

Rule 8.3: The Duty to Report Unethical Conduct and TLAP Interventions

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COMPl^ete



ABA Rule 8.3 and Intervention



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WHAT *is* TLAP?

TLAP IS NOW COMPREHENSIVE

**TLAP PROVIDES ASSISTANCE WITH
ALL MENTAL HEALTH ISSUES**

TLAP'S SERVICES

TLAP's Professional Clinical Staff Provides:

- **Direct Crisis Counseling**
- **Clinical Consultations**
- **Interventions**
- **Referral to Assessments, Diagnostics, and Treatment**
- **Comprehensive TLAP Recovery Monitoring**

TLAP supports long-term recovery and fitness to practice.

Access to TLAP's services is unlimited and always free.

Confidentiality and TLAP

T.C.A. 23-4-105

The records, proceedings and all communications of any lawyers' assistance program **shall be deemed confidential and shall not be available for court subpoena**. This section shall not prevent the subpoena of business records that are otherwise available through subpoena. Such records are not to be construed as privileged merely because they have been provided to a lawyers' assistance committee.

Immunity and TLAP

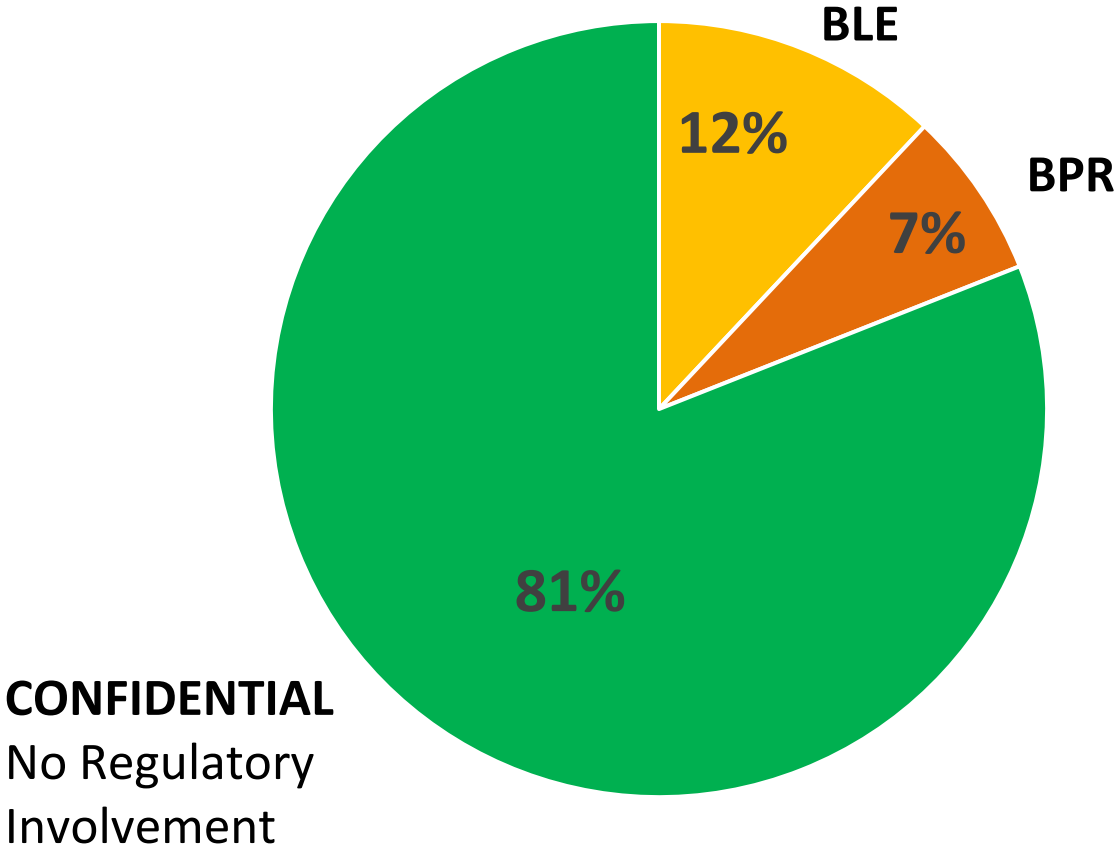
T.C.A 23-4-101

A person who in good faith reports information or takes **action in connection with a lawyers' assistance program**, or a person who receives information in connection with a lawyers' assistance program, **is immune from civil liability** for reporting the information, taking the action or taking no action; provided, that the person has acted in good faith and without malice.

