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AMERICAN BAR ASSOCIATION

**ABA WORKING GROUP TO ADVANCE WELL-BEING IN THE LEGAL PROFESSION
COMMISSION ON LAWYER ASSISTANCE PROGRAMS**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association adopts the *ABA Model Impairment Policy for Legal Employers* ("Model Policy") dated August 2018; and

FURTHER RESOLVED, That the American Bar Association urges legal employers to adopt the Model Policy.

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MODEL IMPAIRMENT POLICY FOR LEGAL EMPLOYERS
(August 2018)

1 We recognize that well-being is essential to a lawyer’s duty of competence, and
2 that impairment is antithetical to both competence and the quality of service expected
3 by our clients. Unfortunately, it is well documented that the legal profession experiences
4 impairment at disproportionately higher rates due to substance use and other mental
5 health disorders. This Legal Employer¹ is committed to the well-being of its personnel,
6 as well as to the prevention of impairments and to assisting our staff in obtaining
7 treatment when needed. Impairment of an individual, due to substance use or other
8 mental health disorder², including a physical illness or condition that would adversely
9 affect cognitive, motor or perceptive skills, adversely affects not only the individual’s
10 well-being, but also the Legal Employer’s ability to serve our clients capably and
11 responsibly.

12
13 The goals of this Policy are: (1) early identification of impairment and proper
14 intervention to assist with preventing, mitigating, or treating the impairment; and (2)
15 preventing our professional standards and the quality of our work for our clients from
16 being compromised by any Legal Employer personnel’s impairment. This Policy is
17 intended to demonstrate compliance with those professional regulations which require
18 legal employers to establish internal policies and procedures ensuring that all lawyers
19 (including those who are impaired) conform to the jurisdiction’s applicable Rules of
20 Professional Conduct (“RPC”), as well as state or federal rules, regulations or statutes.

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22 I. Implementation

23
24 This Policy applies to all legal professionals, including, but not limited to, partners,
25 managing attorneys, owners, shareholders, associates, staff attorneys, paralegals,
26 administrators, and legal assistants, whether full-time, part-time, contract or temporary.
27 This Policy will be publicized in the workplace and placed in the legal employers’
28 personnel handbook. A contact person, such as a managing partner, human resources
29 director, or other designated person, will be responsible for implementing the Policy, but
30 will not undertake/oversee counseling or treatment. The contact person should notify legal
31 professionals of the availability of lawyer assistance programs which can refer impaired
32 persons for assessment, counseling, treatment and other supportive services.

33
34 II. Definition of Impairment

¹ The term “legal employer” is not limited to a traditional law firm setting, use of “legal employer” in this instance and throughout the Policy is intended to apply to any organization that employs lawyers, and may be substituted with the appropriate legal employer entity/designation, e.g., a corporate legal department, governmental or municipal agency, etc.
² See <https://www.samhsa.gov/disorders> for descriptions of mental and substance use disorders.

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For purposes of this Policy, the Legal Employer considers “impairment” to be a condition that materially and adversely affects a person’s judgment, memory, or reactions, or otherwise interferes with work performance and the rendering of legal services in a manner consistent with the Legal Employer’s standards and the RPC. The diagnosis of an illness does not equate with impairment for purposes of this Policy. Illness is the existence of a physical or mental disease, while impairment is a functional classification that implies inability (perhaps resulting from a physical or mental disorder) to render services with reasonable skill and safety. Impairment may be caused by, but not limited to, the use of alcohol or drugs (prescribed or non-prescribed), a mental health disorder, or a physical illness or condition that would adversely affect cognitive, motor or perceptive skills. Determinations about impairment will be made carefully by the firm’s Executive Committee or those most qualified to evaluate impairment as designated by the Legal Employer, such as the Legal Employer’s Employee Assistance Program, following a thorough investigation and based on objective information. The privacy rights of all involved will be respected.

III. Professional Conduct Requirements and Illegal Activities

While this Policy emphasizes treatment of impaired personnel, it is not intended to condone or excuse illegal activities and/or unprofessional behavior. The Legal Employer expects all personnel to maintain a high level of competence and professionalism, appropriate to their position. This Policy is in effect during times and at places where personnel are in a position to be regarded or identified as representing the Legal Employer, such as traveling on business or participating in community, organizational, or professional meetings and affairs.

