

Draft prepared for the July 24, 2020 COPRAC Meeting

Basner\*  
Roche  
Banola

**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 is violating 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 diminution of a lawyer’s mental capacity necessary to competently and ethically perform legal services as required under the CRPC and the State Bar Act. A lawyer’s impairment does not excuse that lawyer’s compliance with the CRPC and the State Bar Act. An impaired lawyer’s conduct can also trigger obligations for the impaired lawyer’s subordinates, supervisors and other colleagues who know of the impaired lawyer’s conduct. These ethical obligations may include, but are not limited to, communicating significant developments related to the lawyer’s conduct to the client and promptly taking 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, the severity of the impaired lawyer’s unethical 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.

**AUHORITIES 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 Rules of Professional Conduct of the State Bar of California; Sections 6068, subdivisions (e)(1) and (m), 6103.5(a) of Business and Professions Code (State Bar Act).

STATEMENT OF FACTS

44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89

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

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

Over the last several months, Subordinate Lawyer has observed significant changes in Impaired Lawyer’s behavior and has become concerned about Impaired Lawyer’s ability to competently and diligently represent Client. Impaired Lawyer has often appeared confused concerning Client’s matter, has missed Client meetings without explanation, has failed to promptly respond to Client inquiries, and, when responding to such inquiries, has discussed facts and strategies that obviously do not apply to Client’s matter. Impaired Lawyer did not recognize these problems and was argumentative with Client when Client raised them.

At a recent hearing on the opposing party’s motion for summary judgment (“MSJ”), Impaired Lawyer attempted to argue against the motion on Client’s behalf, but appeared frazzled and confused, citing facts and law to the court that were not applicable to Client’s matter. Recognizing the problem, the court allowed Subordinate Lawyer, who had drafted the opposition brief, to step in and argue Client’s position. Opposing party’s MSJ was ultimately denied. After the denial, opposing counsel communicated a written settlement offer to Impaired Lawyer. Impaired Lawyer ignored the offer and failed to communicate it to Client. Subordinate Lawyer recently learned of the offer through a follow-up letter from opposing counsel, which mentioned that no response was received from Impaired Lawyer by the deadline provided, so the offer had expired.

Thereafter, Subordinate Lawyer raised ethical concerns about Impaired Lawyer’s conduct directly with Impaired Lawyer. Subordinate Lawyer said that Impaired Lawyer’s recent conduct demonstrated that Impaired Lawyer is no longer competent to handle the role of lead counsel for the Client without additional support, and that other lawyers should be recruited to assist with the Client’s matter, and that failure to do so would violate the duties of competence and diligence owed to the Client. Subordinate Lawyer also said that Impaired Lawyers failure to communicate with Client, both about the settlement offer and the lawyer’s own impairment, violated the duty to communicate with the Client. Subordinate Lawyer expressed concern that continuing the representation without addressing those ethical issues would result in harm to the Client.

In response, Impaired Lawyer denied having any problems, mentioning only that Impaired Lawyer was currently handling a large case load and dealing with a contentious divorce. Impaired Lawyer insisted that no mistakes had been made on Client’s matter and that no staffing changes were necessary to ensure competent representation of the Client. Impaired Lawyer denied that any ethical violations had occurred, and admonished Subordinate Lawyer for

CLEAN

90 suggesting otherwise. Impaired Lawyer further instructed Subordinate Lawyer not to raise any  
91 concerns with Client, since doing so could cause Client to lose confidence in the firm’s  
92 representation, potentially resulting financial and reputational harm to the Impaired Lawyer and  
93 firm.

94  
95 Scenario #1: Impaired Lawyer and Subordinate Lawyer are employed at Big Firm, an 850-  
96 lawyer international law firm. Big Firm has both an executive committee and a risk management  
97 committee.

98  
99 Scenario #2: Impaired Lawyer and Subordinate Lawyer work in Impaired Lawyer’s Small Firm,  
100 where Subordinate Lawyer is Impaired Lawyer’s only employee.

