

Law Firms Face Malpractice Risk Over Substance Abuse, Poor Mental Health

By [Christine Simmons](/author/profile/Christine-Simmons/) | November 28, 2018 at 11:47 AM

- f
- in
- 🐦
- G+
- ✉
- 📄 (http)



(Credit: Shutterstock)

When Dan Donnelly, who oversees claims at ALAS, a malpractice insurer to large law firms, hears about claims arising from an attorney's impairment, stress is often at the root of it: a parent's death, a child's illness, a divorce.

"There are just one too many things that put [the attorney] over the top" and the lawyer shuts down, missing deadlines for the client, said Donnelly, senior vice president of claims at ALAS. "A patent lawyer will stop filing patent applications for his clients" but will lie to the client about the filing, Donnelly said. "Because of stress, impairment, they had gotten themselves in a hole and just didn't deal with it—and now they're trying to cover it."

While there's more awareness than ever about the high rates of depression, anxiety and substance abuse in the legal profession, it is less well-recognized how an attorney's impairment can lead to malpractice claims and overall liability for their law firms. Malpractice insurers report no slow down in claims arising from attorney impairment.

Legal liability experts caution that an attorney's impairment doesn't always cause mistakes, errors and liability, but it does increase the risk.

Trending Stories

- 1 **'Big Law Killed My Husband' - An Open Letter From a Partner's Widow**
(<https://www.law.com/law-killed-my-husband-open-letter-from-a-side-partners-widow/>)
THE AMERICAN LAWYER
(/AMERICANLAWYER/)
- 2 **Partners at These Am Law 200 Firms Make Less Than Associates**
(<https://www.law.com/at-these-am-law-200-firms-make-less-than-cravath-associates/>)
THE AMERICAN LAWYER
(/AMERICANLAWYER/)
- 3 **You Think Legal Education Can't Change? 8 Innovative Ideas from Law Schools**
(<https://www.law.com/legal-think-legal-education-cant-change-8-innovative-ideas-from-law-schools/>)
LEGALTECH NEWS
(/LEGALTECHNEWS/)
- 4 **DiFiore Presses Appellate Judges to Send Fewer Appeals to High Court**
(<https://www.law.com/new-york-law-journal-presses-appellate-judges-to-send-fewer-appeals-to-high-court/>)
NEW YORK LAW JOURNAL
(/NEWYORKLAWJOURNAL/)
- 5 **James Announces Executive Staff for NY AG Transition Committee**
(<https://www.law.com/new-york-law-journal-announces-executive-staff-for-ny-ag-transition-committee/>)
NEW YORK LAW JOURNAL
(/NEWYORKLAWJOURNAL/)

At ALAS, an insurer to many Am Law 200 firms, at least 3 percent of claims are tied to impairment issues, such as alcoholism, substance abuse or mental health concerns, said Donnelly, adding it's a "relatively steady stream."

Donnelly said he suspects the real rate of related claims could be higher, but the insurer never learns of the impairment.

"They often end up being significant claims," Donnelly said, adding the defense of the suits tends to be more difficult, and the alleged damages can be artificially inflated.

Among smaller firms, the percentage of impairment-related claims could be greater because of the smaller support and safety net in those firms, said Christopher Newbold, an executive vice president at ALPS, which primarily insures solo practitioners and small firms.

While ALPS doesn't track impairment-related claims, Newbold estimates it's a "significant" number, possibly at least 10 percent.

"This is a problem—this is not something that should be swept under the rug," Newbold said. "If lawyers are not taking care of themselves, they generally are more likely to commit malpractice, and our experience in claims handling supports that."

Impairment-related claims could be growing in frequency, Newbold added. He points to the growing emphasis on profitability and the business side of the profession as one reason why such claims could be increasing. Lawyers are spending more time on billable hours, which generally means less involvement in bar activity and mentoring, he said.

As a result, impairment-related claims can arise over the lack of satisfaction from working in the law, Newbold said. "We're creating cultures in law firms that are misaligned with the values of taking care of one another," he said.

Downplaying the Risk

Worries about liability may be leading some law firms to downplay the potential for problems in their own ranks, resulting in no effective resources or wellness programs for impaired lawyers, some attorneys speculated.

"What clients want from their lawyers is confidence and competence," said Howard Elman, an Elman Freiberg partner who defends law firms in malpractice cases. "Yes, it's very admirable for firms to take care of their employees, but if you're also struggling in the marketplace, the benefit of the positive workplace may be outweighed by the possible perception that there may be issues with some professionals."

Indeed, in rare instances, an attorney who was too open about stress in his or her life saw repercussions.

Donnelly, at ALAS, said he has seen a handful of claims as a result of an attorney working very closely with a client and revealing personal details, such as an illness or stress from a divorce.

"When the deal doesn't work out, and the trial doesn't go as planned, the clients come back with a malpractice claim, and part of the allegation is that the lawyer was distracted," Donnelly said. "We have definitely seen clients unfairly and improperly

use that as ammunition.”

Still, Elman and several other liability experts said that risk that shouldn't defuse dialogue inside firms, adding that there's an overwhelming benefit to acknowledging and discussing the problem to prevent potential liability down the road.

“The difficulty of trying to prove a malpractice claim and the cost and everything that goes with it—it's a pretty big barrier to people suing. The immediate need to solve a problem for you and your firm should take a priority,” said Ronald Minkoff, who leads the professional responsibility group at Frankfurt Kurnit Klein & Selz in New York.

Robert Denby, senior vice president of loss prevention at ALAS, said he wasn't concerned about firms being too open on the topic. “The day is past, or at least is passing, when firms feel some obligation [to say] this is a problem that does not exist at this firm,” Denby said.

