

Draft prepared for the June 5, 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 who know of the impaired lawyer’s conduct. 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. An impaired lawyer and/or the impaired lawyer’s colleague, who knows or reasonably should know that the impaired lawyer has violated or is likely to violate the CRPC or the State Bar Act, each have ethical obligations to any affected client(s). These ethical obligations include, but are not limited to, communicating significant developments related to the lawyer’s conduct 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 is likely to violate the CRPC or State Bar Act, the severity of the impaired lawyer’s conduct, whether the client has been harmed or will be harmed by the impaired lawyer’s conduct, the nature of the lawyer’s impairment, the size of the law firm and the resources available, and each lawyer’s position within the firm.

47 **AUHORITIES**

48 **INTERPRETED:** Rules 1.1, 1.2, 1.3, 1.4, 1.4.1, 1.6, 1.7, 1.10, 1.16, 5.1, 5.2 and 8.4 of the  
49 Rules of Professional Conduct of the State Bar of California; Sections  
50 6068, subdivisions (e)(1) and (m), 6103.5(a) of Business and Professions  
51 Code (State Bar Act).  
52

53 **STATEMENT OF FACTS**

54

55 Impaired Lawyer is a senior partner and successful trial lawyer, who is a rainmaker for the law  
56 firm. Impaired Lawyer is the lead counsel on a litigation matter for Impaired Lawyer's longtime  
57 Client. Litigation has been ongoing in Client's matter for more than two years and trial is  
58 scheduled to begin in 150 days. Impaired Lawyer has been the primary point of contact with  
59 Client and is expected to try the case if it proceeds to trial.  
60

61

61 Subordinate Lawyer is a fifth-year associate assigned to assist with Client's matter and has been  
62 a part of Client's litigation team since the inception of the case. Thus far, Subordinate Lawyer  
63 has only communicated with Client on a limited basis.  
64

65

65 Over the last several months, Subordinate Lawyer has observed significant changes in Impaired  
66 Lawyer's behavior and has become concerned about Impaired Lawyer's ability to competently  
67 and diligently represent Client. Impaired Lawyer has often appeared confused concerning  
68 Client's matter, has missed Client meetings without explanation, has failed to promptly respond  
69 to Client inquires, and Impaired Lawyer's responses to Client's correspondence concern facts and  
70 strategies that obviously do not apply to Client's matter. Impaired Lawyer did not recognize the  
71 mistakes made in Impaired Lawyer's correspondence and was argumentative with Client when  
72 Client questioned the unrelated facts and strategies in Impaired Lawyer's communications.  
73 Client has expressed concerns with Impaired Lawyer's handling of the matter to both Impaired  
74 Lawyer and Subordinate Lawyer in writing on multiple occasions, all of which were ignored by  
75 Impaired Lawyer.  
76

77

77 At a hearing on the opposing party's motion for summary judgment ("MSJ") over one month  
78 ago, Impaired Lawyer attempted to argue against the motion on Client's behalf, but appeared  
79 frazzled and confused, citing facts and law to the court that were not applicable to Client's  
80 matter. Clearly noticing an issue, the court allowed Subordinate Lawyer, who had drafted the  
81 opposition brief, to step in and argue on behalf of Client's position. Client did not attend the  
82 MSJ hearing. Opposing party's MSJ was ultimately denied. After the order was rendered,  
83 opposing counsel communicated a written, reasonable settlement offer to Impaired Lawyer.  
84 Impaired Lawyer ignored the correspondence. When opposing counsel followed up on the offer  
85 over the phone with Impaired Lawyer weeks later, Impaired Lawyer said the offer would be  
86 communicated to Client, but it never was. Subordinate Lawyer recently learned of the offer  
87 through a follow-up letter from opposing counsel, which mentioned that no response was  
88 received from Impaired Lawyer by the deadline provided, so the offer had expired.  
89

90

90 After much concern, Subordinate Lawyer addressed all of Impaired Lawyer's actions and related  
91 ethical concerns directly with Impaired Lawyer. Subordinate Lawyer stated that in Subordinate  
92 Lawyer's professional judgment, Impaired Lawyer's recent conduct demonstrate that Impaired

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93 Lawyer is not competent to continue to work on Client’s matter and that the lawyers should seek  
94 the help of another lawyer to take over or assist with the Client’s matter. Subordinate Lawyer  
95 also communicated Subordinate Lawyer's belief that Impaired Lawyer’s conduct has violated the  
96 CRPC and the State Bar Act and that Subordinate Lawyer is concerned that Impaired Lawyer’s  
97 conduct will continue to cause harm to the Client. Impaired Lawyer vehemently denied having  
98 any issues or problems, mentioning only that Impaired Lawyer was currently handling a large  
99 case load and dealing with a contentious divorce. Impaired Lawyer insisted that no mistakes had  
100 been made on Client’s matter and that Client’s needs were adequately being served and would  
101 continue to be served by Impaired Lawyer. Impaired Lawyer admonished Subordinate Lawyer  
102 for even suggesting there may be an issue in Impaired Lawyer’s handling of Client’s case.  
103 Impaired Lawyer refused to make any changes regarding the strategy and handling of Client’s  
104 matter. Impaired Lawyer further adamantly instructed Subordinate Lawyer not to raise any  
105 concerns with Client, which could cause Client to lose confidence in the firm’s representation  
106 resulting in the firm’s loss of revenue if Client terminated the representation.

107  
108 Scenario #1: Impaired Lawyer and Subordinate Lawyer are affiliated with Big Firm, an 850-  
109 lawyer international law firm. Big Firm has both an executive committee and a risk management  
110 committee.