101  
102 **DISCUSSION**

103  
104 This opinion deals only with mental impairment that appears to impede a lawyer’s fitness to  
105 competently and diligently engage in the practice of law in accordance with the CRPC and State  
106 Bar Act.<sup>1</sup> Mental impairment can be temporary or permanent and can vary in severity. It can  
107 result from a disease or illness that impacts mental faculties, such as mental illness, depression,  
108 anxiety or dementia; stress; lack of sleep; alcoholism<sup>2</sup>; problematic substance use; or traumatic  
109 life events.<sup>3</sup> A mental impairment, standing alone, does not raise ethical issues. “It is not the  
110 impairment that concerns the regulation and disciplinary system but only the effect, if any, on the  
111 lawyer’s fitness and ability to practice law.”<sup>4</sup> The Committee recognizes that there could be  
112 some tension between a lawyer’s ethical obligations under the CRPC and the State Bar Act  
113 (Business & Professions (“B&P”) Code, Chapter 4 §§ 6001.1-6213), and substantive law  
114 regarding employment, disability and privacy, among other legal rights. This opinion is limited  
115 to addressing ethical obligations, but lawyers and law firms should be aware of other laws that  
116 may apply to these difficult situations.

117  
118 **Responsibilities of the Impaired Lawyer**

---

<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).

<sup>4</sup> Law. Man. Prof. Conduct 101:3301 at page 1 (2020).

119  
 120 A lawyer’s impairment does not excuse the lawyer from complying with the CRPC and the State  
 121 Bar Act. An impaired lawyer has the same ethical obligations as other lawyers. ABA Formal  
 122 Opn. 03-429 at 2; VA Bar Legal Ethics Opn. 1886 (December 15, 2016) at 3. “Simply stated,  
 123 mental impairment does not lessen a lawyer’s obligation to provide competent and ethical  
 124 representation.” ABA Formal Opn. 03-429 at 2. A lawyer’s mental impairment may, however,  
 125 prevent or inhibit a lawyer from recognizing and/or appreciating the existence or extent of the  
 126 impairment and its effect on the lawyer’s performance of legal services. *Id.* at 3 (citing George  
 127 Edward Bailey, *Impairment, The Profession and Your Law Partner*, 11 No. 1 Prof. Law. 2  
 128 (1999) at 2).

129  
 130 **Competence and Diligence**

131  
 132 A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform  
 133 legal services with competence or diligence.<sup>5</sup> Rule 1.1(a). “Competence” means to apply the (i)  
 134 learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the  
 135 performance of the service in question. Rule 1.1(b).<sup>6</sup> Rule 1.0.1(h) defines “reasonably” when  
 136 used in relation to conduct by a lawyer as the conduct of a reasonably prudent and competent  
 137 lawyer. Competence specifically includes both mental and emotional components. Rule  
 138 1.1(a)(ii). “Thus, if Attorney’s mental or emotional state prevents her from performing an  
 139 objective evaluation of her client’s legal position, providing unbiased advice to her client, or  
 140 performing her legal representation according to her client’s directions, then Attorney would  
 141 violate the duty of competence.” Cal. State Bar Form. Opn. 2003-162 at 3 (citing *Blanton v.*  
 142 *Womancare* (1985) 38 Cal.3d 396, 407-408 [212 Cal.Rptr. 151]; *Considine v. Shadle, Hunt &*  
 143 *Hagar* (1986) 187 Cal.App.3d 760, 765 [232 Cal.Rptr. 250]; Cal. State Bar Formal Opn. No.  
 144 1984-77; and L.A. Cty. Bar Assn. Formal Opn. No. 504 (2001)). A lawyer is also obligated to  
 145 perform legal services with “reasonable diligence,” meaning that a lawyer acts with commitment  
 146 and dedication to the interests of the client and does not neglect or disregard, or unduly delay a  
 147 legal matter entrusted to the lawyer. Rule 1.3(b).

148  
 149 Here, Impaired Lawyer’s proposed course of conduct involves, at a minimum, reckless, grossly  
 150 negligent or repetitive violations of the duties of competence and diligence. Impaired Lawyer  
 151 has recently failed to perform competently both in court and in dealings with the client.  
 152 Moreover, Impaired Lawyer has been unable to recognize any misconduct, or any possibility that  
 153 it might call for a change in the staffing or organization of the case. While bristling at the  
 154 suggestion that something is wrong, Impaired Lawyer has implied that a contentious divorce and

---

<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 Ct. 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.

