

Draft prepared for the April 16, 2020 COPRAC Meeting

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**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
DRAFT FORMAL OPINION INTERIM NO. 14-0001
LAWYER IMPAIRMENT**

ISSUES: What ethical obligations does a lawyer have when the lawyer or a lawyer in that lawyer’s law firm has violated or will violate California’s Rules of Professional Conduct (“CRPC”) or the State Bar Act (Business & Professions (“B&P”) Code, Chapter 4 §§ 6001.1, *et. al.*) in the course of representing a client as a result of the lawyer’s possible mental impairment.

DIGEST: Mental impairment in this opinion refers to the impediment of a lawyer’s mental capacity necessary to competently and diligently perform legal services as required under the CRPC and the State Bar Act. A lawyer’s impairment does not excuse compliance with the CRPC and the State Bar Act. An impaired lawyer’s conduct can trigger obligations for the lawyer’s supervisors and colleagues. Although the cause, severity and duration of an impairment may be factors to consider under such circumstances, a lawyer’s ethical responsibilities are primarily determined by the effect of the impairment, if any, on the lawyer’s conduct and ability to practice law. A lawyer who knows that s/he is impaired or knows that an impaired colleague has violated or will violate the CRPC or the State Bar Act in the course of representing a client has an ethical obligation to communicate significant developments to the client and to promptly take reasonable remedial action to prevent or mitigate any adverse consequences resulting from an impaired lawyer’s actions. The required scope of each lawyer’s action depends on the nature of the client’s representation, whether the impaired lawyer has violated or will violate the CRPC or State Bar Act, the severity of the lawyer’s conduct, whether the client has been harmed or will be harmed by the lawyer’s conduct, the nature of the lawyer’s impairment, the size of the law firm and the resources available, and the lawyer’s position within the firm.

AUHORITIES

INTERPRETED: Rules 1.1, 1.2, 1.3, 1.4, 1.6, 1.7, 1.10, 1.16, 5.1, 5.2, and 8.4 of the Rules of Professional Conduct of the State Bar of California; Section 6068,

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46 subdivisions (e)(1) and (m) of Business and Professions Code (State Bar
47 Act).
48

49 **STATEMENT OF FACTS**

50
51 Impaired Lawyer is a senior partner and successful trial lawyer, who is a rainmaker for the law
52 firm. Impaired Lawyer is the lead counsel on a litigation matter for Impaired Lawyer's longtime
53 Client. Litigation has been ongoing in Client's matter for more than two years and trial is
54 scheduled to begin in 150 days. Impaired Lawyer has been the primary point of contact with
55 Client and is expected to try the case if it proceeds to trial.
56

57 Subordinate Lawyer is a fifth-year associate assigned to assist with Client's matter and has been
58 a part of Client's litigation team since the inception of the case. Thus far, Subordinate Lawyer
59 has only communicated with Client on a limited basis.
60

61 Over the last several months, Subordinate Lawyer has observed significant changes in Impaired
62 Lawyer's behavior and has become concerned about Impaired Lawyer's ability to competently
63 and diligently represent Client. Impaired Lawyer has often appeared confused concerning
64 Client's matter, has missed Client meetings without explanation, has failed to promptly respond
65 to Client inquires, and Impaired Lawyer's responses to Client's correspondence concern facts and
66 strategies that obviously do not apply to Client's matter. Impaired Lawyer did not recognize the
67 mistakes made in the correspondence and was argumentative with Client when Client questioned
68 Impaired Lawyer's communications. Client has expressed concerns with Impaired Lawyer's
69 behavior to both Impaired Lawyer and Subordinate Lawyer in writing on multiple occasions, all
70 of which were ignored by Impaired Lawyer.
71

72 At a hearing on the opposing party's motion for summary judgment ("MSJ") over one month
73 ago, Impaired Lawyer attempted to argue against the motion on Client's behalf, but appeared
74 frazzled and confused, citing facts and law to the court that were not applicable to Client's
75 matter. Clearly noticing an issue, the court allowed Subordinate Lawyer, who had drafted the
76 opposition brief, to step in and argue on behalf of Client's position. Client did not attend the
77 MSJ hearing. Opposing party's MSJ was ultimately denied. After the order was rendered,
78 opposing counsel communicated a written, reasonable settlement offer to Impaired Lawyer.
79 Impaired Lawyer ignored the correspondence. When opposing counsel followed up on the offer
80 over the phone with Impaired Lawyer weeks later, Impaired Lawyer said he would communicate
81 the offer to Client, but never did. Subordinate Lawyer recently learned of the offer through a
82 follow-up letter from opposing counsel, which mentioned that no response was received from
83 Impaired Lawyer by the deadline provided, so the offer had expired.
84

85 After much concern, Subordinate Lawyer addressed all of these issues and related ethical
86 concerns directly with Impaired Lawyer. Subordinate Lawyer stated that in Subordinate
87 Lawyer's professional judgment Impaired Lawyer should not continue to work on Client's
88 matter based on Impaired Lawyer's recent pattern of behavior and conduct and that the lawyers
89 should seek the help of another lawyer to take over or assist with the Client's matter. Subordinate
90 Lawyer also communicated Subordinate Lawyer's belief that Impaired Lawyer's conduct has
91 violated the CRPC and Subordinate Lawyer's concerns that Impaired Lawyer's conduct would

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92 continue to cause harm to the Client. Impaired Lawyer vehemently denied having any issues or
93 problems, mentioning only that the Impaired Lawyer was currently handling a large case load
94 and dealing with a contentious divorce. Impaired Lawyer insisted that no mistakes had been
95 made and that Client's needs were adequately being served and would continue to be served by
96 Impaired Lawyer. Impaired Lawyer admonished Subordinate Lawyer for even suggesting there
97 may be an issue in Impaired Lawyer's handling of Client's case. Impaired Lawyer refused to
98 make any changes regarding the strategy and case handling. Impaired Lawyer further adamantly
99 instructed Subordinate Lawyer not to raise any concerns with Client, which could cause Client to
100 lose confidence in the firm's representation and the firm would lose money if Client terminated
101 the representation.