Legal Employer personnel who use, possess, distribute, sell (or attempt to sell), transfer, or purchase any illegal substance or controlled substance for which they do not have a physician’s prescription while at work or while performing in a work-related capacity may be subjected to internal disciplinary action, up to and including termination, and/or civil penalties and criminal penalties if appropriate. In the event of a criminal law or professional liability violation, the Legal Employer, in its sole discretion, may cooperate with courts and disciplinary agencies in the disposition of proceedings by affording treatment to the violator under the impairment procedures of this Policy, or under procedures established by the court or agency.

IV. Duty to Report

Lawyers shall not practice law or otherwise render legal services while impaired, and staff members of legal employers shall not assist in providing legal services while impaired. Legal Employer personnel shall not help a colleague conceal his or her

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77 impairment, including by knowingly assisting an impaired colleague in providing legal
78 services.

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80 A. Legal Employer personnel who:

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82 1. believe they are themselves impaired or at risk of becoming impaired, or

83 2. reasonably believe that another Legal Employer lawyer or staff member

84 may be impaired, shall report their concerns to at least one of the

85 following:

86

87 a. member of the Executive Committee;

88 b. General Counsel;

89 c. Chief Operating Officer;

90 d. leader of the Practice Group or head of the department in which the

91 individual works; or

92 e. other person designated to receive such reports

93

94 B. All Legal Employer personnel shall have the obligation to report any incident

95 in which they themselves or any other legal employer personnel has been

96 arrested or charged with: driving while under the influence, public

97 intoxication, possession or sale of any illegal substance. Such information

98 may be reported to any member listed above in Section IV.A.

99

100 C. The Legal Employer will provide professional training programs to all

101 personnel at regular intervals regarding signs and symptoms of substance

102 use and mental health disorders, including cognitive impairment. The lawyer

103 assistance program below may be consulted for assistance with this

104 programming.

105

106 D. Upon learning of a lawyer's or a staff member's possible impairment, the

107 Legal Employer will investigate the circumstances and undertake reasonable

108 measures to assist that person on a confidential basis.

109

110 E. Anyone concerned about an impairment issue for themselves or for another

111 employee of the Legal Employer are encouraged to also contact their state

112 or local lawyer assistance program or the Legal Employer's Employee

113 Assistance Program for confidential assistance.³

³ The Legal Employer should include the name and phone number of the lawyer assistance program (LAP) in each state in which it operates. Most LAPs provide free consultations, assessments, brief counseling and education, peer support, intervention, monitoring and referrals. A directory of LAPs may be found at: https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state.html.

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F. The duty to report pursuant to this Policy is not intended to and does not supersede a lawyer’s reporting obligation in any circumstance that may exist under the applicable RPC. [See, e.g., state version of Model Rule 8.3.]

_____	_____
State Lawyers Assistance Program	Phone number
_____	_____
Legal Employer’s Employee Assistance Program	Phone number

V. Confidentiality

The Legal Employer will treat all communications as confidential to the extent consistent with the Legal Employer’s duties to protect clients, as well as to comply with the RPC, state or federal rule, regulation or statute. All protected health information will be handled in accordance with state and federal laws. Communications include those by and between the potentially impaired lawyer and members of the Legal Employer assigned with responsibilities to investigate and assist, as well as any member of the Legal Employer who reports concerns regarding the potential impairment of another.

Please be advised that while the Legal Employer recognizes confidentiality is important for the successful implementation and operation of this Policy, certain matters may not remain confidential (e.g., a threat to harm yourself or others, future criminal conduct, child abuse, or other legal reporting obligations), but reasonable good-faith attempts will be made to keep personal issues confidential.

VI. Prohibition Against Retaliation or Discrimination

A report made in good faith under this Policy, and good-faith participation in the investigation of any report, will not result in adverse action against any reporting or participating person. Any concern about retaliation must be reported immediately to one of the individuals listed above in Section IV.A. The Legal Employer will investigate any report of retaliation and take such action as may be appropriate, including disciplinary action, against anyone found to have retaliated against a person for reporting a possible impairment or participating in the investigation of a report.

VII. Procedures Upon Determination of Impairment

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154 The Legal Employer seeks early identification of impairment issues of its personnel
155 in order to provide the impaired individual with qualified treatment services as soon as
156 possible to facilitate that person's recovery. At the same time, the Legal Employer will
157 take such steps as may be necessary to protect the interests of its clients and to comply
158 with the RPC and any state or federal rule, regulation or statute.

