects workplace conduct is frequently in the news.

- Akron Beacon Journal, September 13, 2106. Three ranking officers on the Akron Police Department were charged with drunk driving over the past two months.
- Akron Beacon Journal, September 8, 2016. Local employers figuring out how to deal with Ohio’s new medical marijuana law and how it will impact the workplace.
- Cleveland Plain Dealer, July 22, 2015. An administrator in Cuyahoga County's Department of Health and Human Services, was fired for violating the county's drug-free workplace policy. She was asked to take a drug test after displaying signs of being under the influence of drugs or alcohol during a pre-disciplinary conference about an unrelated issue.

b. Annual Cost of Substance Abuse

- Abuse of tobacco, alcohol, and illicit drugs is costly to our country, exacting more than \$700 billion annually in costs related to crime, lost work productivity and health care.¹
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	Health Care	Overall
Tobacco	\$130 billion	\$295 billion
Alcohol	\$25 billion	\$224 billion
Illicit Drugs	\$11 billion	\$193 billion

¹ U.S. Department of Health and Human Services. *The Health Consequences of Smoking—50 Years of Progress. A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2014. www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf (PDF, 38MB)
Centers for Disease Control and Prevention. Excessive Drinking Costs U.S. \$223.5 Billion. www.cdc.gov/features/alcoholconsumption/. Updated April 17, 2014. Accessed March 9, 2015.
National Drug Intelligence Center. National Drug Threat Assessment. Washington, DC: United States Department of Justice; 2011. www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf (PDF, 8MB)

c. Some Workplace Statistics:

- 77% of illicit drug users work
- More than 60% of adults know someone who has reported to work under the influences of alcohol or other drugs.
- Alcohol and drug abuse has been estimated to cost American businesses roughly 81 billion dollars in lost productivity each year.
- Alcoholism is estimated to cause 500 million lost workdays annually.

1999 National Household Survey on Drug Abuse.
Rockville, MD: US Department of Health and Human Services

2. Prevalence of substance abuse in America.

a. Substance abuse in general.

- In 2007, an estimated 19.9 million Americans were current illicit drug users. The rate of current illicit drug use among Americans has remained stable since 2002, hovering around 8 percent.¹
- Nearly 58 million people, or more than one-fifth (23.3 percent) of the population age 12 and over, participated in binge drinking (having five or more drinks on the same occasion at least once in the past 30 days). About 17 million people or 6.9 percent of the population age 12 and over, reported heavy drinking (defined as binge drinking on at least 5 of the past 30 days).
- In 2007, an estimated 22.3 million persons (9.0 percent of the population age 12 and over) were classified with substance dependence or abuse in the past year. Of these, 15.5 million abused or were dependent on alcohol, 3.7 million abused or were dependent on illicit drugs, and 3.2 million abused or were dependent on both alcohol and illicit drugs.

b. Substance Use and Abuse among Workers in 2007

- Most drug users, binge and heavy drinkers, and people with substance use disorders are employed.
- *In 2007, of the 17.4 million current illicit drug users age 18 and over, 13.1 million (75.3 percent) were employed.*
- *Similarly, among 55.3 million adult binge drinkers, 44.0 million (79.4 percent) were employed, and among 16.4 million persons reporting heavy alcohol use, 13.1 million (79.6 percent) were employed.*

- Of the 20.4 million adults classified with substance dependence or abuse, 12.3 million (60.4 percent) were employed full-time.
- The prevalence of substance use among workers is lower than the prevalence among the unemployed, but a sizeable number of employed individuals use drugs and alcohol.
- In 2007, 8.4 percent of those employed full-time were current illicit drug users, and 8.8 percent reported heavy alcohol use.

Substance Abuse and Mental Health Services Administration, Office of Applied Studies (2008). Results from the 2007 National Survey on Drug Use and Health: National Findings (NSDUH Series H-34, DHHS Publication No. SMA 08-4343). Rockville, MD.

- Following years of declines, the percentage of employees in the combined U.S. workforce testing positive for drugs has steadily increased over the last three years to a 10-year high, according to an analysis of nearly 11 million workforce drug test results released today by Quest Diagnostics, the world's leading provider of diagnostic information services. The Quest Diagnostics Drug Testing Index™ examines illicit drug use by America's workforce based on an analysis of de-identified results of more than 9.5 million urine, 900,000 oral fluid, and 200,000 hair laboratory-based tests performed nationally by the company for employers in 2015.
- The percentage of positive drug tests among American workers has increased for the first time in more than a decade, fueled by a rise in marijuana and amphetamines use.
- Marijuana positivity increased 6.2 percent nationally in urine drug tests, but by double digits in Colorado and Washington
- Detection of marijuana continues to increase significantly in oral fluid testing.
- Methamphetamine positivity increased across all drug testing types.
- Oxycodone positivity declined for the second consecutive year due to a decrease in prescriptions being written.