102
103 Scenario #1: Impaired Lawyer and Subordinate Lawyer are affiliated with Big Firm, an 850-
104 lawyer international law firm. Big Firm includes both an executive committee and a risk
105 management committee.

106
107 Scenario #2: Impaired Lawyer and Subordinate Lawyer work in Impaired Lawyer's Small Firm,
108 where Subordinate Lawyer is Impaired Lawyer's only employee.

DISCUSSION

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114 This opinion deals only with mental impairment that appears to impede a lawyer's ability to
115 competently and diligently represent a client in accordance with the CRPC and State Bar Act.¹
116 Mental impairment can be temporary or permanent and of varying degrees of severity. Mental
117 impairment can result from a disease or illness that impacts mental faculties, such as mental
118 illness, depression, anxiety or dementia; stress; lack of sleep; alcoholism², substance abuse, or
119 traumatic life events.³ "It is not the impairment that concerns the regulation and disciplinary
120 system but only the effect, if any, on the lawyer's fitness and ability to practice law."⁴ The
121 Committee recognizes that there could be some tension between a lawyer's ethical obligations

¹ Lawyers are not immune from normal and short-term variations in efficiency, moods, energy, confidence, and decision-making that are common in everyday life. General low points within such normal fluctuations likely do not constitute a form of impairment within the meaning of this opinion, so long as a client's interests are not threatened. See 2016 ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation; August 2017 National Task Force on Lawyer Well-Being, "The Path to Lawyer Well-Being: Practice Recommendations for Positive Change."

² 2016 ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," Krill, Patrick R. JD, LL.M.; Johnson, Ryan MA; Albert, Linda MSSW ("Attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations.")

³ See American Bar Association ("ABA") Formal Opinion ("Opn.") 03-429 (June 11, 2003), fn. 2, for discussion of mental impairments that affect lawyers; ABA Formal Opn. 03-431 (August 8, 2003) at 1; D.C. Bar Ethics Opn. 377 at 1; see also Virginia Bar Legal Ethics Opn. 1886 (December 15, 2016) at page 2 and authorities cited at fns. 4-6; Lawyers' Manual of Professional Conduct ("Law. Man. Prof. Conduct"): Practice Guides: Misconduct and Discipline, Disciplinary Process, Impairment 101:3301 at page 1 (2020).

⁴ Law. Man. Prof. Conduct 101:3301 at page 1 (2020).

122 under the CRPC and the State Bar Act (Business & Professions (“B&P”) Code, Chapter 4 §§
123 6001.1-6213), and substantive law regarding employment, disability and privacy, among other
124 legal rights. This opinion is limited to addressing ethical obligations, but lawyers and law firms
125 should be aware of other laws that may apply to these difficult situations.

126

127 **Responsibilities of the Impaired Lawyer**

128

129 A lawyer’s impairment does not excuse the lawyer from complying with the CRPC and the State
130 Bar Act. An impaired lawyer has the same ethical obligations as other lawyers. ABA Formal
131 Opn. 03-429 at 2; VA Bar Legal Ethics Opn. 1886 (December 15, 2016) at 3. However, a
132 lawyer’s mental impairment may prevent or inhibit a lawyer from recognizing and/or
133 appreciating the existence or extent of the impairment and its effect on the lawyer’s performance
134 of legal services. ABA Formal Opn. 03-049 at 3.

135

136 **Competence & Diligence**

137

138 “Competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental,
139 emotional, and physical ability reasonably necessary for the performance of such service. Rule
140 1.1(b). Rule 1.0.1(h) defines “reasonably” when used in relation to conduct by a lawyer as the
141 conduct of a reasonably prudent and competent lawyer. A lawyer shall not intentionally,
142 recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
143 Rule 1.1(a).

144

145 A lawyer is also obligated to perform legal services with “reasonable diligence,” meaning that a
146 lawyer acts with commitment and dedication to the interests of the client and does not neglect or
147 disregard, or unduly delay a legal matter entrusted to the lawyer. Rule 1.3(b). A lawyer shall not
148 intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence
149 in representing a client. Rule 1.3(a).

150

151 A lawyer who fails to act with competence and/or diligence in representing a client violates his
152 or her ethical obligations even if that failure is due to impairment. Rules 1.1 and 1.3. In addition
153 to potentially causing irreparable harm to clients, a violation of Rules 1.1 and 1.3 may result in
154 State Bar discipline, malpractice and other civil liability.

155

156

157 Here, Impaired Lawyer’s conduct raises serious questions about whether Impaired Lawyer has
158 competently and diligently represented Client, or is able to do so. While bristling at the
159 suggestion that something is wrong, Impaired Lawyer has implied that a contentious divorce and
160 a heavy case load are to blame for any potential issues in Impaired Lawyer’s performance⁵.

⁵ A heavy caseload does not generally excuse or mitigate an attorney’s failure to perform diligently and competently. *Blair v. State Bar* (1989) 49 Cal.3d 762, 780 (decided under former rule); *Carter v. State Bar* (1988) 44 Cal.3d 1091, 1101 (decided under former rule) [“Office workload and scheduling problems do not generally serve to substantially mitigate misconduct.”]; see also ABA Model Rule 1.3, Comment [2] [“A lawyer’s workload must be controlled so that each matter can be handled competently.”]