111  
112 Scenario #2: Impaired Lawyer and Subordinate Lawyer work in Impaired Lawyer’s Small Firm,  
113 where Subordinate Lawyer is Impaired Lawyer’s only employee.

114

## DISCUSSION

115  
116  
117 This opinion deals only with mental impairment that appears to impede a lawyer’s fitness to  
118 competently and diligently engage in the practice of law in accordance with the CRPC and State  
119 Bar Act.<sup>1</sup> Mental impairment can be temporary or permanent and of varying degrees of severity.  
120 Mental impairment can result from a disease or illness that impacts mental facilities, such as  
121 mental illness, depression, anxiety or dementia; stress; lack of sleep; alcoholism<sup>2</sup>; problematic  
122 substance use; or traumatic life events.<sup>3</sup> “It is not the impairment that concerns the regulation  
123 and disciplinary system but only the effect, if any, on the lawyer’s fitness and ability to practice

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<sup>1</sup> 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.”

<sup>2</sup> 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.”)

<sup>3</sup> 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).

124 law.”<sup>4</sup> The Committee recognizes that there could be some tension between a lawyer’s ethical  
125 obligations under the CRPC and the State Bar Act (Business & Professions (“B&P”) Code,  
126 Chapter 4 §§ 6001.1-6213), and substantive law regarding employment, disability and privacy,  
127 among other legal rights. This opinion is limited to addressing ethical obligations, but lawyers  
128 and law firms should be aware of other laws that may apply to these difficult situations.  
129

130 **Responsibilities of the Impaired Lawyer**

131  
132 A lawyer’s impairment does not excuse the lawyer from complying with the CRPC and the State  
133 Bar Act. An impaired lawyer has the same ethical obligations as other lawyers. ABA Formal  
134 Opn. 03-429 at 2; VA Bar Legal Ethics Opn. 1886 (December 15, 2016) at 3. In other words, the  
135 existence of a mental impairment does not allow that impaired lawyer to represent clients with  
136 any lesser amount of duty and professional care than an unimpaired lawyer. ABA Formal Opn.  
137 03-429 at 2. However, a lawyer’s mental impairment may prevent or inhibit a lawyer from  
138 recognizing and/or appreciating the existence or extent of the impairment and its effect on the  
139 lawyer’s performance of legal services. *Id.* at 3 (citing George Edward Bailey, *Impairment, The*  
140 *Profession and Your Law Partner*, 11 No. 1 Prof. Law. 2 (1999) at 2).  
141

142 **Competence & Diligence**

143  
144 A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform  
145 legal services with competence or diligence.<sup>5</sup>  
146

147 Rule 1.1(a). “Competence” in any legal service shall mean to apply the (i) learning and skill, and  
148 (ii) mental, emotional, and physical ability reasonably necessary for the performance of such  
149 service. Rule 1.1(b).<sup>6</sup> Rule 1.0.1(h) defines “reasonably” when used in relation to conduct by a  
150 lawyer as the conduct of a reasonably prudent and competent lawyer. Competence specifically  
151 includes a mental component. Rule 1.1(a)(ii). “Thus, if Attorney’s mental or emotional state  
152 prevents her from performing an objective evaluation of her client’s legal position, providing  
153 unbiased advice to her client, or performing her legal representation according to her client’s  
154 directions, then Attorney would violate the duty of competence.” Cal. State Bar Form. Opn.  
155 2003-162 at 3 (citing *Blanton v. Womancare* (1985) 38 Cal.3d 396, 407-408 [212 Cal.Rptr. 151];  
156 *Considine v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 765 [232 Cal.Rptr. 250]; Cal.  
157 State Bar Formal Opn. No. 1984-77; and L.A. Cty. Bar Assn. Formal Opn. No. 504 (2001)).  
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<sup>4</sup> Law. Man. Prof. Conduct 101:3301 at page 1 (2020).

<sup>5</sup> Specific intent is not required to find a violation of [CRPC 1.1](#); only a “general purpose or willingness to commit the act or permit the omission is necessary.” *King v. State Bar* (1990) 52 Cal.3d 307, 313-314 (decided under former rule); *Matter of Respondent G* (Rev. Dept. 1992) 2 Cal. State Bar Crt. Rptr. 175, 178 (decided under former rule).

<sup>6</sup> ABA Model Rule 1.3, Comment [5], which was not adopted by California, states that attorney competence includes anticipating events or circumstances that may adversely affect client representation. By planning ahead for the orderly disposition of his or her law practice, an attorney can ensure that clients will continue to be represented without significant interruption in the event the attorney dies or becomes incapacitated.

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159 A lawyer is also obligated to perform legal services with “reasonable diligence,” meaning that a  
160 lawyer acts with commitment and dedication to the interests of the client and does not neglect or  
161 disregard, or unduly delay a legal matter entrusted to the lawyer. Rule 1.3(b).