“From a macro perspective, the liability angle is really in favor of talking about the issue and ensuring people have resources to turn to when they need help, rather than burying it,” Denby said. This helps head off a problem, he said.

“Let's focus attention on this issue and make it better” by making lawyers and staff conscious of certain red flags, and urging firms to put resources in place to help people, Denby said. “What you want is that the leadership appreciates that no firm is immune from having lawyers suffer from an impairment. You're probably going to have to deal with those situations. The best practice is to be proactive.”

Newbold, of ALPS, said he sees value in firms having open discussions where attorneys with impairment can come forward without being stigmatized. “I believe that firms that maintain a commitment to well-being,” he said, “are going to have a lower loss ratio than firms that don't sign on.”

Evolving Practices

Liability experts point to other reasons why law firms have been slow to commit to attorney well-being resources and programs, such as any extra costs to implement such programs, concerns over invasion of privacy, low prioritization or little prior experience confronting an attorney's impairment.

Some firms may not be as proactive it because they feel it's a sign of weakness, said Minkoff. “Are you saying in my big firm where average profits per partner is \$1.5 million, we have people with drug and alcohol problems? No way, we would spot that immediately.”

More firms deal with attorney impairment risks retroactively than proactively, Minkoff said. “Some firms are proactive, recognize it's a problem and try to get out in front of it, like creating [wellness] programs or having CLEs or having firm-wide training so that people may recognize their own problems and in colleagues,” Minkoff said. “Other firms don't want to acknowledge there's a problem and will only deal with it after it surfaces, which is generally only after some harm or dispute occurs.”

While a firm may not go so far to openly deny the risk, “it's a question of whether they want to prioritize the resources in that direction,” Minkoff said.

Best practices among firms are still evolving, said Philip Tuitou, a partner at Hinshaw & Culbertson who focuses on professional liability issues. "Law firms are grappling with how to best implement a policy since it's a very personal issue. How far can firms go to police the lawyers within the firm on issues that are private? How do you compel somebody to participate in a program unless they want to?" he said

Despite the increasing frequency of impairment-related claims he sees, Newbold, at ALPS, said he's optimistic that more firms are starting to appreciate the importance of attorney well-being and its effect on recruiting and retention of talented lawyers.

"Ultimately that will have an [effect] on the bottom line, more so than the churn and burn" of lawyers, he said.

READ MORE:

[ALM Survey on Mental Health and Substance Abuse: Big Law's Pervasive Problem \(https://www.law.com/2018/09/14/alm-survey-on-mental-health-and-substance-abuse-big-laws-pervasive-problem/\)](https://www.law.com/2018/09/14/alm-survey-on-mental-health-and-substance-abuse-big-laws-pervasive-problem/)

[As Attorney Suicides Mount, a Survivor Speaks Out \(https://www.law.com/americanlawyer/2018/11/12/as-attorney-suicides-mount-a-survivor-speaks-out/\)](https://www.law.com/americanlawyer/2018/11/12/as-attorney-suicides-mount-a-survivor-speaks-out/)

[Big Law Leaders Say Stress Is Main Cause of Addiction and Mental Health Problems \(https://www.law.com/americanlawyer/2018/10/01/big-law-leaders-say-stress-is-main-cause-of-addiction-and-mental-health-problems/\)](https://www.law.com/americanlawyer/2018/10/01/big-law-leaders-say-stress-is-main-cause-of-addiction-and-mental-health-problems/)

[ABA Sounds New Alarm on Substance Abuse, Firms Pledge Action \(https://www.law.com/americanlawyer/2018/09/10/aba-sounds-new-alarm-on-substance-abuse-and-law-firms-pledge-action/\)](https://www.law.com/americanlawyer/2018/09/10/aba-sounds-new-alarm-on-substance-abuse-and-law-firms-pledge-action/)

[Drinking is a Problem for 1 in 3 Lawyers, Study Find \(https://www.law.com/nationallawjournal/almID/1202748754010/drinking-is-a-problem-for-1-in-3-lawyers-study-finds/\)s](https://www.law.com/nationallawjournal/almID/1202748754010/drinking-is-a-problem-for-1-in-3-lawyers-study-finds/)

f SHARE t SHARE

Christine Simmons

Christine Simmons writes about the New York legal community and the business of law. Email her at csimmons@alm.com and find her on Twitter [@chsimmons](https://twitter.com/chsimmons)



[\(/author/profile/Christine-Simmons/\)](/author/profile/Christine-Simmons/)

More from this author → [\(/author/profile/Christine-Simmons/\)](/author/profile/Christine-Simmons/)

Dig Deeper

[Law Firm Management \(/topics/law-firm-management/\)](/topics/law-firm-management/)

[Law Firm Partners \(/topics/law-firm-partners/\)](/topics/law-firm-partners/)

[Law Firms - Large \(/topics/law-firms-large/\)](/topics/law-firms-large/)

Law Firms Mentioned

[Frankfurt Kurnit Klein \(/search?q=Frankfurt+Kurnit+Klein&Submi\)](/search?q=Frankfurt+Kurnit+Klein&Submi)

LEAN ADVISER LEGAL (/LEAN-ADVISER/STATIC/LEAN-ADVISER/?CMP=LARMLDC)

Think Lean Daily Message

" Choosing tactics is like selecting golf clubs from the bag; choice is affected by circumstances. We are all tempted to grab an old favorite from the toolbox, which perhaps plays to our strengths. Some lawyers are more natural street-fighters while others are