161 However, personal problems do not justify a lawyer’s failure to perform services competently⁶.
162 Importantly, regardless of the cause or nature of the mental impairment, Impaired Lawyer
163 appears unable to recognize or appreciate the impact Impaired Lawyer’s conduct is having on
164 Impaired Lawyer’s ability to perform legal services for Client. In addition, and because Impaired
165 Lawyer’s conduct is continuing, Subordinate Lawyer and Law firm will need to intervene to
166 protect Client from harm. (See discussion below on Responsibilities of Others in Law Firm.)
167

168 **Communication with Client(s)**
169

170 Competent representation includes the lawyer’s obligation to communicate with the client.
171 *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782 (decided under former rule); *Matter of Peavey*
172 (Rev. Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 491 (decided under former rule). Rule
173 1.4(a)(1) requires lawyers to promptly inform the client of any decision or circumstance with
174 respect to which disclosure and the client’s informed consent is required by the CRPC or the
175 State Bar Act. Rule 1.4(a)(2) further requires that a lawyer reasonably consult with the client
176 about the means by which to accomplish the client’s objectives in the representation. A lawyer
177 shall explain a matter to the extent reasonably necessary to permit a client to make informed
178 decisions regarding the client’s representation. Rule 1.4(b); see also *Lysick v. Walcolm* (1968)
179 258 Cal.App.2d 136 (decided under former rule) [A lawyer must disclose all facts and
180 circumstances necessary to enable the client to make free and intelligent decisions regarding the
181 subject matter of the representation.].
182

183 Rule 1.4(a)(3) and B&P Code section 6068(m), require lawyers to keep their clients reasonably
184 informed about significant developments relating to the representation, which includes promptly
185 complying with reasonable requests for information and copies of significant documents when
186 necessary to keep the client so informed. Rule 1.4(a)(3). What constitutes a “significant
187 development” depends on the purpose of the representation, the sophistication of the client,
188 client expectations and other relevant factors. Rule 1.4, Comment [1]. A settlement offer
189 qualifies as a significant development. Rule 1.4.1 and B&P Code section 6103.5 each require
190 that a lawyer shall promptly communicate to the client all amounts, terms and conditions of any
191 written offer of settlement made to the client in all matters. A lawyer is not required to
192 communicate insignificant or irrelevant information to the client. Rule 1.4, Comment [1]. Thus,
193 a “significant development” under Rule 1.4(a)(3) will not typically encompass minor or
194 unexceptional circumstances that are not likely to impact the purpose or outcome of the
195 representation.
196

197 Here, Impaired Lawyer failed to communicate the opposing party’s settlement offer to Client
198 before it expired in violation of Rules 1.4, 1.4.1 and B&P Code section 6103.5. Facts indicate
199 that Impaired lawyer also ignored Client’s reasonable requests for information in violation of
200 Rule 1.4(a)(3). These violations may cause harm to Client. Additionally, an error potentially
201 giving rise to a legal malpractice claim, such as failing to communicate a settlement offer to
202 Client, creates a conflict and is a significant development relating to the representation that must
203 be communicated. Rule 1.4(a)(3); see also Cal. State Bar Formal Opn. 2019-197 [addresses duty

⁶ “Even in the face of serious personal problems, an attorney has a professional responsibility to fulfill his duties to his clients or to make appropriate arrangements to protect his clients’ interests.” *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 (decided under former rule).

204 to communicate a lawyer’s error]. However, Impaired Lawyer does not appear to acknowledge
205 these mistakes, let alone appreciate their potential impact on Client and Client’s matter, which
206 likely explains why Impaired Lawyer has not communicated these issues to Client. Nonetheless,
207 Impaired Lawyer’s failure to communicate these significant developments to Client is a breach if
208 Impaired Lawyer’s duty to Client.

209
210 **Personal Interest Conflict**

211
212 “A lawyer shall not, without informed written consent from each affected client and compliance
213 with paragraph (d), represent a client if there is a significant risk that lawyer’s representation of
214 the client will be materially limited by ... the lawyer’s own interests.” Rule 1.7(b). If there is a
215 significant risk that the lawyer’s representation of the client(s) will be materially limited by the
216 lawyer’s impaired mental condition, then a conflict exists under Rule 1.7(b). A conflict under
217 Rule 1.7(b) may only be waived by informed written consent of the client if “the lawyer
218 reasonably believes that the lawyer will be able to provide competent and diligent
219 representation.” Rule 1.7(d)(1). Therefore, if the impaired lawyer cannot provide competent and
220 diligent representation to the client(s) as required under Rules 1.1 and 1.3, then a conflict that
221 exists under Rule 1.7(b) cannot be waived by the client and the impaired lawyer cannot represent
222 the client(s).

223
224 The impaired lawyer’s personal interest conflict, however, does not prohibit the representation of
225 the client(s) by other lawyers of the firm. A conflict between the client(s) and the impaired
226 lawyer is not imputed to other lawyers of the firm because the impaired lawyer’s mental
227 impairment does not present a significant risk of materially limiting the representation of the
228 client by the remaining lawyers in the firm. Rule 1.10(a)(1).

229
230 Here, Subordinate Lawyer communicated Subordinate Lawyer’s professional judgment to
231 Impaired Lawyer concerning Impaired Lawyer’s actions, and Impaired Lawyer denied any
232 misconduct, refused to stop working on the case and instructed Subordinate Lawyer not to
233 communicate those concerns to Client because Impaired Lawyer did not want to risk losing the
234 money from the representation. Impaired Lawyer’s conduct reflects -a conflict between Impaired
235 Lawyer and Client under Rule 1.7(b) because the Impaired Lawyer put Impaired Lawyer’s own
236 personal interests above Client’s interests and created a significant risk that Impaired Lawyer’s
237 continued representation of Client will be materially limited by Impaired Lawyer’s personal
238 interests. Under these facts, the conflict is also unwaivable as to Impaired Lawyer. However,
239 Impaired Lawyer’s personal interest conflict is not imputed to the firm because it does not
240 present a significant risk of materially limiting the representation of Client by other firm lawyers.
241 Therefore, other lawyers of the firm are not prohibited from representing Client. Rule 1.10(a)(1).