Allows TLAP, TLAP's Commission, volunteers, members of the profession, and any other "person" to participate effectively in TLAP assistance and interventions

TLAP: Primarily Confidential Cases

Referral Source



PART ONE

Self-Regulated Profession Addressing Impairment-Related Conduct

Lawyers:	Rule 8.3
Law Firms:	Rule 5.1(c)(2)
Judges:	Rule 10, Section 2.14

Tennessee Rule 8.3

Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a **substantial question** as to that lawyer's honesty, trustworthiness, or **fitness** as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a **substantial question** as to the judge's **fitness** for office shall inform the Disciplinary Counsel of the Board of Judicial Conduct.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6 or information gained by a lawyer or judge while serving as a member of a **lawyer assistance program approved by the Supreme Court of Tennessee** or by the Board of Professional Responsibility.

RULE 8.3(a) Basics

- lawyer **knows** of another lawyer's **violation**

AND

- raises a **substantial question** about honesty, trustworthiness or **fitness**

THEN

- lawyer **shall inform** licensing authority.

RULE 8.3

Mandatory Reporting of “Substantial” Questions Only



“Self-Regulation” and 8.3 Reporting Barriers

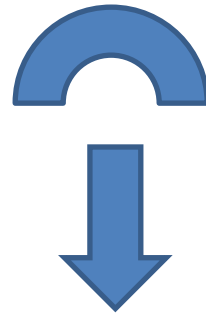
- Lawyers develop an extraordinary ability to professionally weather conflict between clients and opposing counsel.
- Lawyers are much less likely to spark personal conflict that is caused by reporting a peer to discipline.
- Cooperating with disciplinary counsel after making a Rule 8.3 report can be time consuming and divert valuable energy.
- Lawyers who report ethical violations against an opposing counsel can find themselves fending off meritless “counter-claims” of unethical conduct.

AND THEN THERE'S

THIS:

The “Tattle Tale” Factor

SHE DIDN'T DO HER HOMEWORK!
SHE TOOK MY TOY!
HE TOOK MY CANDY!
HE SAID A BAD WORD!
SHE DIDN'T CLEAN HER ROOM!
HE PULLED MY HAIR!



RAT!
SNITCH!
NARC!
STOOLIE!
FINK!

AS CHILDREN WE ARE TAUGHT:

“NO ONE LIKES A TATTLE TALE!”

***Snitches Get
Stitches!***



As a Practical Matter

- Lawyers form a common bond during law school, the bar exam, and in the ongoing “battles” of practicing law thereafter.
- Lawyers are skilled at spotting evidence of **bad character**: missing money; dishonestly; deceptive practices; etc.
- But lawyers are still reticent to report a “bad” lawyer’s violation to Discipline unless they themselves fear 8.3 prosecution for not reporting it.
- A relatively small number of disciplinary complaints emanate from lawyers reporting other lawyers.

The Punitive versus Restorative Barrier

- Rule 8.3 is primarily seen as a tool to deal with “bad actors”, not for helping people with mental health impairment issues.
- Substantial questions about a lawyer’s fitness, mental health, and competency to practice often go un-confronted by peers.
- Lawyers generally resist acting in any way that might appear to others in the profession as a betrayal or prosecution of a peer.
- Lawyers resist voluntarily involving themselves in any disciplinary proceedings under any circumstances.

**Is there a duty under Rule 8.3 to address
mental impairment in the profession?**

ABA Standing Committee on Ethics

(Formal Opinion 03-431 on Reporting and Impairment)

- “Because lawyers are not mental health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment . . .”
- “Nonetheless, **a lawyer may not shut his eyes to** conduct reflecting generally recognized **symptoms of impairment.**”

ABA Standing Committee on Ethics

(Formal Opinion 03-431 on Reporting and Impairment)

ABA Standing Committee: a **PATTERN** of conduct comprised of Rule 1.1 (Competence) and 1.3 (Diligence) shortcomings may be a “Red Flag” that the lawyer is not meeting his or her obligations:

- Missing deadlines;
- Failing to timely file pleadings or complete transactions;
- Failure to complete agreed upon tasks; and,
- Failing to raise issues and advance client’s interests as would be expected by competent counsel.