159
160 A. Leave of Absence: The Legal Employer will permit an impaired individual to
161 use accrued paid leave time for treatment, and will provide accommodations
162 upon a return to work as permitted under the Legal Employer's leave policies
163 and as required under state and federal law.

164
165 B. Referral and Treatment: The Legal Employer will make concerted efforts to
166 assist the impaired individual in obtaining appropriate medical care and
167 treatment. The state's lawyer assistance program may be consulted for
168 assistance with referrals, evaluations and/or monitoring of lawyers.

169
170 C. Restriction of Work Duties: The Legal Employer may restrict the impaired
171 individual by removal from client or other work matters, supervision of work
172 activities, or any other reasonable restriction of activities on client matters
173 deemed necessary to protect client interests and comply with the RPC.

174
175 D. Review of Lawyer's Activity: After determining that a lawyer is, or has been,
176 suffering from an impairment, the Legal Employer will determine if a review of
177 all matters recently handled by the lawyer is warranted in order to take
178 remedial action on client matters. This review may include: review of client
179 files, the lawyer's time and billing records, electronic communications,
180 telephone records, and interviews with others in the Legal Employer with
181 whom the lawyer worked.

182
183 E. Remedial Action: The Legal Employer shall immediately take any remedial
184 action on client matters deemed necessary to mitigate any violation, or potential
185 violation, of the RPC or other adverse consequences arising as a result of the
186 individual's lawyer's impairment. [See state version of Model Rule 5.1(c).]
187 Disclosure to the client may be required and will be done in compliance with
188 the RPC.

189
190 F. Reporting to Disciplinary Authorities: A report will be made to the appropriate
191 professional disciplinary authorities as required by state or federal rule,
192 regulation or statute. [See state version of Model Rule 8.3, ABA Formal
193 Opinion 03-431; ABA Formal Opinion 03-429].

194
195 G. Conditional Employment: Continued employment with the Legal Employer,

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196 unless otherwise required by the Family and Medical Leave Act or the
197 Americans with Disabilities Act, may be conditioned upon:

- 198
- 199 1. Taking a leave of absence;
 - 200 2. Execution of a Return to Work Agreement (see Appendix A);
 - 201 3. Evaluation by a healthcare professional approved by the Legal Employer;
 - 202 4. Commitment to a treatment plan, if recommended by the healthcare
203 professional;
 - 204 5. Periodic alcohol or drug testing resulting in consistent negative results,
 - 205 6. Ongoing participation in peer support recovery programs;
 - 206 7. Continuing therapy or medication management;
 - 207 8. Monitoring by a lawyer assistance program or other professional;
 - 208 9. Disclosure of evaluation results and verification of participation in
209 appropriate treatment and support programs; and/or
 - 210 10. Any other condition deemed appropriate by the Legal Employer.

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212 Cooperation in all such matters is required, and failure to cooperate may result in
213 Legal Employer discipline, up to and including possible termination.

214

215 H. Termination: Personnel who fail or refuse to avail themselves of the opportunity
216 to seek and follow through on treatment of impairment will be subject to internal
217 discipline, up to and including termination.

218

219 VIII. Consequences of Policy Violations

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221 Any person, including any staff or lawyer, who acts contrary to this Policy, or any
222 other Legal Employer policy, or violates any standards hereby established, will be subject
223 to disciplinary action up to and including termination. The Legal Employer may, however,
224 in its discretion, offer personnel the opportunity to participate in a counseling, treatment
225 or rehabilitation program in lieu of such discipline.

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228 IX. Other Laws

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230 This Policy is in no way intended to interfere with the Legal Employer's
231 obligations to provide reasonable accommodations to those who are disabled under the
232 Americans with Disabilities Act. Please see the Legal Employer's EEO and Reasonable
233 Accommodation policies for further information.

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REPORT

The American Bar Association has been instrumental in developing recent research examining aspects of impairment among law students and attorneys. This research has quantified an alarming rate of problematic alcohol/substance use and mental health impairments, coupled with deficient help-seeking behaviors in the legal profession.¹ For example, the research indicates that attorneys engage in problematic alcohol use at nearly twice the level of the general population and have higher rates of depression and anxiety throughout their legal careers. Complicating matters, attorneys are reluctant to seek help. They are concerned that available measures are not sufficiently private and confidential, are worried that others will learn of their circumstances, and that any indication of an issue will detrimentally impact their career or position in the legal employer setting.