242
243 **Termination of Representation**

244
245 A lawyer shall not represent or continue to represent a client if the lawyer (1) “knows or
246 reasonably should know” that his/her actions during the representation of a client have or will
247 violate the CRPC or the State Bar Act (Rule 1.16(a)(2)); and/or (2) “the lawyer’s mental
248 condition renders it unreasonably difficult to carry out the representation effectively.” Rule

249 1.16(a)(3). Under either of these circumstances, the lawyer must withdraw from representing the
250 client in accordance with Rule 1.16(a).

251
252 A lawyer may, but is not required to, withdraw from representing a client if the lawyer (1)
253 believes “the continuation of the representation is likely to result in a violation of [the CRPC] or
254 the State Bar Act” (Rule 1.16(b)(9)); and/or (2) “the lawyer’s mental condition renders it
255 difficult for the lawyer to carry out the representation effectively” (Rule 1.16(b)(8).

256
257 In situations where a lawyer has a mental condition impairing the legal services provided, the
258 distinction between mandatory and permissive withdrawal is the degree of difficulty the lawyer
259 faces in continuing the representation. An impaired lawyer’s actions should be evaluated in
260 determining the degree of difficulty. Impairment can become a disciplinary issue under Rule
261 1.16(a)(3) if the impaired lawyer continues client representations when the lawyer is not
262 mentally capable of competently practicing law.

263
264 Under such circumstances, withdrawal may be contingent upon permission of the tribunal, if
265 required. Rule 1.16(c). A lawyer shall not withdraw until the lawyer has taken reasonable steps
266 to avoid reasonably foreseeable prejudice to the rights of the client. Rule 1.16(d). When seeking
267 permission to withdraw, lawyers must comply with their ethical obligations to the client(s) and
268 the court. Rule 3.3. Lawyers are bound to preserve client confidences even when seeking to be
269 relieved as counsel. B&P Code §6068(e); Rule 1.6; Rule 1.16, Comment [4]; see California
270 Rules of Court (“CRC”) 3.1362(c). A lawyer may disclose to the court only as much
271 information as reasonably necessary to demonstrate the need to withdraw. Cal. State Bar Form.
272 Opn. 2015-192 (decided under former rule); see also Cal. State Bar Form. Opn. 2019-220; B&P
273 Code §6068(e)(1). Further, the impaired lawyer’s privacy and other legal rights must be
274 considered and cannot be violated when seeking to be removed as counsel. If a tribunal denies a
275 lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal’s order. Rule
276 1.16, Comment [4], citing B&P Code §§6068(d) and 6103.

277
278 Here, under Rule 1.16(a)(2), Impaired Lawyer cannot continue to represent Client because
279 Impaired Lawyer reasonably should know that a violation of the CRPC and the State Bar Act has
280 occurred. As the facts indicate, Impaired Lawyer has denied any misconduct and Impaired
281 Lawyer’s problematic conduct has continued and become more egregious. While Impaired
282 Lawyer has also rejected Subordinate Lawyer’s recommendation that Impaired Lawyer should
283 no longer represent Client, this is likely because Impaired Lawyer cannot appreciate, or is in
284 denial, that Impaired Lawyer’s conduct has resulted in a breach of duties to Client. However,
285 under these facts, Impaired Lawyer’s failure to end Impaired Lawyer’s representation of Client
286 when required is a further violation of the CRPC, specifically Rule 1.16(a).

287
288 **Responsibilities of the Other Lawyers in the Firm**

289
290 When an impaired lawyer is “unable or unwilling to deal with the consequences of his [or her]
291 impairment,” firm lawyers and the impaired lawyer’s supervisors who know of the impaired
292 lawyer’s conduct have an obligation to take steps to ensure the impaired lawyer’s compliance
293 with the CRPC and the State Bar Act. ABA Formal Ethics Opn. 03-429, 19 Law. Man. Prof.
294 Conduct 380 (2003). This imposes two sets of responsibilities: (1) responsibilities to the affected

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295 client(s); and (2) responsibilities to the impaired lawyer and the firm, if any.⁷ Although a
296 lawyer’s paramount obligation is to take steps to protect the interests of the client(s), other
297 ethical obligations cannot be ignored. See ABA Formal Opn. 03-429 at 4.

298
299 Each lawyer has independent ethical obligations to protect the interests of clients. Generally,
300 when a client retains a law firm, the client’s relationship extends to all attorneys in the firm.⁸
301 “Every attorney, including an associate . . . , must exercise professional judgment in the best
302 interest of his clients and must take steps which are necessary to assure competent representation
303 for his client[.]” LA County Bar Assoc. Form. Opn. No. 383 (December 11, 1979). An impaired
304 lawyer’s failure to fulfill ethical responsibilities and/or take appropriate action to protect the
305 client does not excuse other lawyers from their own professional responsibilities, including
306 taking reasonable remedial measures to protect the client. Remedial actions may include
307 investigating the matter, notifying another lawyer within the firm who has supervisory or
308 managerial responsibilities, confronting the impaired lawyer, notifying the client and ending
309 impaired lawyer’s representation of the client or adjusting the impaired lawyer’s responsibilities
310 as appropriate under the CRPC and the State Bar Act.

311
312 Multiple factors may affect the duties of lawyers within a firm to act in the face of a colleague’s
313 impairment, including, but not limited to, the impaired lawyer’s actions or inactions; the nature
314 of the client matter; the urgency of the situation; the nature, severity and permanence of the
315 lawyer’s impairment; the size of the firm and the resources available; and the non-impaired
316 lawyer’s role within the firm. See D.C Bar Ethics Opn. 377 [“Depending on the nature, severity,
317 and permanence (or likelihood of periodic reoccurrence) of the lawyer’s impairment,
318 management of the firm has an obligation to supervise the legal services performed by the
319 lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to the clients
320 of the firm.”]. Some circumstances may allow accommodations to be made for the impaired
321 lawyer, so long as reasonable steps have been taken to prevent or mitigate any resulting
322 consequences and assure compliance with the CRPC and the State Bar Act. See ABA Formal
323 Opn. 03-429 at 4. Lawyers in a firm who knowingly allow an impaired lawyer to continue a
324 client representation at a time when consequences could have been avoided or mitigated through
325 reasonable remedial action, breach their own ethical responsibilities under Rules 5.1 or 5.2,
326 whether or not the client has actually been harmed. Professional misconduct includes a violation
327 of the CRPC or State Bar Act, knowingly assisting, soliciting or inducing another to do so, or
328 doing so through the acts of others. Rule 8.4(a).