ABA Standing Committee on Ethics

(Formal Opinion 03-431 on Reporting and Impairment)

ABA Standing Committee: a **SINGLE ACT** “Red Flag” of Rule 1.1 (Competence) and 1.3 (Diligence) impairment may include:

- Visibly intoxicated or impaired in court or in a deposition, etc.
- ABA Ethics Committee: “An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”
- ABA suggests consulting mental health experts or your local State LAP . . . **[CALL YOUR TLAP FOR REFERRAL TO AN EXPERT!](#)**

ABA Standing Committee on Ethics

(Formal Opinion 03-431 on Reporting and Impairment)

The ABA: “Knowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not itself enough to trigger a duty to report under Rule 8.3”

TLAP view: *“Where there is a lot of smoke there’s usually fire.”*

- A lawyer who is routinely, heavily impaired by alcohol in social settings is likely at risk and will likely exhibit patterns of conduct that include difficulty in meeting obligations and deadlines.
- Even a moderate pattern of decline in diligence may be the “Tip of the Iceberg” of a High Functioning Alcoholic’s illness.

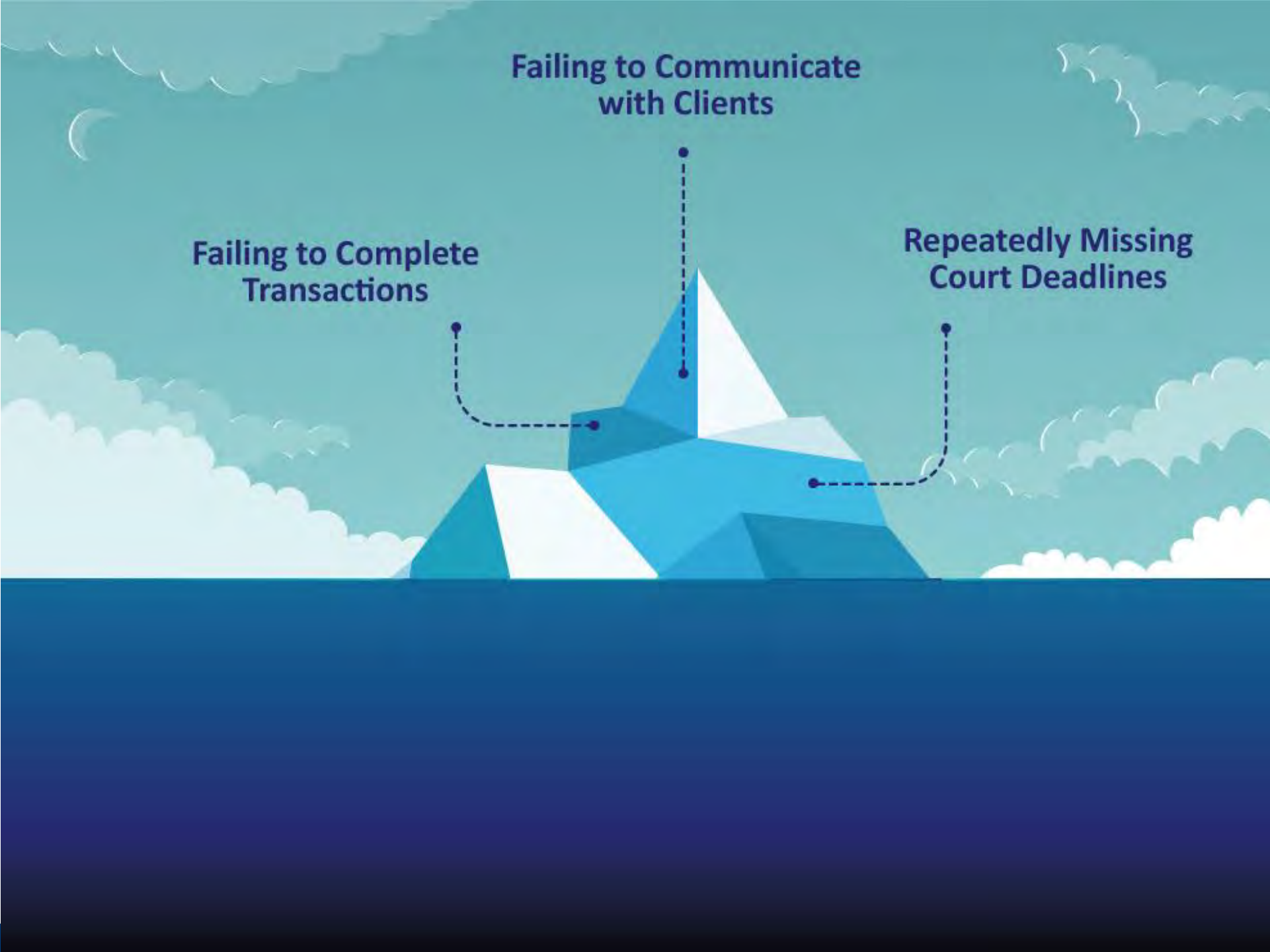
**In Impairment Cases The Profession
Often Sees Only The**