162  
163 A lawyer who intentionally, recklessly, repeatedly or with gross negligence fails to act with  
164 competence and/or diligence in representing a client violates lawyer’s ethical obligations even if  
165 that failure is due to impairment. Rules 1.1 and 1.3. In addition to potentially causing  
166 irreparable harm to clients, a violation of Rules 1.1 and 1.3 may result in State Bar discipline.  
167 Harm to the client is not required to show a violation of the rules of professional conduct.<sup>7</sup>

168  
169 Here, Impaired Lawyer’s conduct, which could be viewed as reckless, grossly negligent,  
170 repetitive, or perhaps even intentional, raises serious questions about whether Impaired Lawyer  
171 has competently and diligently represented Client or is able to do so. While bristling at the  
172 suggestion that something is wrong, Impaired Lawyer has implied that a contentious divorce and  
173 a heavy case load are to blame for any potential issues in Impaired Lawyer’s performance<sup>8</sup>.  
174 However, like impairment, personal problems do not justify a lawyer’s failure to perform  
175 services competently<sup>9</sup>. Importantly, regardless of the cause or nature of the mental impairment,  
176 Impaired Lawyer appears unable to recognize or appreciate the impact Impaired Lawyer’s  
177 conduct is having on Impaired Lawyer’s ability to perform legal services for Client. In addition,  
178 because Impaired Lawyer’s conduct is continuing, Subordinate Lawyer and any other lawyers in  
179 the Law Firm who know of Impaired Lawyer’s conduct will need to intervene to protect Client  
180 from harm. See discussion below on Responsibilities of Others in Law Firm.

181

### Communication with Client(s)

182

183  
184 Competent representation includes the lawyer’s obligation to communicate with the client.  
185 *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782 (decided under former rule); *Matter of Peavey*

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<sup>7</sup> A CRPC violation requires no showing of client injury or prejudice. See *Reznik v. State Bar* (1969) 1 Cal.3d 198, 203; *Garlow v. State Bar* (1982) 30 Cal.3d 912, 917; *Gadda v. State Bar* (1990) 50 Cal.3d 344, 355. The violation of a Rule of Professional Conduct does not automatically give rise to a civil cause of action. Rule 1.0(b)(3), Comment [1].

<sup>8</sup> 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.”]

<sup>9</sup> “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); *Gary v. State Bar* (1988) 44 Cal.3d 820, 824 (decided under former rule) – alcohol problem; *Snyder v. State Bar* (1976) 18 Cal.3d 286, 293 (decided under former rule) – mental and emotional strain. However, serious personal problems, including marital difficulties or financial pressures, can interfere with the attorney’s performance of his or her professional responsibilities and result in a violation of the lawyer’s duty of competence under [CRPC 1.1](#), and could mandate withdrawal under Rule 1.16(a)(3). A. Sources of Duty of Competence, Cal. Prac. Guide Prof. Resp. Ch. 6-A.

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186 (Rev. Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 491 (decided under former rule). Rule  
187 1.4(a)(1) requires lawyers to promptly inform the client of any decision or circumstance with  
188 respect to which disclosure and the client’s informed consent is required by the CRPC or the  
189 State Bar Act. Rule 1.4(a)(2) further requires that a lawyer reasonably consult with the client  
190 about the means by which to accomplish the client’s objectives in the representation. A lawyer  
191 shall explain a matter to the extent reasonably necessary to permit a client to make informed  
192 decisions regarding the client’s representation. Rule 1.4(b); see also *Lysick v. Walcolm* (1968)  
193 258 Cal.App.2d 136 (decided under former rule) [A lawyer must disclose all facts and  
194 circumstances necessary to enable the client to make free and intelligent decisions regarding the  
195 subject matter of the representation.].

196  
197 Rule 1.4(a)(3) and B&P Code section 6068(m), require lawyers to keep their clients reasonably  
198 informed about significant developments relating to the representation, which includes promptly  
199 complying with reasonable requests for information and copies of significant documents when  
200 necessary to keep the client so informed.<sup>10</sup> Rule 1.4(a)(3). What constitutes a “significant  
201 development” depends on the purpose of the representation, the sophistication of the client,  
202 client expectations and other relevant factors. Rule 1.4, Comment [1].

203  
204 Rule 1.4.1 and B&P Code section 6103.5 each require that a lawyer shall promptly communicate  
205 to the client all amounts, terms and conditions of any written offer of settlement made to the  
206 client in all matters. Further, an error potentially giving rise to a legal malpractice claim, which  
207 could include the failure to communicate a settlement offer to client, is a significant development  
208 and creates a conflict relating to the representation that must be communicated. Rule 1.4(a)(3);  
209 see also Cal. State Bar Formal Opn. 2019-197 [addresses duty to communicate a lawyer’s error].

210  
211 Here, Impaired Lawyer failed to communicate the opposing party’s written settlement offer to  
212 Client before it expired in violation of Rules 1.4(a)(2), 1.4.1(a)(2) and B&P Code section  
213 6103.5(a). The facts also demonstrate a pattern of conduct whereby Impaired Lawyer has  
214 repeatedly failed to address client’s concerns about Impaired Lawyer’s misstatements of key  
215 information and strategies related to the matter. Impaired lawyer also ignored Client’s reasonable  
216 requests for information in violation of Rule 1.4(a)(3). These violations may cause harm to  
217 Client. However, Impaired Lawyer does not acknowledge these mistakes, let alone appreciate  
218 their potential impact on Client and Client’s matter.

219  
220 As discussed, Impaired Lawyer’s failure to communicate these matters to Client is a breach of  
221 Impaired Lawyer’s duty to Client, which is not excused by Impaired Lawyer’s mental  
222 impairment. There is also a strong likelihood that more violations will occur because Impaired  
223 Lawyer refuses to recognize and acknowledge Impaired Lawyer’s misconduct. Under these  
224 circumstances, other lawyers in the Law Firm will likely need to intervene to protect Client from  
225 harm.

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<sup>10</sup> Failure to communicate with a client regarding important matters is ground for State Bar discipline. *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 127; *Spindell v. State Bar* (1975) 13 Cal.3d 253, 260.