329

⁷ ABA Formal Opn. 03-429 states that attorneys have two different obligations under the Model Rules when an attorney in the same firm is mentally impaired: (1) to adopt measures to prevent the impaired attorneys from violating ethical obligations, and (2) to advise existing clients of facts surrounding the withdrawal of an impaired attorney that are necessary to enable an informed decision about selection of counsel. As discussed herein, these obligations also apply under the California Rules.

⁸ See State Bar of California Formal Opn. 2014-190 [accepting "the basic premise that all attorneys in a law firm owe duties – including ethical duties – to each of the firm’s clients. What will differ, however, among attorneys is what steps those attorneys must take to discharge those duties."] (citing Cal. State Bar Formal Opn. No. 1981-64 [opining that all attorneys employed by a legal services program owe identical professional responsibilities to clients of the program] and several California cases in the legal malpractice context).

330 **Responsibilities of Subordinate Lawyer**

331 Rule 5.2(a) requires that a lawyer must comply with the CRPC and the State Bar Act
 332 “notwithstanding that the lawyer acts at the direction of another lawyer or other person.”
 333 Therefore, both the supervisory lawyer and the subordinate lawyer are each responsible for
 334 fulfilling their own responsibilities and obligations under the CRPC and the State Bar Act. Rule
 335 5.2, Comment; see *In re Maloney & Virsik* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-
 336 797 (decided under former rule) [associate attorney disciplined along with supervising partner
 337 for misrepresentations misleading the court and failing to obey a court order.]
 338

339 If a subordinate lawyer believes his or her supervisor (or another lawyer in the firm) is
 340 incompetent to handle a client matter because of a mental impairment, then the subordinate
 341 lawyer should communicate his or her concerns to the impaired lawyer or an unimpaired
 342 supervisory lawyer within the law firm, or both. See Rule 5.2, Comment; see also LA County
 343 Bar Form. Opn. No. 383 (December 11, 1979) (construing former rule) [“When an associate
 344 attorney has concluded that a partner in the firm has committed malpractice or is incompetent
 345 with respect to the handling of a client’s affairs, the matter should be brought to the attention of
 346 the partnership in an effort to agree upon a course of conduct with regard to the client which will
 347 insure competent representation.”].⁹ Lawyers within the law firm who have supervisory or
 348 managerial responsibilities may include in-house ethics counsel, management committee
 349 member(s) or risk management committee member(s). Importantly, a subordinate lawyer’s
 350 communication of professional judgment to a supervisory lawyer imparts knowledge to the
 351 supervisory lawyer(s) of the impaired lawyer’s conduct, triggering the responsibilities of the
 352 supervisory lawyer(s) under Rule 5.1. Further, a lawyer with supervisory authority who has
 353 knowledge of the impaired lawyer’s actions, should have access to additional resources available
 354 to address the situation and to ensure that the continued representation of Client complies with
 355 the CRPC and the State Bar Act.

356 If the subordinate lawyer believes that the supervisor's proposed resolution would result in a
 357 violation of the CRPC of the State Bar Act, the subordinate lawyer must communicate his or her
 358 professional judgment to the supervisory lawyer. Comment to Rule 5.2. If the supervisor and
 359 the subordinate lawyer “cannot agree on a method of providing competent representation to the
 360 client and protecting the client from any adverse effect” of the impaired lawyer’s actions, and the
 361 question of professional judgment can be reasonably be answered only one way, the subordinate
 362 lawyer is responsible to uphold his or her duties to the client(s), notwithstanding an objection by
 363 the supervisory lawyer. See Rule 5.2, Comment to Rule 5.2.¹⁰ The subordinate lawyer must

⁹ See also Cal. Prac. Guide Prof. Resp. (December 2019) Ch. 6 Professional Competence and Professional Liability, C. Other Duties Related to Competence, 6:153.2.

¹⁰ See also LA County Bar Form. Opn. No. 383 (December 11, 1979) (construing former rule) [“[I]f the associate and the partnership cannot agree on a method of providing competent representation to the client and protecting the client from any adverse effect of past malpractice, the disagreement regarding representation or the impairment to the client’s interest as a result of the incompetent lawyer’s actions must be thoroughly disclosed to the client, notwithstanding an objection by the partnership, for the client’s resolution, and the decision of the client shall control the action to be taken.”] While this Committee does not agree with this LA County Bar Association opinion to the extent it states the disagreement between the associate and the firm must be disclosed to the client, we agree that the impaired lawyer's misconduct, its consequences and proposed remedial actions must be discussed with the client to allow the client to make an informed decision regarding continued representation.