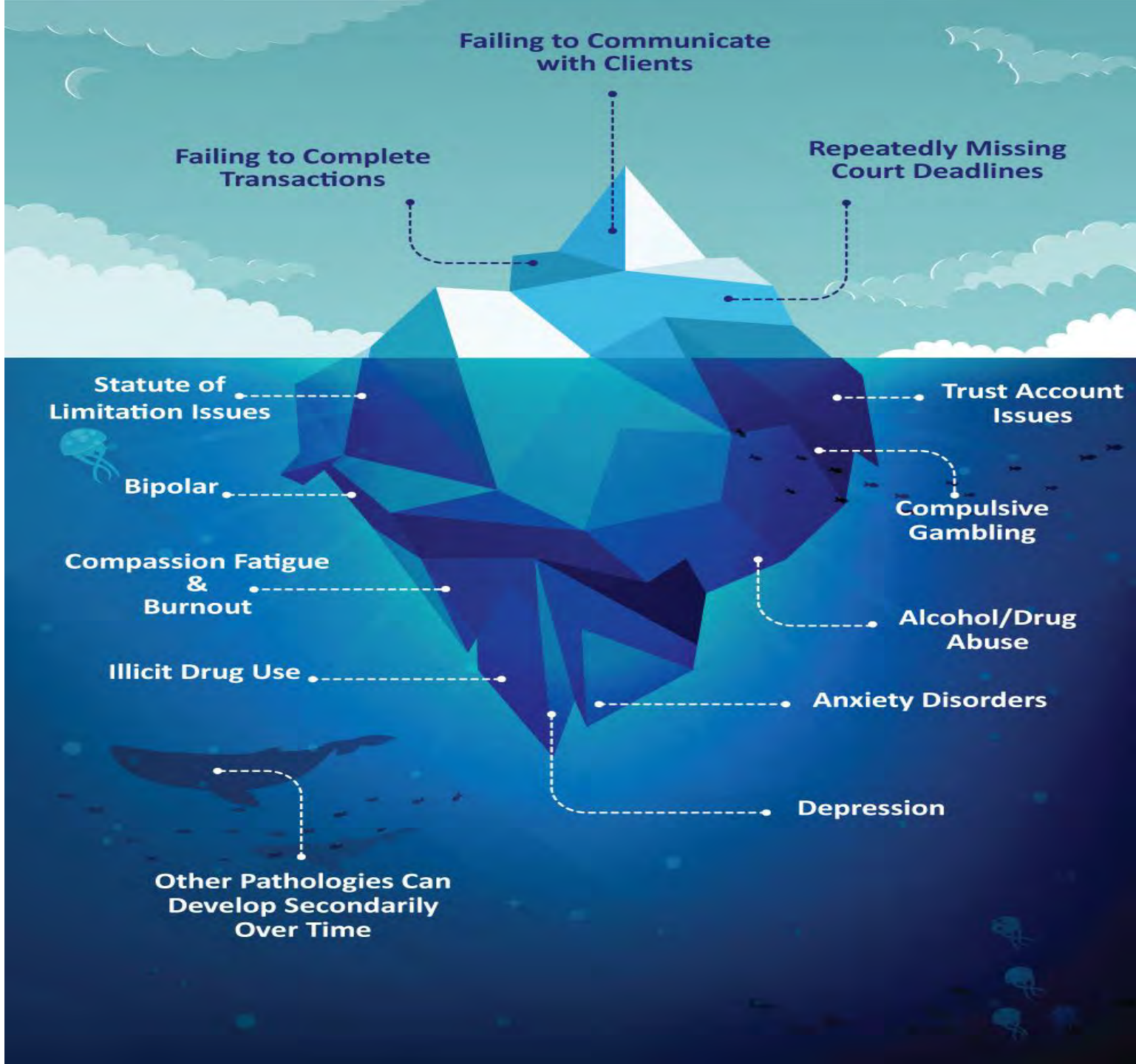
“Tip of the Iceberg”

