



# LOSING IT

*Ethical and Practical Issues in Temporary or Permanent*

*Loss of Professional Competency*

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### **I. CALIFORNIA RULES OF PROFESSIONAL CONDUCT**

#### **a. Rule 3-110 Failing to Act Competently**

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required. (emphasis added).

#### **b. Rule 3-700 Termination of Employment**

Termination of employment is mandatory if:

(1) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(2) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

### **II. CALIFORNIA BUSINESS AND PROFESSIONS CODE**

#### **a. Section 6180**

This section address the procedure for cessation of law practice and assumption by the court of the law practice of an attorney who has died, resigned or been rendered incompetent.

#### **b. Sections 6190-6109.6**

These sections affords the court jurisdiction of a person's law practice when the attorney is rendered incapacitated. The incapacity can be from any of the following: drugs, alcohol, physical or mental illness, or other infirmity rendering

the attorney unable to devote quality of service, time and attention to the client's matters.

c. Sections 6231 – 6238

These sections describe the attorney diversion and assistance program for attorneys impaired due to drugs, alcohol, or mental illness affecting competency.

### III. CASE LAW

- a. *In Re Hessinger & Assoc.* 192 B.R. 211 - A violation of Rule 3-110 occurred where attorneys placed their desire to maximize profits over duty to assist clients, and by using non-lawyers to prepare bankruptcy petitions.
- b. *Porter v. State Bar*, 52 Cal.3d 518 (1990) - Extreme emotional difficulties are a mitigating factor if a direct and proximate cause.
- c. *In re Naney*, 51 Cal.3d 186 (1990) – "The body of a person under heavy stress may become chemically unbalanced, resulting in impaired judgment and distortion of the person's value system."
- d. *Matter of Wells*, 4 Cal. State Bar Ct. Rptr. 896 (2006) Serious marital problems, hostility and racism by local population (So. Carolina) constituted mitigation.
- e. *In re Blum*, 4 Cal. State Bar Ct. Rptr. 403 (2002) Post-traumatic stress disorder from domestic abuse constituted mitigation.

### IV. ARTICLES

- a. AN INCONVENIENT TRUTH: THE NEED TO EDUCATE EMOTIONALLY COMPETENT LAWYERS 45 Creighton L. Rev. 827 - The ideal of a dispassionate analytical mind untainted by emotions and personal biases is a fiction. This article described four basic domains of emotional competency skills that are demanded by the practice of law, reflects on some of the costs we incur by marginalizing emotional competency in law school training and makes suggestions for moving away from the "flawed nineteenth century understanding of the human brain."
- b. AWARENESS AND ETHICS IN DISPUTE RESOLUTION AND LAW: WHY MINDFULNESS TENDS TO FOSTER ETHICAL BEHAVIOR, 50 S. Tex. L. Rev. 493 <http://www.cnn.com/2014/01/19/us/lawyer-suicides/> Mindfulness reduces conflict, can lead to better performance in negotiation, mediation and other lawyering activities because it allows lawyers to think more clearly, reduce aberrant distractions, and respond more skillfully in ways that further clients' interests and foster more ethical conduct.
- c. ABA ON COGNITIVE IMPAIRMENT IN LAWYERS [http://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/lscolap\\_working\\_paper\\_on\\_cognitive\\_imp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lscolap_working_paper_on_cognitive_imp.authcheckdam.pdf) This article

addresses basic causes of cognitive decline, a summary of how evaluations are conducted, and practical suggestions for dealing with the potentially impaired lawyer.

- d. HOW TO RECOGNIZE AND MANAGE COGNITIVE IMPAIRMENT IN AGING LAWYERS [http://www.americanbar.org/news/abanews/aba-news-archives/2013/09/how\\_to\\_recognizeand.html](http://www.americanbar.org/news/abanews/aba-news-archives/2013/09/how_to_recognizeand.html) “Deciding what to do when you notice that a lawyer or a judge is showing signs of cognitive decline or impairment is always difficult and usually complicated,” said Terry Harrell, executive director of the Indiana Judges and Lawyers Assistance Program. “Generally, the lawyers surrounding the person know they have a responsibility to do something, but they are very reluctant to act.” This article discusses some of the complications and duties in the context of the ABA Model Rules.
- e. LAW PRACTICE TODAY : DEALING WITH IMPAIRED ATTORNEYS <http://apps.americanbar.org/lpm/lpt/articles/pma06091.shtml> The legal profession has previously reached number one in another Johns Hopkins study that ranks professionals in rate of depression and suicide. The major cause of suicide is untreated depression, a condition which lawyers are particularly apt in masking and particularly unable to ask for help.
- f. THE SOBERING TRUTH – FACING SUBSTANCE ABUSE IN THE PRACTICE OF LAW, CONTRA COSTA COUNTY BAR ASSOCIATION <http://cclawyer.cccba.org/2012/01/the-sobering-truth-facing-substance-abuse-in-the-practice-of-law> Lawyers face a great deal of stress on a daily basis. That stress can, and often does, lead to anxiety, which is closely-tied to depression. Studies estimate that lawyers are more than three times more likely to grapple with depression than the general population; substance abuse often follows. This article articulates symptoms of each to lookout for, as well resources available for support.

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