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364 take necessary remedial measures to protect the client, including communicating to the client any
365 information required under Rule 1.4. In an emergency situation, a subordinate lawyer should
366 take such action as may be required to preserve the client's rights. Los Angeles Bar Ass'n Form.
367 Opn. 348 (June 19, 1975) (construing former rule). After the emergency situation has subsided,
368 subordinate lawyer should follow the procedures outlined in the prior paragraph. *Id.*

369
370 California did not adopt Model Rule 8.3 or any rule which requires a lawyer to report another
371 lawyer to the California State Bar if the lawyer knows that another lawyer has committed a
372 violation of the rules of professional conduct that raises a substantial question as to that lawyer's
373 honesty, trustworthiness or fitness as a lawyer in other respects. Therefore, California lawyers
374 may, but are not required to, report another lawyer's misconduct to the California State Bar. A
375 lawyer's impairment, on its own, does not necessarily violate the CRPC or State Bar Act. San
376 Diego Bar Ass'n Form. Opn. 1992-2; Los Angeles Bar Ass'n Form. Opn. 440 (1986) [attorney
377 should consider seriousness of other lawyer's offense and potential impact on public and the
378 profession]. However, to the extent an impaired lawyer's conduct has violated the CRPC and/or
379 the State Bar Act and the impaired lawyer's misconduct is reported to the State Bar, information
380 protected by Rule 1.6 and B&P Code § 6068(e) cannot be disclosed unless otherwise permitted
381 by the rules, applicable law or the client's consent is obtained. Rule 1.6. The reporting lawyer
382 must also be careful to avoid violating the impaired lawyer's privacy rights, the Americans with
383 Disabilities Act, Fair Employment and Housing Act and any other applicable laws that implicate
384 the impaired lawyer's legal rights. See North Carolina 2013 Formal Ethics Opn. 8, fn. 8.

385
386 Here, Impaired Lawyer has clearly violated the CRPC and the State Bar Act by failing to timely
387 communicate the settlement offer to Client, among other possible violations. In accordance with
388 Rule 1.16(a)(2) and Rule 1.7, the Impaired Lawyer is required to end his or her representation of
389 Client. The facts state that Subordinate Lawyer communicated to Impaired Lawyer this
390 professional judgment. Impaired Lawyer has refused to end his or her representation and
391 instructed Subordinate Lawyer not to communicate these issues to Client because Impaired
392 Lawyer does not want Client to terminate the representation. Impaired Lawyer's proposed
393 actions will result in continued violations of the CRPC and State Bar Act, namely violations of
394 Rule 1.4, 1.7 and Rule 1.16, which may result in harm to Client.

395
396 In Scenario #1, Subordinate Lawyer works for Big Firm, which has both an executive committee
397 and a risk management committee. Here, Subordinate Lawyer communicated Subordinate
398 Lawyer's professional judgment concerning Impaired Lawyers actions and the handling of
399 Client's matter to Impaired Lawyer directly. Given, Impaired Lawyer's response, and the nature
400 of Subordinate Lawyer's concerns that Impaired Lawyer is mentally impaired and is unable to
401 appreciate the nature of Impaired Lawyer's conduct, Subordinate Lawyer should also consider
402 communicating Subordinate Lawyer's concerns to one or more members of either of these
403 committees. By appropriately reporting such concerns internally, Subordinate Lawyer will
404 provide knowledge to the supervisory lawyer(s) of Big Firm, triggering his/her/their
405 responsibilities under Rule 5.1. Subordinate Lawyer should then be able to work with the
406 supervisory or managerial lawyer(s) to investigate the matter and evaluate reasonable remedial
407 measures to avoid further ethical misconduct by Impaired Lawyer and to protect the Client. This
408 could include evaluating whether Big Firm is able to continue to represent Client, how and what

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409 to communicate to Client, how to communicate with Impaired Lawyer¹¹, and Impaired Lawyer’s
410 role with Big Firm moving forward, if any. Given Subordinate Lawyer’s involvement in Client’s
411 matter, Big Firm may also ask Subordinate Lawyer to facilitate communications with Client and
412 to provide any continuity with respect to the representation.

413
414 Reporting the Impaired Lawyer’s actions to a lawyer with supervisory authority does not fully
415 discharge the Subordinate Lawyer’s duties. Subordinate Lawyer owes separate duties to Client
416 and is not relieved from those duties by internally reporting the matter. Rule 5.2, Comment.
417 Should Subordinate Lawyer believe that Big Firm’s proposed resolution(s) to the question(s) of
418 professional duties are not reasonable and would result in a violation of the CRPC and the State
419 Bar Act, then Subordinate Lawyer “is obligated to communicate his or her professional judgment
420 regarding the matter to the supervisory lawyer.” Rule 5.2, Comment. Subordinate Lawyer may
421 not comply with an unreasonable resolution that would result in ethical violations. *Id.*; see also
422 Rule 8.4(a). Subordinate Lawyer is independently responsible to act in order to fulfill his or her
423 ethical obligations to Client as discussed below under Scenario 2. A lawyer may always
424 consider seeking guidance about professional responsibilities from the legal ethics hotline of the
425 California State Bar¹², the hotlines of local bar associations where available, or from appropriate
426 legal ethics advisors within or outside of a lawyer’s firm. Lawyers may also consider speaking
427 confidentially with an appropriate mental health professional, the State Bar of California’s
428 confidential Lawyer Assistance Program (“LAP”)¹³, or a lawyer mentor for additional insight.

429
430 In Scenario #2, Subordinate Lawyer does not have any other supervisory lawyer to communicate
431 with about Impaired Lawyer’s actions and resulting consequences to Client’s representation.
432 Impaired Lawyer has denied there is any problem and refused to consider getting the help of
433 another lawyer or stepping away from the Client matter. Under these circumstances, Subordinate
434 Lawyer must act in accordance with his or her duties to Client and take reasonable remedial
435 measures, which may include an investigation of Impaired Lawyer’s actions, review of Client’s
436 matter as well as the other cases being handled by Impaired Lawyer, communicating to Client all
437 information and developments relating to the representation as required under the CRPC and the
438 State Bar Act, such as the expired settlement offer and the need to change lead counsel as a
439 result of Impaired Lawyer’s actions. See Rules 1.4, 1.4.1, 1.7 and 1.16; and B&P Code sections
440 6068(m) and 6103.5.

441
442 These developments must be truthfully explained to Client only to the extent reasonably
443 necessary to permit Client to make informed decisions regarding the representation while
444 balancing and maintaining the privacy and other legal rights of Impaired Lawyer, unless
445 Impaired Lawyer authorizes his private information to be shared. Rule 1.4(b); see also Rule
446 7.1(a). This may necessitate communicating to Client only that Impaired Lawyer is unable to
447 continue as counsel on Client’s matter, focusing on the facts of Impaired Lawyer’s conduct
448 specific to Client’s matter and avoiding any disclosure of Impaired Lawyer’s personal and

¹¹ See, e.g., “How to Approach Cognitively Impaired Colleagues,” Oregon State Bar Bulletin, November 2014.