In 2016, these studies were a catalyst for a coalition of entities within and outside of the ABA to form the National Task Force on Lawyer Well-Being. After analyzing the data and seeking input from numerous sources, the Task Force issued a report in August 2017, which presented a series of recommendations directed at a variety of stakeholders within the justice system, and more importantly, for the purpose of this report, legal employers and lawyers' professional liability carriers.² Both the Conference of U.S. Chief Justices³ ("CCJ") and the American Bar Association⁴ have passed resolutions recommending further consideration of the Task Force recommendations.

To further examine these recommendations, in September 2017, American Bar Association President, Hilarie Bass, sought approval for the creation of the Working Group to Advance Well-Being in the Legal Profession ("the Working Group"), to study certain Task Force recommendations as related to law firms and legal employers, and to develop model policies and guidelines for well-being and impairment in this setting. As part of this effort, on April 25, 2018, law firm stakeholders such as law firm managing

¹ See P.R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016); J.M. Organ, D. Jaffe, & K. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116 (2016).

² See *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>.

³ See CCJ Resolution 6. The Resolution may be viewed using the following link: https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_conference_of_chief_justices_resolution_6.authcheckdam.pdf.

⁴ See 2018MY105. The Resolution may be viewed using the following link: https://www.americanbar.org/news/reporter_resources/midyear-meeting-2018/house-of-delegates-resolutions/105.html.

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partners, Executive Committee members, senior risk managers, other law firm leaders, and the equivalent to Directors or above at insurance brokers, came together for a National Workshop in Washington, D.C. The purpose of the interactive Workshop was to create practical and workable law firm policies to reinforce lawyer well-being as a core component of the ethical obligations of competence and diligence as well as professionalism, and to address impairment issues in the law firm setting. Using a collaborative process, participants, including subject matter experts, such as members of lawyer assistance programs, generated ideas, innovations, and tools to develop this national model. Based on all the data and research gathered, the Working Group drafted the Model Impairment Policy for Legal Employers (“the Policy”).

The foundation of this Policy is the recognition that well-being is essential to an attorney’s duty of competence, and that impairment is antithetical to both the competence and quality service expected by the clients of the legal employer. To support this duty, legal employers need to demonstrate a commitment to the well-being of their personnel, to the prevention of impairments, and to assisting their employees in obtaining treatment when needed. Impairment of a legal employee, due to substance use or other mental health disorder⁵, including cognitive impairment or dementia, adversely affects not only the individual’s well-being, but also the legal employer’s ability to serve clients capably and responsibly. This Policy deals directly with the impairment of a legal employee. Impairment is a sub-set of the overall well-being of a legal employee, and this Policy is not meant to encompass the panoply of all well-being initiatives that can be employed in the legal employer setting.

Recognizing that law firms, or legal entities that employ multiple practicing attorneys and other staff, are a broad and sizeable group with considerable diversity, this Policy applies fairly universally. However, the policy may need to be tailored to address the realities particular to each legal employer setting. We also recognize that the ABA adopted a Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines. See 1990AM118. The current Policy reinforces, but does not duplicate, the 1990 policy. The 1990 policy primarily focused on “substance use/abuse and dependence,” terminology that is antiquated and no longer used. In fact, in the 2013 edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), the American Psychiatric Association updated the clinical diagnoses to “alcohol use disorder” and “substance use disorder” which may be described as mild, moderate, or severe. The prior clinical diagnoses of “substance abuse” and “substance dependence” were eliminated. Further, the 1990 Policy did not incorporate the current rates of mental health issues seen in the legal profession, and is not reflective of the current resources available to legal professionals in the treatment of problematic substance use and/or mental health disorders. The over-arching goals of the Policy are: (1) early identification of impairment

⁵ See <https://www.samhsa.gov/disorders> for descriptions of mental and substance use disorders.

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and proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) preventing professional standards and the quality of the work for clients from being compromised by the impairment of any legal personnel. The Policy is intended to demonstrate compliance with those professional regulations which require legal employers to establish internal policies and procedures ensuring that all lawyers (including those impaired) conform to the jurisdiction's applicable Rules of Professional Conduct ("RPC"), as well as state or federal rules, regulations or statutes.