227 **Personal Interest Conflict**

228  
229 “A lawyer shall not, without informed written consent from each affected client and compliance  
230 with paragraph (d), represent a client if there is a significant risk that lawyer’s representation of  
231 the client will be materially limited by . . . the lawyer’s own interests.” Rule 1.7(b). A conflict  
232 under Rule 1.7(b) may only be waived by informed written consent of the client if “the lawyer  
233 reasonably believes that the lawyer will be able to provide competent and diligent  
234 representation.” Rule 1.7(d)(1). Therefore, if an impaired lawyer cannot provide competent and  
235 diligent representation to the client per Rule 1.7(d)(1) as required under Rules 1.1 and 1.3, then a  
236 conflict that exists under Rule 1.7(b) cannot be waived by the client and the impaired lawyer  
237 cannot represent the client.

238  
239 An impaired lawyer’s personal interest conflict, however, does not prohibit the representation of  
240 the client by other lawyers of the firm. A conflict between the client and the impaired lawyer is  
241 not imputed to other lawyers of the firm because the impaired lawyer’s mental impairment does  
242 not present a significant risk of materially limiting the representation of the client by the  
243 remaining lawyers in the firm. Rule 1.10(a)(1).

244  
245 Here, Subordinate Lawyer communicated Subordinate Lawyer’s professional judgment to  
246 Impaired Lawyer concerning Impaired Lawyer’s actions, and Impaired Lawyer denied any  
247 misconduct, refused to stop working on the case and instructed Subordinate Lawyer not to  
248 communicate those concerns to Client because Impaired Lawyer did not want to risk losing the  
249 fees incurred from the representation should Client terminate the firm. Impaired Lawyer’s  
250 decision to favor Impaired Lawyer’s finances over Impaired Lawyer’s duty to communicate with  
251 Client (among other duties) reflects a conflict under Rule 1.7(b) between Impaired Lawyer’s  
252 personal interests and Client’s best interests, creating a significant risk that Impaired Lawyer’s  
253 continued representation of Client will be materially limited by Impaired Lawyer’s personal  
254 interests. Client may not waive this conflict to permit Impaired Lawyer’s representation  
255 because Impaired Lawyer’s violations of the CRPC and the State Bar Act, including Impaired  
256 Lawyer’s failure and continued refusal to communicate the settlement offer to Client in violation  
257 of Rules 1.4(a)(3), 1.4.1(a)(2) and B&P Code §6103.5(a), evidence that Impaired Lawyer cannot  
258 provide competent and diligent representation to Client as required under Rule 1.7(d)(1).  
259 Impaired Lawyer’s personal interest conflict is not imputed to the firm because it does not  
260 present a significant risk of materially limiting the representation of Client by other firm lawyers.  
261 Therefore, other lawyers of the firm are not prohibited from representing Client. Rule 1.10(a)(1).

262  
263 **Termination of Representation**

264  
265 A lawyer shall not represent or continue to represent a client if the lawyer (1) “knows or  
266 reasonably should know” that lawyer’s actions during the representation of a client *will* result in  
267 violation the CRPC or the State Bar Act (Rule 1.16(a)(2)); and/or (2) “the lawyer’s mental or  
268 physical condition renders it *unreasonably difficult* to carry out the representation effectively.”  
269 (Rule 1.16(a)(3)). Under either of these circumstances, the lawyer must withdraw from  
270 representing the client in accordance with Rule 1.16(a).

272 A lawyer may, but is not required to, withdraw from representing a client if the lawyer (1)  
273 believes “the continuation of the representation is *likely* to result in a violation of [the CRPC] or  
274 the State Bar Act” (Rule 1.16(b)(9)); and/or (2) “the lawyer’s mental condition renders it *difficult*  
275 for the lawyer to carry out the representation effectively[,]” (Rule 1.16(b)(8)). Any lawyer  
276 seeking to terminate a representation of a client under Rule 1.16(a) or (b), must also comply with  
277 1.16(c) and (d).

278  
279 In situations where a lawyer has a mental condition impairing the legal services provided, the  
280 distinction between mandatory and permissive withdrawal is whether the impaired lawyer *will* or  
281 is *likely* to violate the CRPC or the State Bar Act,<sup>11</sup> as well as the degree of difficulty the lawyer  
282 faces in continuing the representation.<sup>12</sup> An impaired lawyer’s actions should be evaluated under  
283 these standards. A disciplinary issue could occur under either Rule 1.16(a)(2) or (a)(3) if an  
284 impaired lawyer continues client representation when the lawyer is not mentally capable of  
285 competently practicing law.

286  
287 Here, under Rule 1.16(a)(2) and/or (a)(3), Impaired Lawyer should not continue to represent  
288 Client because Impaired Lawyer reasonably should know, for the reasons stated above, that  
289 continued representation will result in violations of the CRPC and the State Bar Act and  
290 Impaired Lawyer’s condition has demonstrated that it is unreasonably difficult for Impaired  
291 Lawyer to carry out the representation effectively. Impaired Lawyer has denied any misconduct,  
292 refuses to communicate significant developments to Client, has insisted that Subordinate Lawyer  
293 not communicate required information to Client, and Impaired Lawyer’s problematic conduct is  
294 continuing and becoming more egregious. It appears Impaired Lawyer cannot appreciate, or is in  
295 denial, that Impaired Lawyer’s conduct has resulted in the breach of Impaired Lawyer’s duties to  
296 Client. Under these facts, Impaired Lawyer’s failure to end Impaired Lawyer’s representation of  
297 Client when required could be a further violation of the CRPC subjecting Impaired Lawyer to  
298 discipline.