¹² California State Bar Legal Ethics Hotline: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Hotline>

¹³ California’s LAP: <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program>

449 private information. For example, Subordinate Lawyer could disclose to Client that Impaired
450 Lawyer failed to timely communicate the settlement demand and was unable to effectively argue
451 before the court on behalf of Client’s opposition to the MSJ.

452
453 Subordinate Lawyer should further advise Client how Subordinate Lawyer believes Client’s
454 matter should be handled as a result of these developments, including whether Subordinate
455 Lawyer believes he or she is competent to continue handling Client’s case as well as any actions
456 that should be considered as a result of these significant developments. If Subordinate Lawyer
457 does not have sufficient learning and skill to take over the representation, Subordinate Lawyer
458 may provide competent representation by associating with or, where appropriate, professionally
459 consulting another lawyer whom the lawyer reasonably believes to be competent, or referring the
460 matter to another lawyer whom the lawyer reasonably believes to be competent. Rule 1.1(c). A
461 decision on any matter that will affect Client’s substantive rights, including who serves as lead
462 counsel for Client, is something that should be discussed with the Client as it is within Client’s
463 sole authority.¹⁴

464
465 **Lawyer(s) with Managerial or Supervisory Authority**

466
467 A lawyer who, individually or together with other lawyers, possesses managerial or supervisory
468 authority in a law firm must make reasonable efforts to ensure that the firm’s lawyers comply
469 with the CRPC and State Bar Act. Rule 5.1 (a-b). A lawyer who has direct supervisory
470 authority over another lawyer is responsible for the other lawyer’s violations of the CRPC and
471 State Bar Act if the supervisory lawyer orders or, with knowledge of the relevant facts and of the
472 specific conduct, ratifies the conduct involved, or knows of the conduct at a time when its
473 consequences can be avoided or mitigated but fails to take reasonable remedial action. Rule
474 5.1(c).¹⁵

475 In accordance with Rule 5.1, firms should have enforceable policies and procedures in place to
476 ensure that all lawyers within the firm comply with the CRPC and State Bar Act. Rule 5.1,
477 Comments [1] & [4]. Such policies and procedures will vary depending on the size of the firm,
478 its structure and the nature of its practice. Rule 5.1, Comment [2]. The policies and procedures
479 should account for situations where a firm lawyer is impaired, so that the steps to be taken in
480 response to the impairment are in place and known by all lawyers of the firm before an issue
481 arises. Supervisory or managerial lawyers within the firm are not responsible for the impaired
482 lawyer’s violation of the rules if reasonable efforts have been made to institute procedures

¹⁴ *Echlin v. Superior Court of San Mateo County* (1939) 13 Cal.2d 368; *Heller Ehrman v. Davis Wright*, 4 Cal.5th 467, 479 (2018) (citing *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790, 100 Cal. Rptr. 385; Code of Civ. Proc., section 284; and *General Dynamics v. Superior Court (Rose)* (1994) 7 Cal.4th 1164, 1174-1175, 32 Cal. Rptr.2d 1); Rule 1.2, Comment [1] (citing *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404, 212 Cal. Rptr. 151, 156); see also Rules 1.2 and 1.16(a)(4).

¹⁵ Rule 5.1, Comment 8: “Paragraphs (a), (b) and (c) create independent bases for discipline. [Rule 5.1] does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside of the law firm. Apart from paragraph (c) of this rule and rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer’s conduct is beyond the scope of these rules.”

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483 designed to assure compliance with the CRPC and State Bar Act, unless they knew of the
484 conduct at a time when they could have acted to avoid or mitigate the consequences and failed to
485 take remedial action. Rule 5.1(c).

486 If permitted by applicable law, a firm should consider including in its policies a requirement as a
487 condition of continued employment that an impaired lawyer seek appropriate assistance, such as
488 medical care, counseling, or therapy, where the impairment is impeding the lawyer's ability to
489 represent the client(s). Firms should also consider including procedures that encourage the
490 reporting of concerns of impairment adversely affecting the representation of client(s) to
491 appropriate personnel, such as anonymous reporting, perhaps through a hotline or through
492 designating a neutral firm representative who does not supervise or manage subordinate lawyers.
493 See Rule 5.1(a), Comments [1], [2] and [4]; see also D.C. Bar Ethics Opn. 377. Anonymous
494 reporting may not only encourage subordinate lawyers to report any concerns they may have
495 about their superiors, but it may also encourage an impaired lawyer to self-report and hopefully
496 get timely assistance.

497 Lawyers with supervisory or managerial authority within a firm, who know of relevant facts and
498 conduct relating to another firm lawyer's suspected impairment, are required to take reasonable
499 remedial action to avoid or mitigate any consequences. Rule 5.1(c)(2). Whether remedial action
500 is appropriate depends on the nature and seriousness of the misconduct, as well as the nature and
501 immediacy of its harm. Rule 5.1, Comment [6]. A lawyer's failure to supervise other lawyers
502 can result in attorney discipline. *Matter of Whitehead* (Rev. Dept. 1991) 1 Cal. State Bar Ct.
503 Rptr. 354, 368-369; *Matter of Phillips* (Rev. Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 335-336.