[http://www.questdiagnostics.com/home/physicians/health-trends/drug-testing.html?utm_source=SilverpopMailing&utm_medium=email&utm_campaign=DTI%20Email%20\(3\)&utm_content=](http://www.questdiagnostics.com/home/physicians/health-trends/drug-testing.html?utm_source=SilverpopMailing&utm_medium=email&utm_campaign=DTI%20Email%20(3)&utm_content=)

c. Substance Use and Abuse in Particular Industries

- The major industry groups with the highest prevalence of illicit drug use in the past month were accommodations and food services and construction, and those

with the lowest prevalence were the utilities industry, educational services, and public administration.

- About 16.9 percent of workers in the accommodations and food services industry and 13.7 percent of workers in the construction industry reported illicit drug use in the past month.
- About 3.8 percent of workers in the utilities industry, 4.0 percent of workers in the educational services industry, and 4.1 percent of workers in the public administration industry reported past month illicit drug use.
- The major industry groups with the highest prevalence of heavy alcohol use were construction, arts, entertainment and recreation, and mining, and those with the lowest were health care and social assistance and educational services.
- About 15.9 percent of workers in the construction industry and 13.6 percent of workers in the arts, entertainment and recreation industry reported heavy alcohol use in the past month.
- In contrast, 4.0 percent of workers in the educational services industry and 4.3 percent of workers in the health care and social assistance industry reported heavy alcohol use.
- Likewise, workers in certain occupations may be more at risk for problems with substance use and abuse.
- Workers in food service and construction occupations showed a higher prevalence of illicit drug use during the past month than other occupational groups, while those in protective service, community and social services, and education and related services occupations showed the lowest prevalence rates.
- About 17.4 percent of food service workers and 15.1 percent of construction workers used illicit drugs in the past month.
- About 3.4 percent of protective service workers, 4.0 percent of community and social services workers, and 4.1 percent of education, training, and library workers used illicit drugs in the past month.
- Construction occupations and installation, maintenance, and repair occupations showed higher prevalence of heavy alcohol use in the past month, while community and social services occupations showed the lowest prevalence rates.
- About 17.8 percent of construction and extraction workers and 14.7 percent of installation, maintenance, and repair workers reported heavy alcohol use in the past month.

- In contrast, 2.8 percent of community and social services workers reported heavy alcohol use in the past month.

Larson, S.L., Eyerman, J., Foster, M.S., and Gfroerer, J.C. (2007). Worker Substance Use and Workplace Policies and Programs (DHHS Publication No. SMA 07-4273, Analytic Series A-29). Rockville, MD: Substance Abuse and Mental Health Services Administration, Office of Applied Studies.

- *Attorneys experience problematic drinking that is hazardous, harmful, or otherwise consistent with alcohol use disorders at a rate much higher than other populations. Among the participants 20.6% scored at a level consistent with problematic drinking, compared to 11.8% of a broad highly educated workforce.*

The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys
Journal of Addiction Medicine:
February 2016 - Volume 10 - Issue 1 - p 46–52

d. America’s Workplaces at Risk

- Substance use and abuse is not necessarily limited to after work hours, leading to the risk of impairment on the job.
- An estimated 3.1 percent of employed adults actually used illicit drugs before reporting to work or during work hours at least once in the past year, with about 2.9 percent working while under the influence of an illicit drug.
- An estimated 1.8 percent of employed adults consumed alcohol before coming to work, and 7.1 percent drank alcohol during the workday.
- An estimated 1.7 percent of employed adults worked while under the influence of alcohol, and 9.2 percent worked with a hangover in the past year.

Frone, M. R. (2006). Prevalence and distribution of illicit drug use in the workforce and in the workplace: Findings and implications from a U.S. national survey. *Journal of Applied Psychology*, 91, 856-869. Frone, M. R. (2006). Prevalence and distribution of alcohol use and impairment in the workplace: A U.S. national survey. *Journal of Studies on Alcohol*, 76, 147-156.

3. Signs of substance abuse.

a. What is addiction

- i. The inability to stop the use of the substance or behavior in question; the perceived inability to stay stopped.
- ii. Behavior characterized by: 1. Compulsion: an internal demand beyond intellectual resource or understanding; 2. Loss of control over amount consumed; 3. Continued use or activity despite adverse consequences.

b. Signs of a potential substance abuse issue.