299  
300 **Responsibilities of the Other Lawyers in the Firm**

301  
302 When an impaired lawyer is “unable or unwilling to deal with the consequences of his [or her]  
303 impairment,” firm lawyers and the impaired lawyer’s supervisors who know of the impaired

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<sup>11</sup> Rule 1.16(a)(2) imposes a *duty* to withdraw where there is a *prospective* violation of another Rule of Professional Conduct (e.g., rule against representing conflicting interests) or a provision of the State Bar Act. This rule does *not* mandate withdrawal for *past violations* (although past violations may result in disqualification by court order). Withdrawal is mandatory only where continued employment “*will result*” in ethical violations (i.e., where it is *reasonably clear* that the rules will be violated). Withdrawal is permissive, not mandatory, where such violations are merely “*likely*” (CRPC 1.16(b)(9)). B. Withdrawal (Termination) by Lawyer, Cal. Prac. Guide Prof. Resp. Ch. 10-B.

<sup>12</sup> “An attorney who is physically or mentally unable to serve the client effectively must withdraw. (Rules of Professional Conduct, Rule 1.16(a)(3).) These unfortunate situations range from alcohol and drug problems to terminal illnesses.” Mandatory withdrawal—Inability to proceed, Younger on California Motions § 17:4 (2d ed.)

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304 lawyer’s conduct have an obligation to take steps to protect the client and ensure the impaired  
305 lawyer’s compliance with the CRPC and the State Bar Act. ABA Formal Ethics Opn. 03-429, 19  
306 Law. Man. Prof. Conduct 380 (2003). This imposes two sets of responsibilities for the other  
307 lawyer(s): (1) responsibilities to the affected client(s); and (2) responsibilities to the impaired  
308 lawyer and the firm, if any. Although a lawyer’s paramount obligation is to take steps to protect  
309 the interests of the client(s), other ethical obligations cannot be ignored. *Id.* at 4.

310  
311 Each lawyer has independent ethical obligations to protect the interests of clients. Generally,  
312 when a client retains a law firm, the client’s relationship extends to all attorneys the firm.<sup>13</sup>  
313 “Every attorney, including an associate . . . , must exercise professional judgment in the best  
314 interest of his clients and must take steps which are necessary to assure competent representation  
315 for his client[.]” LA County Bar Assoc. Form. Opn. No. 383 (December 11, 1979). An impaired  
316 lawyer’s failure to fulfill ethical responsibilities and/or take appropriate action to protect a client  
317 does not excuse other lawyers, who know of the impaired lawyer’s conduct and relevant facts,  
318 from fulfilling their own professional responsibilities, including taking reasonable remedial  
319 measures to protect the client. See further discussion re remedial measures at page 13.

320  
321 Multiple factors may affect the duties of lawyers within a firm to act in the face of a colleague’s  
322 impairment, including, but not limited to, the impaired lawyer’s actions or inactions; the nature  
323 of the client matter; the urgency of the situation; the nature, severity and permanence of the  
324 lawyer’s impairment; the size of the firm and the resources available; and the role within the firm  
325 of each non-impaired lawyer who knows of the impaired lawyer’s actions and the relevant  
326 circumstances.<sup>14</sup> In some situations where the impairment does not materially affect the lawyer’s  
327 work, accommodations may be able to be made for the impaired lawyer, so long as reasonable  
328 steps have been taken to prevent or mitigate any resulting consequences and assure compliance  
329 with the CRPC and the State Bar Act. See ABA Formal Opn. 03-429 at 4. For example, a  
330 lawyer with an anxiety disorder may be able to competently function if assigned to transactional  
331 work rather than courtroom litigation. *Id.* Lawyers in a firm who knowingly allow an impaired  
332 lawyer to continue a client representation at a time when negative consequences could have been  
333 avoided or mitigated through reasonable remedial action, breach their own ethical  
334 responsibilities under Rules 5.1 or 5.2, whether or not the client has actually been harmed.<sup>15</sup>

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<sup>13</sup> 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).

<sup>14</sup> See D.C Bar Ethics Opn. 377 [“Depending on the nature, severity, and permanence (or likelihood of periodic reoccurrence) of the lawyer’s impairment, management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to the clients of the firm.”].

<sup>15</sup> California did not adopt Model Rule 8.3 or any rule which requires a lawyer to report another lawyer to the California State Bar if the lawyer knows that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Therefore, California lawyers may, but are not required to, report another lawyer’s misconduct to the California State Bar.<sup>15</sup> A lawyer’s impairment, on its own, does not necessarily violate the CRPC or State Bar Act.

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**Responsibilities of Subordinate Lawyer**

Rule 5.2(a) requires that a lawyer must comply with the CRPC and the State Bar Act “notwithstanding that the lawyer acts at the direction of another lawyer or other person.” Therefore, both a supervisory lawyer and a subordinate lawyer is each responsible for fulfilling their own responsibilities and obligations under the CRPC and the State Bar Act. Rule 5.2, Comment; see *In re Maloney & Virsik* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-797 (decided under former rule) [associate attorney disciplined along with supervising partner for misrepresentations misleading the court and failing to obey a court order.] However, a subordinate lawyer does not violate the CRPC or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of professional duty. Rule 5.2(b).