504 Each situation of impairment must be analyzed and addressed based on the specific
505 circumstances. Lawyers cannot diagnose the cause or extent of a colleague's mental impairment
506 but must make a reasonable effort to ensure the impaired lawyer's compliance with the rules and
507 act to avoid or mitigate any consequences that affect the interests of the client(s). "Because
508 lawyers are not health care professionals, they cannot be expected to discern when another
509 lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical
510 psychologist, or therapist. Nonetheless, a lawyer may not shut his eyes to conduct reflecting
511 generally recognized symptoms of impairment (e.g. patterns of memory lapse or inexplicable
512 behavior not typical of the subject lawyer, such as repeated missed deadlines)." ABA Formal
513 Opn. 03-431 (August 8, 2003). A lawyer cannot act on conjecture or conflicting reports, so the
514 prudent first step is to investigate the colleague's perceived impairment to confirm the accuracy
515 of the report(s); determine if the lawyer's mental condition has harmed or may harm the client(s)
516 (Rule 5.1); analyze if there has been a violation of any rules or the State Bar Act (Rule
517 1.16(a)(2)), or if the impaired lawyer's continuation of the representation will likely result in a
518 violation of the rules or the State Bar Act (Rule 1.16(b)(9)); and evaluate if the lawyer's mental
519 condition makes it difficult or unreasonably difficult for that lawyer to carry out the
520 representation effectively (Rule 1.16, subsections (a)(3) and (b)(8)).¹⁶ As advised in ABA
521 Formal Op. 03-429,

¹⁶ The ABA's Model Rule 1.16(a)(2) differs from CRPC Rule 1.16(a)(3) because it requires withdrawal if "(2) the lawyer's physical or mental condition *materially impairs* the lawyer's ability to represent the client." (italics added for emphasis). The ABA's ethics opinions cited herein use the "materially impair" standard, while California uses

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522 [t]he Firm’s paramount obligation is to take steps to protect the interest of its
523 clients. The first step may be to confront the impaired lawyer with the facts of
524 his impairment and insist upon steps to assure that clients are ethically
525 represented notwithstanding the lawyer’s impairment. Other steps include
526 forcefully urging the impaired lawyer to accept assistance to prevent future
527 violations or limiting the ability of the impaired lawyer to handle legal matters
528 or deal with clients.

529 The investigation must analyze any and all legal services provided by the impaired lawyer to
530 establish if other client matters are affected by the colleague’s impairment. See Rules 5.1(b-c)
531 and 8.4(a). This entails identifying and auditing other client’s files where the impaired lawyer is
532 involved to ensure the firm’s representation complies with applicable ethical duties. *Id.* The
533 investigating lawyers must be careful to not reveal the impaired lawyer’s private information or
534 impair any other legal rights when speaking with other lawyers or staff within the firm as
535 necessary to investigate the lawyer’s condition and resulting impact.

536 The severity of the impaired lawyer’s conduct, the duration of such conduct and whether the
537 lawyer’s conduct can be resolved or improved should be considered in an analysis of whether the
538 lawyer’s condition renders it difficult or unreasonably difficult for the impaired lawyer to carry
539 out legal representation effectively. ABA Formal Opn. 03-429 at 3. “If a lawyer’s mental
540 impairment can be accommodated by changing the lawyer’s work environment or the type of
541 work that the lawyer performs, such steps also should be taken.” NC Bar 2013 Form. Opn. 8;
542 see also VA Bar LEO 1886 at 4. However, “if such episodes of impairment have an appreciable
543 likelihood of recurring, lawyers who manage or supervise the impaired lawyer may have to
544 conclude that the lawyer’s ability to represent clients is materially impaired.” ABA Formal Opn.
545 03-429.

546 Under Scenario #1, knowledge by a supervisory or managerial lawyer of Impaired Lawyer’s
547 actions at a time when the consequences can be avoided or mitigated will trigger the obligations
548 of the supervisory or managerial lawyer under Rule 5.1(c)(2), requiring the lawyer to take
549 reasonable remedial action to avoid or mitigate any resulting consequences. Before acting, a
550 supervisory or managerial lawyer should review Big Firm’s policies and procedures which
551 address these situations.

552 An investigation should be conducted to confirm the facts, to determine whether violations of the
553 CRPC and State Bar Act have occurred, and to evaluate if Impaired Lawyer’s condition renders
554 it difficult or unreasonably difficult for Impaired Lawyer to carry out the representation of Client
555 effectively and if Impaired Lawyer's continued representation will or is likely to result in
556 additional violations of ethical obligations. Further, Impaired Lawyer’s demand that his or her
557 misconduct not be communicated to Client creates a personal conflict under Rule 1.7(b)
558 requiring that Impaired Lawyer's representation of Client end. Thus, a change in lead counsel is
559 necessary and is a significant development that must be communicated to the client under Rule
560 1.4, along with other significant information such as the expired settlement offer.

the “unreasonably difficult” standard for mandatory withdrawal and the “difficult” standard for permissive withdrawal.

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561 Big Firm should also make suggestions to Client as to how it believes the case should be re-
562 staffed and further inform Client of any other necessary actions that it believes should be taken
563 as a result of these significant developments. Big Firm may have sufficient internal resources
564 available to assign a new lawyer or lawyers within Big Firm to replace Impaired Lawyer on
565 Client's case in consultation with Client.
566

CONCLUSION

567
568
569 Regardless of its nature or source, a mental impairment that impedes a lawyer's ability to
570 competently and diligently provide legal services as required under the CRPC and the State Bar
571 Act triggers ethical obligations not just for the impaired lawyer, but also for lawyers who know
572 of the conduct at a time when the consequences can be avoided or mitigated. Although the
573 impact of an impairment can be addressed and resolved through internal procedures, to the extent
574 the impairment significantly affects the representation of a client, the impairment triggers a duty
575 to communicate significant events to the client and may require client's representation by the
576 impaired lawyer to end, resulting in the firm's re-staffing or withdrawal from the representation.
577 The available resources and options to address this type of situation may differ from firm to firm
578 and will depend on the nature of each representation, but the duties and ethical responsibilities
579 owed by lawyers who have knowledge of an impairment are the same.
580

581 This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of
582 the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of
583 California, its Board of Trustees, any persons, or tribunals charged with regulatory
584 responsibilities, or any member of the State Bar.
585