**Failing to Communicate
with Clients**

**Failing to Complete
Transactions**

**Repeatedly Missing
Court Deadlines**





Tennessee Rule 5.1(c)(2)

Law Partners; Supervising Lawyers

- A partner in a law firm, or together with other lawyers possesses comparable managerial authority in a law firm . . .
- A lawyer having direct supervisory authority over another . . .

(c)(2) shall be responsible for another lawyer's violation if the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and **knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

- “Avoided or mitigated” suggests **duty to act before a violation.**

Law Partners; Supervising Lawyers (cont'd)

- All calls from any source to TLAP are confidential.
- Confidential assistance is available to both the firm and lawyer.
- TLAP referral and compliance satisfies Firm's duty per the Rules.
- Law Firm and impaired lawyer are supported/protected.
- TLAP compliance generates reliable "fitness to practice".
- All parties benefit; public is protected.
- Disciplinary involvement is averted, if successful in TLAP.

Judges and Impairment: Rule 10 Section 2.14

“A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.”

Rule 10 Section 2.14; Comment [1]

[1] “Appropriate action” means action intended and **reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system.** Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making **a referral to an assistance program.**

Rule 10 Section 2.14; Comment [2]

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. **Depending upon the gravity** of the conduct that has come to the judge's attention, however, the **judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body.** *See* RJC 2.15.

The Ticking Time Bomb

- Subtle declines in competency and diligence seen on the surface can signal a serious progression of an underlying impairment such as alcoholism, addiction or depression.
- The profession abides the “tolerable inconvenience” that is caused by low levels of incompetency and lack of diligence that do not meet the “substantial question” trigger of Rule 8.3.
- Often, by the time impairment driven behavior triggers Rule 8.3 reporting, the public and the profession are already damaged.
- **Missing or co-mingled trust funds; client matters irreparably harmed; malpractice claims; and, disciplinary charges.**

“WE KNEW SOMETHING WAS WRONG”

- Lawyers and judges calling TLAP “early on” *in their eyes* for confidential help for a colleague are often stunned by the underlying behavior and damage that has already occurred.
- In solo practitioner cases, peers who initially planned to confidentially rally behind and cover cases for the impaired solo lawyer under Rule 8.3(c) can uncover a hornet’s nest of severe ethical violations in some cases.
- The damage is sometimes so profound that the helpful peers see no way to continue to help under 8.3(c) and call Discipline.

“We Should Have Called TLAP Sooner”

In the wake of mental health impairment cases, coming confidentially through TLAP or via disciplinary referral to TLAP, judges and peers routinely declare:

“We honestly did not realize things were that bad.”

In cases of suspected mental health impairment

- Can we trust that applicable Court Rules are health-related restorative tools for reliable reporting that saves lives and careers in impairment cases?
- Can we see beyond the discomfort that these Rules may feel intrusive to some, or raise “Tattle Tale” eyebrows, and instead be confident that helping an impaired peer is an act of love and support, not condemnation and prosecution?
- Can we believe the Rules as to TLAP do something wonderful FOR a peer rather than something terrible TO a peer?

PART TWO

INTERVENTION:

Overcoming the Addicted Brain Myths of Addiction and *“Enablers”*

“It’s better to apologize than eulogize.”

The Addicted Brain (a disease, not a moral failing)

- New information via CT, PET, MRI and SPECT imaging has allowed science to better understand how the disease of addiction impacts the brain.
- Alcohol compromises the brain system responsible for problem solving, memory, arranging things in order, and doing multiple tasks simultaneously.
- It can take up to two years of abstinence for a brain to heal from severe alcohol abuse and in some cases there is **permanent damage**.

The Addicted Brain, cont'd

- Methamphetamines and cocaine inhibit the building of communication networks in the brain.
- Research suggests that resulting impairment lasts well into sobriety.
- If used in large amounts over prolonged periods, the damage can be irreversible.
- EARLY Intervention is the key to mitigating harm and reducing the risk of permanent brain damage.