“If the subordinate lawyer believes that the supervisor’s proposed resolution of the question of professional duty would result in a violation of [the CRPC] or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.” Rule 5.2, Comment. The subordinate lawyer must exercise reasonable discretion to satisfy Rule 5.2, including determining which supervisory lawyer the subordinate lawyer should communicate the subordinate lawyer’s professional judgment to, if more than one supervisory lawyer exists. Lawyers within the law firm who have supervisory or managerial responsibilities may include in-house ethics counsel, executive committee member(s), risk management committee member(s) and the partner in charge of the client matter(s) at issue. Therefore, if a subordinate lawyer believes that subordinate lawyer’s direct supervisor is incompetent to handle a client matter, then the subordinate lawyer could communicate subordinate lawyer’s concerns to the impaired lawyer and/or another unimpaired supervisory lawyer. See Rule 5.2, Comment; see also LA County Bar Form. Opn. No. 383 (December 11, 1979) (construing former rule) [“When an associate attorney has concluded that a partner in the firm has committed malpractice or is incompetent with respect to the handling of a client’s affairs, the matter should be brought to the attention of the partnership in an effort to agree upon a course of conduct with regard to the client which will insure competent representation.”]<sup>16</sup> Communicating the impaired lawyer’s actions to an unimpaired lawyer supervisor triggers the obligations of that lawyer. See further discussion of supervisory lawyer’s duties at page 13.

In an emergency situation, a subordinate lawyer should take such action as may be required to preserve the client’s rights. Los Angeles Bar Ass’n Form. Opn. 348 (June 19, 1975) (construing former rule). After the emergency situation has subsided, subordinate lawyer should follow the procedures outlined in the prior paragraph. *Id.*

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San Diego Bar Ass’n Form. Opn. 1992-2; Los Angeles Bar Ass’n Form. Opn. 440 (1986) [attorney should consider seriousness of other lawyer’s offense and potential impact on public and the profession].

<sup>16</sup> 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.

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372 In a situation where the only supervisory lawyer is the impaired lawyer and the question of  
373 professional judgment as to the lawyers’ responsibilities under the CRPC and the State Bar Act  
374 can reasonably be answered in only one way, the supervisory lawyer and subordinate lawyer are  
375 equally responsible for fulfilling that duty. Rule 5.2, Comment. Therefore, the subordinate  
376 lawyer is responsible to uphold subordinate lawyer’s duties to the client, notwithstanding an  
377 objection by the supervisory lawyer. See Rule 5.2(a), Comment to Rule 5.2.<sup>17</sup> The subordinate  
378 lawyer must take necessary remedial measures to protect the client, including communicating to  
379 the client any information required under Rule 1.4. See further discussion re remedial action at  
380 page 13.

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382 In Scenario #1, Subordinate Lawyer works for Big Firm, which has both an executive committee  
383 and a risk management committee. Here, Subordinate Lawyer communicated Subordinate  
384 Lawyer’s professional judgment concerning Impaired Lawyer’s actions and the handling of  
385 Client’s matter to Impaired Lawyer directly. Given that the question of professional judgment  
386 can only be answered one way and Impaired Lawyer’s response would result in violation(s) of  
387 the CRPC or State Bar Act, Subordinate Lawyer must uphold Subordinate Lawyer’s independent  
388 duties to Client. Subordinate Lawyer also has the discretion to communicate Subordinate  
389 Lawyer’s professional judgment to one or more unimpaired supervisory lawyers at Big Firm. By  
390 appropriately reporting Subordinate Lawyer’s concerns internally to an unimpaired supervisory  
391 lawyer at Big Firm, Subordinate Lawyer triggers the responsibilities of the unimpaired  
392 supervisory lawyer(s) under Rule 5.1. Subordinate Lawyer should then be able to work with the  
393 supervisory or managerial lawyer(s) of Big Firm to investigate the matter and evaluate  
394 reasonable remedial measures to avoid further ethical misconduct by Impaired Lawyer and to  
395 protect the Client. This could include an investigation and evaluation of whether Big Firm is  
396 able to continue to represent Client, how and what to communicate to Client, how to  
397 communicate with Impaired Lawyer<sup>18</sup>, and Impaired Lawyer’s role with Big Firm moving  
398 forward, if any. Given Subordinate Lawyer’s involvement in Client’s matter, Big Firm may ask  
399 Subordinate Lawyer to assist with the remedial measures, such as facilitating communications  
400 with Client and to provide any continuity with respect to the representation. See discussion of the  
401 duties of Lawyers with Managerial or Supervisory Authority beginning at page 13.

402  
403 Internally reporting the Impaired Lawyer’s actions to an unimpaired lawyer with supervisory  
404 authority does not fully discharge the Subordinate Lawyer’s duties. Subordinate Lawyer owes  
405 separate duties to Client and is independently responsible to fulfill those ethical obligations to  
406 Client as discussed below under Scenario 2. Rule 5.2, Comment. If a reasonable resolution to

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<sup>17</sup> 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.

<sup>18</sup> See, e.g., “How to Approach Cognitively Impaired Colleagues,” Oregon State Bar Bulletin, November 2014.

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407 an arguable question of professional duty is proposed by a supervisory lawyer to fulfill the  
408 lawyers' duties to Client, then Subordinate Lawyer will not violate the CRPC or State Bar Act if  
409 Subordinate Lawyer acts in accordance with that reasonable resolution. Subordinate Lawyer  
410 should not comply with an unreasonable resolution to a question of professional judgment that  
411 would result in ethical violations. *Id.*; see also Rule 8.4(a).