- i. Coworker and client/customer complaints
- ii. Unexplained or unauthorized absences
- iii. Frequent tardiness
- iv. Excessive use of sick leave
- v. Patterns of absences – day before or day after weekends
- vi. Missed deadlines
- vii. Careless or sloppy work
- viii. Multiple excuses for missed deadlines or incomplete assignments
- ix. Relationships with coworkers or supervisors are strained
- x. Belligerent, argumentative, or short-tempered
- xi. Isolating – becoming a loner
- xii. Noticeable financial problems – asking for loans from other employees, phone calls at work from creditors, wage garnishments
- xiii. Changes in physical appearance and dress
- xiv. Staggering or unsteady gate
- xv. Avoiding contact with supervisors
- xvi. Sleeping at work

4. What action should be taken if an employee's behavior and appearance lead you to conclude an employee may be impaired?

a. Ask the employee to come to private area with another supervisor and/or security personnel.

- i. Inquire about the behavior, rumor or report
- ii. Inform the employee of your concerns
- iii. Get his or her explanation of what is going on
- iv. If you feel there is a problem, take appropriate action
- v. Encourage the employee to seek assistance and refer the employee to an EAP, if applicable
- vi. Place the employee on suspension until a formal investigation takes place

- vii. Arrange for the employee to be escorted home
- viii. Escort the employee to a collection for the drug test, if applicable
- ix. Assure employee of the confidentiality of the process

5. Ongoing performance problems that do not respond to normal supervisory actions may be signs of addiction and other personal problems and may require more intervention.

a. Meet with the employee to express concern about his/her performance

- i. State problem
- ii. Refer to documentation of specific events
- iii. Avoid over-generalizations
- iv. Ask for explanation
- v. Avoid getting involved in discussions of personal problems
- vi. Encourage the employee to acknowledge what you see as the problem
- vii. State what must be done to correct problem
- viii. Set time frame for performance improvement
- ix. Specify consequences if problem continues
- x. Encourage the employee to seek assistance, EAP or other medical treatment
- xi. Assure employee of the confidentiality of the process

b. After the initial meeting continue to monitor the employee:

- i. Continue feedback about behavior and performance
- ii. Encourage follow through with continuing care and support groups
- iii. Provide accurate performance appraisals and fair treatment

- iv. Provide time to adjust to doing things differently, but maintain performance standards
 - v. Respect their privacy
 - vi. Open lines of communication
- c. Supervisors should:**
- i. Emphasize that you only are concerned with work performance or conduct
 - ii. Have documentation of performance issues with you when you talk with the employee
 - iii. Remember that many problems get worse without assistance
 - iv. Emphasize that conversations with an EAP, if applicable, are confidential
 - v. Explain that an EAP, if applicable, is voluntary, exists to help the employee and is confidential.
 - vi. Call an EAP, if applicable, to discuss how to make a referral
- d. Supervisors should not:**
- i. Try to diagnose the problem
 - ii. Not moralize or pass judgment; limit comments to job performance and conduct issues only
 - iii. Discuss alcohol and drug use
 - iv. Be misled by sympathy-evoking tactics
 - v. Cover up the issue; it may enable the employee not to address the performance or substance abuse issues
 - vi. Make threats of personnel action that you do not intend to carry out

20 Questions: Are You An Alcoholic?

To answer this question, ask yourself the following questions and answer them as honestly as you can.

1. Do you lose time from work due to your drinking?
2. Is drinking making your home life unhappy?
3. Do you drink because you are shy with other people?
4. Is drinking affecting your reputation?
5. Have you ever felt remorse after drinking?
6. Have you gotten into financial difficulties as a result of your drinking?
7. Do you turn to lower companions and an inferior environment when drinking?
8. Does your drinking make you careless of your family's welfare?
9. Has your ambition decreased since drinking?
10. Do you crave a drink at a definite time daily?
11. Do you want a drink the next morning?
12. Does drinking cause you to have difficulty in sleeping?
13. Has your efficiency decreased since drinking?
14. Is drinking jeopardizing your job or business?
15. Do you drink to escape from worries or troubles?
16. Do you drink alone?
17. Have you ever had a complete loss of memory as a result of your drinking?
18. Has your physician ever treated you for drinking?
19. Do you drink to build up your self-confidence?
20. Have you ever been in a hospital or institution on account of drinking?

*If you have answered YES to any one of the questions, there is a definite warning that you may be an alcoholic.

*If you have answered YES to any two, the chances are that you are an alcoholic.

*If you have answered YES to three or more, you are definitely an alcoholic.

(The above Test Questions are used by Johns Hopkins University Hospital, Baltimore, Md., in deciding whether or not a patient is alcoholic.)