NORMAL 3-D BRAIN SPECT IMAGES

Top-
down
surface
view



Front-on
surface
view



Underside
surface
view

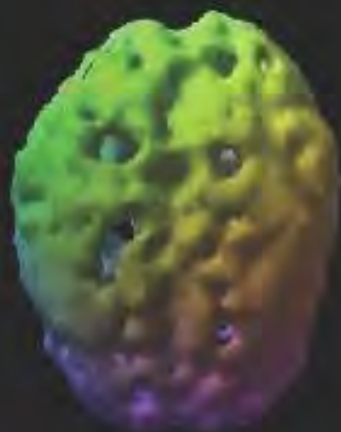


Side
surface
view



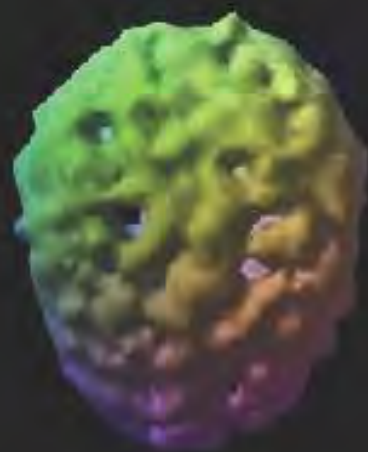
Photos by: Dr. Daniel Amen

COCAINE



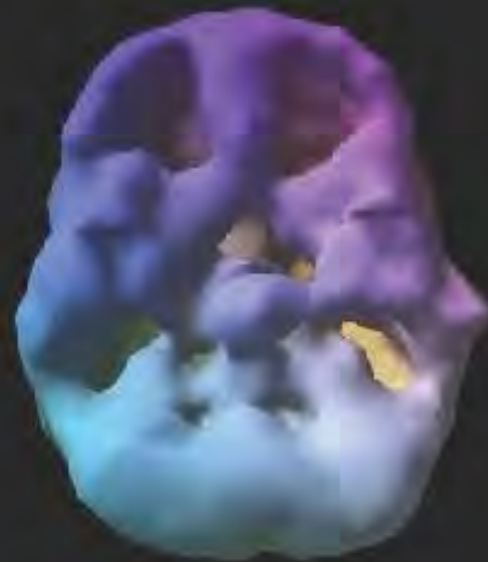
Twenty-four year old.
Using two years frequently.

METHAMPHETAMINE



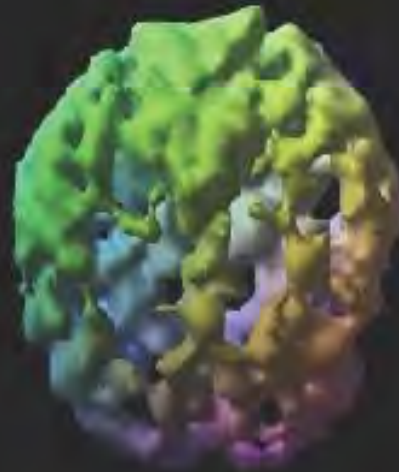
Twenty-eight year old.
Eight year heavy use.

MARIJUANA



Eighteen year old.
Using 3 years.
Four times week.

OPIATES



Forty year old.
Methadone 7 years.
Previously, heroin 10 years.