412  
413 In Scenario #2, Subordinate Lawyer does not have an unimpaired supervisory lawyer to  
414 communicate with about Impaired Lawyer's actions and resulting consequences to Client's  
415 representation. Here, Impaired Lawyer has denied there is any problem, has refused to  
416 communicate necessary information to Client, and has refused to consider stepping away from  
417 the Client matter. Under these circumstances, and because Impaired Lawyer refuses to answer  
418 the question of professional judgment in a reasonable way, Subordinate Lawyer must act in  
419 accordance with Subordinate Lawyer's duties to Client and take timely reasonable remedial  
420 measures despite Impaired Lawyer's insistence that such actions not be taken.

421  
422 Here, Subordinate Lawyer will need to communicate significant developments and other  
423 information reasonably necessary to permit the Client to make informed decisions regarding the  
424 ongoing representation. Rule 1.4(a)(2-3) and (b). When it is possible to do so, the Subordinate  
425 Lawyer should consider maintaining the privacy and other legal rights of Impaired Lawyer<sup>19</sup>  
426 when communicating with Client, unless Impaired Lawyer authorizes his private information to  
427 be shared. Rule 1.4(b); see also Rule 7.1(a). This may necessitate communicating to Client only  
428 that Impaired Lawyer is unable to continue as counsel on Client's matter, focusing on the facts of  
429 Impaired Lawyer's conduct specific to Client's matter and avoiding any disclosure of Impaired  
430 Lawyer's personal and private information. For example, Subordinate Lawyer should disclose to  
431 Client that Impaired Lawyer failed to timely communicate the settlement demand, the details of  
432 the offer, and the impact it may have on the Client's matter. Subordinate Lawyer could also  
433 disclose that Impaired Lawyer was unable to effectively argue before the court on behalf of  
434 Client's opposition to the MSJ.

435  
436 Subordinate Lawyer should further advise Client how Subordinate Lawyer believes Client's  
437 matter could be handled as a result of these developments. This may include Subordinate  
438 Lawyer's recommendation to Client that Subordinate Lawyer is competent to continue handling  
439 Client's case. If Subordinate Lawyer does not have sufficient learning and skill to take over the  
440 representation, Subordinate Lawyer may suggest to Client that Subordinate Lawyer can continue  
441 to provide competent representation by associating with or, where appropriate, professionally  
442 consulting with another lawyer; Subordinate Lawyer may also recommend referring the matter to  
443 another lawyer whom the Subordinate Lawyer reasonably believes is competent. Rule 1.1(c). A  
444 decision on any matter that will affect Client's substantive rights, including who serves as lead  
445 counsel for Client, is something that should be discussed with the Client as it is within Client's  
446 sole authority.<sup>20</sup>

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<sup>19</sup> ABA Formal Opn. 03-429 at 6 ("In discussions with the client, the lawyer must act with candor and avoid material omissions, but to the extent possible, should be conscious of the privacy rights of the impaired lawyer.").

<sup>20</sup> *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; 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).

447  
448 In order to help fulfill Subordinate Lawyer’s obligations to Client, Subordinate Lawyer may  
449 consider seeking confidential guidance about professional responsibilities from the legal ethics  
450 hotline of the California State Bar,<sup>21</sup> the hotlines of local bar associations where available, or  
451 appropriate legal ethics advisors within or outside of a lawyer’s firm. Subordinate Lawyer may  
452 also consider speaking confidentially with an appropriate mental health professional, the State  
453 Bar of California’s confidential Lawyer Assistance Program (“LAP”),<sup>22</sup> or a lawyer mentor for  
454 additional insight.

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456 **Lawyer(s) with Managerial or Supervisory Authority**

457 A lawyer who, individually or together with other lawyers, possesses managerial or supervisory  
458 authority in a law firm must make reasonable efforts to ensure that the firm’s lawyers comply  
459 with the CRPC and State Bar Act. Rule 5.1 (a-b). A lawyer who has direct supervisory  
460 authority over another lawyer is responsible for the other lawyer’s violations of the CRPC and  
461 State Bar Act if the supervisory lawyer orders or, with knowledge of the relevant facts and of the  
462 specific conduct, ratifies the conduct involved, or knows of the conduct at a time when its  
463 consequences can be avoided or mitigated but fails to take reasonable remedial action. Rule  
464 5.1(c).<sup>23</sup> A lawyer’s failure to supervise other lawyers can result in attorney discipline. *Matter of*  
465 *Whitehead* (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 368-369; *Matter of Phillips* (Rev.  
466 Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 335-336.

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

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<sup>21</sup> California State Bar Legal Ethics Hotline: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Hotline>

<sup>22</sup> California’s LAP does not provide legal advice, but can discuss the problem, provide a free and confidential professional mental health assessment, and provide direction to the caller as to available services. The LAP also offers professional monitoring to satisfy specific monitoring or verification requirements. A Support Lawyer Assistance Program is also offered for lawyers who are interested in weekly group meetings and the support of a qualified medical professional. See <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program>

<sup>23</sup> 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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476 conduct at a time when they could have acted to avoid or mitigate the consequences and failed to  
477 take remedial action. Rule 5.1(c).

478 If permitted by applicable law, a firm should consider including in its policies a requirement that  
479 conditions continued employment on an impaired lawyer's seeking and receiving appropriate  
480 assistance, such as medical care, counseling, or therapy, where the impairment is impeding the  
481 lawyer's ability to competently represent the client(s). Firms should also consider including  
482 procedures that encourage firm lawyers to report to the appropriate personnel concerns of a  
483 lawyer's impairment adversely affecting representation of client(s), perhaps facilitated through a  
484 hotline or by designating a neutral firm representative who does not supervise or manage  
485 subordinate lawyers. See Rule 5.1(a), Comments [1], [2] and [4]; see also D.C. Bar Ethics Opn.  
486 377. Anonymous reporting within a law firm could encourage lawyers, particularly subordinate  
487 lawyers, to report any concerns they may have about their superiors and other colleagues without  
488 the fear of any backlash, and it could also encourage an impaired lawyer to self-report and  
489 hopefully get timely assistance.