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Conclusion

Abraham Lincoln advised that “the best way to predict the future is to create it.” Right now, the leaders of our legal profession stand at a crossroads and must take action. To maintain the status quo is not an option. We can create our future. Too many in our profession are too exhausted, too impaired, or too disengaged to develop into their best selves. Many find themselves in a profession drained of civility and compassion and plagued by chronic stress, poor self-care, and high rates of depression and alcohol problems. The result is that the legal profession is not living up to its full potential as an institution in which attorneys can thrive, best serve their clients, and contribute to a better society. The research demonstrates the need, and the National Task Force on Lawyer Well-Being and key legal employer stakeholders have identified the solutions, one of which is a Model Impairment Policy for Legal Employers. We respectfully ask that the ABA adopt this Model Impairment Policy for Legal Employers, advance the path to lawyers’ well-being, and assure a legal system that deserves the public’s confidence.

Respectfully submitted,

Terry Harrell

Chair, The ABA Working Group to
Advance Well-Being in the Legal
Profession

August 2018

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GENERAL INFORMATION FORM

Submitting Entity: The Working Group to Advance Well-Being in the Legal Profession

Submitted By: Terry Harrell

1. Summary of Resolution(s). The Resolution seeks to have the American Bar Association adopt the ABA Model Impairment Policy for Legal Employers (“Model Policy”) dated August 2018, and that the American Bar Association urges legal employers to adopt the Model Policy.
2. Approval by Submitting Entity. May 7, 2018 during a regularly-scheduled conference call.
3. Has this or a similar resolution been submitted to the House or Board previously? Yes, see below.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

At the 1990 Annual Meeting, the House of Delegates passed the Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines, which remains active policy. See 1990AM118. However, that 1990 policy primarily focused on “substance use and dependence,” terminology that is antiquated and no longer used, it did not incorporate the current rates of mental health issues seen in the legal profession, and is not reflective of the current resources available to legal professionals in the treatment of problematic substance use and/or mental health disorders.

The current Policy reinforces, but does not duplicate, the current policy.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Working Group to Advance Well-Being in the Legal Profession was established by President Bass to, in part, advance the recommendations of the National Task Force on Lawyer Well-Being and

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to develop model policies on well-being and impairment in the legal employer setting. Therefore, efforts to implement this policy will come from ABA leadership and be advanced in collaboration with the participating entities that comprise the National Task Force.

8. Cost to the Association. (Both direct and indirect costs) None
9. Disclosure of Interest. (If applicable) N/A
10. Referrals. Prior to filing, the proposed resolution has been circulated to:
Commission on Lawyer Assistance Programs
National Organization of Bar Counsel
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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Director
ABA Center for Professional Responsibility
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tracy.kepler@americanbar.org

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution seeks to have the American Bar Association adopt the ABA Model Impairment Policy for Legal Employers (“Model Policy”) dated August 2018, and that the American Bar Association urges legal employers to adopt the Model Policy.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the crisis of lawyer well-being that has been documented by research conducted and data compiled by the ABA Commission on Lawyer Assistance Programs and the ABA Working Group to Advance Well-Being in the Legal Profession. The research demonstrates that alcohol use, substance use and mental health disorders among lawyers far exceed other professions and populations. These circumstances undermine the ability of the legal profession to assure the public that the system of American justice is competent, fair and just.

The foundation of this Policy is the recognition that well-being is essential to an attorney’s duty of competence, and that impairment is antithetical to both competence and quality service expected for the clients of legal employers. To support this duty, legal employers need to demonstrate a commitment to the well-being of their personnel, to the prevention of impairments, and to assisting their employees in obtaining treatment when needed. Impairment of a legal employee, due to substance use or other mental health disorder, including cognitive impairment or dementia, adversely affects not only the individual’s well-being, but also the legal employer’s ability to serve clients capably and responsibly.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Implementation of the Policy will provide a mechanism within the legal employer setting to identify impairment and craft proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) prevent professional standards and the quality of the work for clients from being compromised by any legal employer personnel’s impairment. The Policy is intended to demonstrate compliance with those professional regulations which require legal employers to establish internal policies and procedures ensuring that all lawyers (including those impaired)

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conform to the jurisdiction's applicable Rules of Professional Conduct ("RPC"), as well as state or federal rules, regulations or statutes.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None