ALCOHOL - 17 YEARS OF HEAVY WEEKEND USE

Top-
down
surface
view



Front-on
surface
view



Underside
surface
view



Side
surface
view



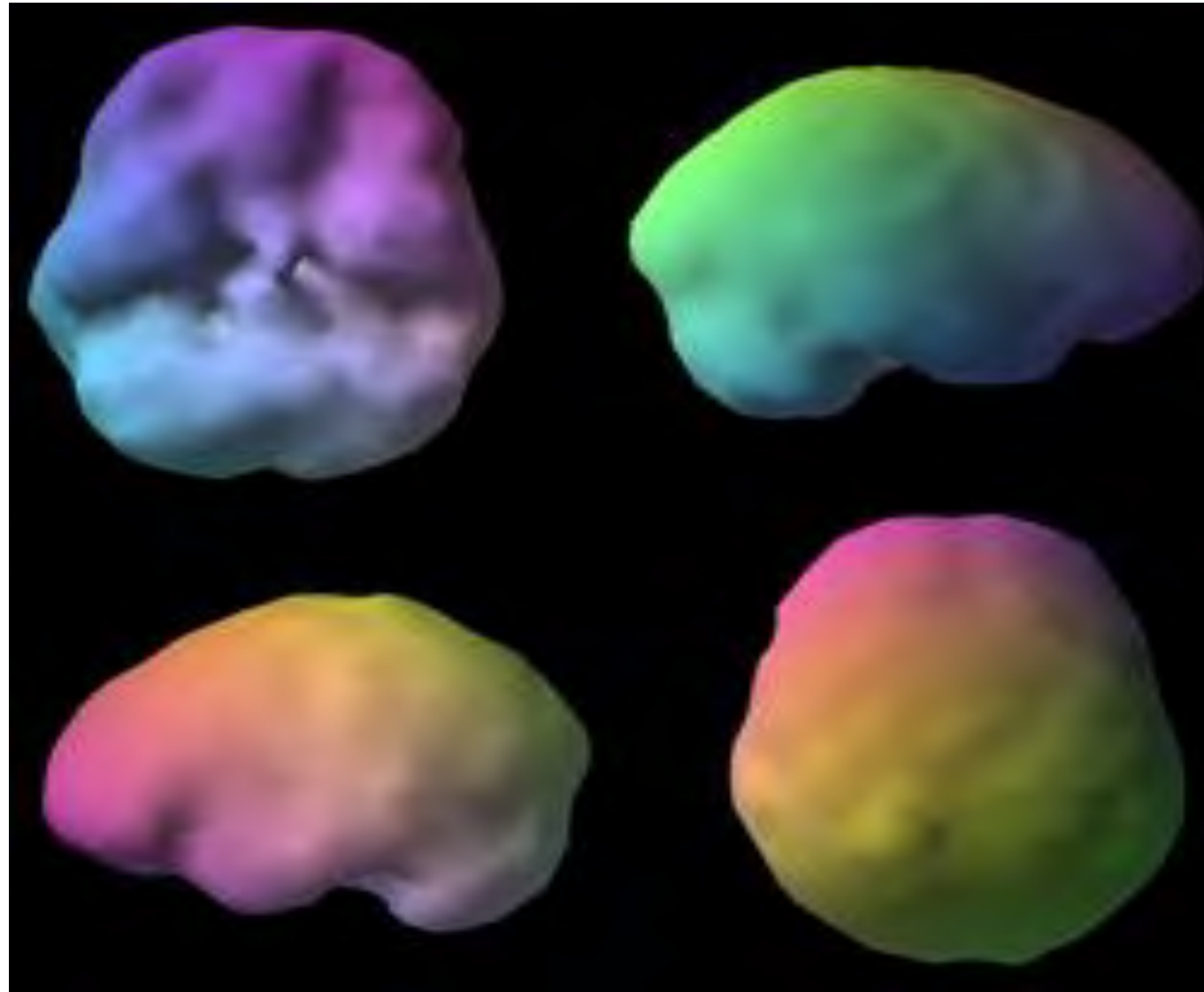
BEFORE & AFTER RECOVERY



Top down surface view
during substance abuse.



Same view after one year
alcohol and drug free.



NORMAL BRAIN

Myths of Addiction (Lack of Insight)

- Historically, going back centuries and into the present, society has largely misunderstood alcoholism and addiction.
- Myths and misinformation abound.
- Early Intervention is often blocked by these myths and misinformation.
- **Intervention cannot be successfully initiated unless the true severity of the substance use problem is acknowledged.**

TRUE OR FALSE?

“An alcoholic or addict must be ready for help before he or she can be helped.”

FALSE

A Hazelden Foundation study found:

70 percent of its patients did not come to treatment on their own but rather because a family member, friend, or employer or co-worker intervened.

TRUE OR FALSE?

“You can’t be an alcoholic if you don’t drink daily.”

FALSE

Patterns of alcohol or drug use vary widely from person to person.

While one alcoholic may drink daily, another may only binge once every few months.

TRUE OR FALSE?

“You can’t be an alcoholic or addict if you have a good job and never miss a day of work.”

FALSE

When someone has a problem with drugs or alcohol, they're also out to prove to themselves and others that they are not addicted, and one of the commonly accepted signs of addiction is absenteeism from the job.

Alcoholics often diligently go to work while their personal and family lives increasingly suffer.