490 Lawyers cannot diagnose the cause or extent of a colleague's mental impairment, but must make  
491 a reasonable effort to ensure the impaired lawyer's compliance with the rules, and must act to  
492 avoid or mitigate any consequences that affect a client's interests.<sup>24</sup> A lawyer cannot act on  
493 conjecture or conflicting reports, so the prudent first step is to investigate the colleague's  
494 perceived impairment to evaluate the accuracy of the report(s); the severity and duration of the  
495 impaired lawyer's conduct; whether the lawyer's conduct can be resolved or improved; and  
496 whether the lawyer's condition renders it difficult or unreasonably difficult for the impaired  
497 lawyer to carry out legal representation effectively. ABA Formal Opn. 03-429 at 3.<sup>25</sup> The  
498 investigation must analyze any and all legal services provided by the impaired lawyer to  
499 establish if other client matters are affected by the colleague's impairment. See Rules 5.1(b-c)  
500 and 8.4(a). This entails identifying and auditing other client's files where the impaired lawyer is  
501 involved to ensure the firm's representation complies with applicable ethical duties. *Id.* The  
502 investigating lawyers must be careful to not reveal the impaired lawyer's private information or  
503 impair any other legal rights when speaking with other lawyers or staff within the firm as  
504 necessary to investigate the lawyer's condition and resulting impact.

505 Reasonable remedial action should be determined on a case-by-case basis and consider the  
506 nature and seriousness of the misconduct and the nature and immediacy of its harm. Rule 5.1,  
507 Comment [6]. Remedial actions may include notifying another lawyer within the firm who has

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<sup>24</sup> "Because lawyers are not health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist. Nonetheless, a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment (e.g. patterns of memory lapse or inexplicable behavior not typical of the subject lawyer, such as repeated missed deadlines)." ABA Formal Opn. 03-431 (August 8, 2003).

<sup>25</sup> 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 the "unreasonably difficult" standard for mandatory withdrawal and the "difficult" standard for permissive withdrawal.

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508 supervisory or managerial responsibilities, confronting the impaired lawyer, notifying the client  
509 of all information relevant to the representation as required under the CRPC and the State Bar  
510 Act, ending impaired lawyer's representation of the client or adjusting the impaired lawyer's  
511 responsibilities as appropriate under the CRPC and the State Bar Act, and referring the client to  
512 new counsel to handle the matter. See Rules 1.4, 1.4.1, 1.7 and 1.16; and B&P Code sections  
513 6068(m) and 6103.5.

514 "If a lawyer's mental impairment can be accommodated by changing the lawyer's work  
515 environment or the type of work that the lawyer performs, such steps also should be taken." NC  
516 Bar 2013 Form. Opn. 8; see also VA Bar LEO 1886 at 4. However, "if such episodes of  
517 impairment have an appreciable likelihood of recurring, lawyers who manage or supervise the  
518 impaired lawyer may have to conclude that the lawyer's ability to represent clients is materially  
519 impaired." ABA Formal Opn. 03-429.<sup>26</sup>

520 Under Scenario #1, knowledge by an unimpaired supervisory or managerial lawyer of Impaired  
521 Lawyer's actions will trigger the obligations of the supervisory or managerial lawyer under Rule  
522 5.1(c)(2), requiring the supervisory lawyer to take reasonable remedial action to avoid or  
523 mitigate any resulting consequences. Before acting, a supervisory or managerial lawyer ought to  
524 review Big Firm's policies and procedures which should address these situations.

525 As described above, a comprehensive investigation should be conducted to evaluate the reported  
526 misconduct, its impact on all client matters and appropriate remedial actions. Under these facts,  
527 a change in lead counsel is necessary because of Impaired Lawyer's violations and is another  
528 significant development that must be communicated to the client under Rule 1.4, along with  
529 other significant information such as the expired settlement offer.

530 Big Firm can make suggestions to Client as to how it believes the case should be re-staffed and  
531 any other necessary actions that it believes should be taken as a result of these significant  
532 developments. Big Firm may have sufficient internal resources available to assign a competent  
533 new lawyer or lawyers within Big Firm to replace Impaired Lawyer on Client's case in  
534 consultation with Client.

## CONCLUSION

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537  
538 Regardless of its nature or source, a mental impairment that impedes a lawyer's ability to  
539 competently and diligently provide legal services as required under the CRPC and the State Bar  
540 Act triggers ethical obligations not just for the impaired lawyer, but also for lawyers who know  
541 of the conduct at a time when the consequences can be avoided or mitigated. Although the

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<sup>26</sup> "The Firm's paramount obligation is to take steps to protect the interest of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are ethically represented notwithstanding the lawyer's impairment. Other steps include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients." ABA Formal Op. 03-429

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542 impact of an impairment can try to be addressed and resolved through internal procedures,  
543 communication to the client may be required and representation by the impaired lawyer may  
544 need to end, resulting in the firm's re-staffing or withdrawal from the representation. The  
545 available resources and options to remediate this type of situation may differ from firm to firm  
546 and will depend on the particular facts and circumstances, but the duties and ethical  
547 responsibilities owed by the lawyers who have knowledge of an impairment remain.

548  
549 This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of  
550 the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of  
551 California, its Board of Trustees, any persons, or tribunals charged with regulatory  
552 responsibilities, or any member of the State Bar.