TRUE OR FALSE?

“Alcoholism and addiction are actually diseases, not choices, and these diseases can’t be successfully controlled by willpower.”

TRUE

Substance Use Disorder diseases are complex and they affect the person physically, mentally, emotionally, and spiritually.

Willpower is no more an effective therapy for addiction than it would be for cancer, diabetes, or heart disease.

Addiction happens at a physiological and physical place that is *beyond the reach of the will.*

TRUE OR FALSE?

“As long as my doctor is prescribing the drugs to me, then I am safe and there is no danger that I might become a drug addict.”

FALSE

While prescription mood-altering drugs have an important role to play in medicine, some people using those drugs will become addicted to them.

Drug-seeking behavior is a marker for prescription drug addiction:

- Taking more than prescribed
- Doctor-shopping for multiple prescriptions
- Buying drugs off the street when prescription runs out early
- Being secretive about use of the drug(s)

TRUE OR FALSE?

“Addiction and alcoholism is the addict’s and alcoholic’s personal problem and is not my problem or the profession’s problem.”

FALSE

Alcoholism and Addiction affects families:

Every person who is an addict or alcoholic personally impacts eight other people around them on average.

Alcoholism and Addiction affects the profession:

At least fifty percent (50%) of disciplinary complaints are rooted in whole or part in some type of substance use or other mental health disorder that impaired the professional.

What is “*Enabling*” In Addiction?

- Every practicing alcoholic and addict has established a network of family, friends and co-workers who unknowingly enable the addiction.
- Enabling is the act of bailing out the alcoholic or addict when they get into scrapes as a result of their drinking or drug use.
- Families and friends often underestimate the sheer power of alcoholism and addiction and genuinely believe that the alcoholic or addict will have “learned their lesson” after being bailed out of an arrest or other problem.

Examples of Enabling:

- Loaning money
- Taking over responsibilities
- Making up alibis for missed work or failed responsibilities
- Covering up or minimizing the problem
- Shielding the alcoholic or addict from consequences
- “Fixing” DUI, illegal drug, or other substance-related arrests
- Allowing the alcoholic to manipulate them
- Doing things to “keep the peace” rather than confront the issue
- Continuing to simply deny the problem at all cost

Stages of Enabling

- **Innocent Enabling**: a combination of **love and denial** results in the enabler helping the alcoholic or addict out of scrapes. Unwittingly this type of “help” actually hurts and is like fertilizer that helps grow the alcoholism or addiction disease.
- **Desperate Enabling**: a combination of **reality and fear** sets in and the family knows there is a problem but refuses to demand that the loved one seek treatment and instead go to any length to continue to support the alcoholic or addict, thinking that they can save him or her and that things will get better one day.
- These efforts prevent consequences that are often necessary before the alcoholic or addict will consider surrender and help.

Challenges of Intervention

A professional, *Love First*, intervention takes on the challenge to:

- Educate the participants and dispel myths to help them muster courage to end enabling and set hard and fast “bottom lines.”
- Prepare them to interact productively with an alcoholic or addict who may be in fierce denial, does not want help, and has chemical “holes in their head.”
- Focus all effort on meticulously planning and preparing an intervention based upon specialized communications aimed at the heart and soul of the alcoholic and addict.

Early Action Saves Lives and Careers

Whether it be by confidential referral to TLAP or via reporting impairment-related conduct to discipline and a formal referral to TLAP, early intervention is key.

REMEMBER: per the ABA Standing Committee on Ethics: “lawyers may not shut their eyes to conduct reflecting generally recognized symptoms of impairment.”

Our self-regulated profession cannot be an “enabler” or turn a “blind eye” toward alcoholism, addiction, or other mental health issues in our peers because to do so harms the person, the person’s family, our profession, and can ultimately place clients and the public at risk.

***If you THINK a colleague is
at risk . . .***

Don't wait . . .

CALL TLAP!

- ✓ ***It's Free!***
- ✓ ***It's Anonymous!***
- ✓ ***It's Confidential!***

THE GOAL OF TLAP



Healthy Lawyers and Judges at Their Best!

THANK YOU!

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We hope you enjoyed this session. Please enjoy a 15-minute Networking Break. Coming up next:

**“TODAY in Tennessee (part 2):
The Workers’ Compensation Review: Negotiating
and Settling the Claim”**



Agenda



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