155 a heavy case load are to blame for any potential issues in Impaired Lawyer’s performance.<sup>7</sup>  
156 Whether the lawyer’s performance is due to impairment or personal problems, however, it does  
157 not excuse failing to meet obligations to the client.<sup>8</sup>  
158

159 **Communication with the Client**  
160

161 Competent representation includes the lawyer’s obligation to communicate with the client.  
162 *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782 (decided under former rule); *Matter of Peavey*  
163 (Rev. Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 491 (decided under former rule). Rule  
164 1.4(a)(1) requires lawyers to promptly inform the client of any decision or circumstance with  
165 respect to which disclosure and the client’s informed consent is required by the CRPC or the  
166 State Bar Act. Rule 1.4(a)(2) further requires that a lawyer reasonably consult with the client  
167 about the means by which to accomplish the client’s objectives in the representation. A lawyer  
168 shall explain a matter to the extent reasonably necessary to permit a client to make informed  
169 decisions regarding the client’s representation. Rule 1.4(b); see also *Lysick v. Walcolm* (1968)  
170 258 Cal.App.2d 136 (decided under former rule) [A lawyer must disclose all facts and  
171 circumstances necessary to enable the client to make free and intelligent decisions regarding the  
172 subject matter of the representation.].  
173

174 Rule 1.4(a)(3) and B&P Code section 6068(m), require lawyers to keep their clients reasonably  
175 informed about significant developments relating to the representation, which includes promptly  
176 complying with reasonable requests for information and copies of significant documents when  
177 necessary to keep the client so informed.<sup>9</sup> Rule 1.4(a)(3). What constitutes a “significant  
178 development” depends on the purpose of the representation, the sophistication of the client,  
179 client expectations and other relevant factors. Rule 1.4, Comment [1].  
180

181 Rule 1.4.1 and B&P Code section 6103.5 each require a lawyer to promptly communicate to the  
182 client all amounts, terms and conditions of any written offer of settlement made to the client.  
183 Further, an error potentially giving rise to a legal malpractice claim, which could include the

---

<sup>7</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>8</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.

<sup>9</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.

184 failure to communicate a settlement offer to client, is a significant development and creates a  
185 conflict relating to the representation that must be communicated. Rule 1.4(a)(3); see also Cal.  
186 State Bar Formal Opn. 2019-197 [addresses duty to communicate a lawyer’s error].  
187

188 Here, Impaired Lawyer has failed to communicate the opposing party’s written settlement offer  
189 to Client before it expired in violation of Rules 1.4(a)(2), 1.4.1(a)(2) and B&P Code section  
190 6103.5(a), and continues to refuse to do so. The facts also demonstrate a pattern of conduct in  
191 which Impaired Lawyer has repeatedly ignored Client’s reasonable requests for information in  
192 violation of Rule 1.4(a) (3). Finally, Impaired Lawyer has barred any communication with the  
193 Client about Impaired Lawyer’s own ability to continue to represent the Client effectively,  
194 although that issue would clearly be significant to the Client. These ongoing violations may  
195 cause harm to Client. However, Impaired Lawyer does not acknowledge these mistakes, let alone  
196 appreciate their potential impact on Client and Client’s matter.  
197

198 **Personal Interest Conflict**  
199

200 “A lawyer shall not, without informed written consent from each affected client and compliance  
201 with paragraph (d), represent a client if there is a significant risk that lawyer’s representation of  
202 the client will be materially limited by ... the lawyer’s own interests.” Rule 1.7(b). A conflict  
203 under Rule 1.7(b) may only be waived by informed written consent of the client if “the lawyer  
204 reasonably believes that the lawyer will be able to provide competent and diligent  
205 representation.” Rule 1.7(d)(1). Add (d)(2).  
206

207 An impaired lawyer’s personal interest conflict, however, does not prohibit the representation of  
208 the client by other lawyers of the firm. A conflict between the client and the impaired lawyer is  
209 not imputed to other lawyers of the firm because the impaired lawyer’s mental impairment does  
210 not present a significant risk of materially limiting the representation of the client by the  
211 remaining lawyers in the firm. Rule 1.10(a)(1).  
212

213 Here, Impaired Lawyer has ordered Subordinate Lawyer not to communicate with the Client  
214 concerning the issues that Subordinate Lawyer has identified because Impaired Lawyer did not  
215 want to risk the economic harm that would result were Client to terminate the firm. Impaired  
216 Lawyer’s decision to place the Impaired Lawyer’s personal, economic and reputational interests  
217 ahead of the Client’s interest to receive competent and ethical representation reflects an  
218 impermissible conflict of interest, because there is a significant risk that the representation of the  
219 Client will be materially limited. Because this conflict has not been disclosed or client consent  
220 has not been sought, then continued representation is not permissible under rule 1.7(b).<sup>10</sup>  
221

222 **Termination of Representation**  
223

224 A lawyer shall not continue to represent a client if the lawyer (1) “knows or reasonably should  
225 know” that lawyer’s actions during the representation of a client *will* result in violation the  
226 CRPC or the State Bar Act (Rule 1.16(a)(2)); and/or (2) “the lawyer’s mental or physical

---

<sup>10</sup> Under the facts presented in this opinion, consent to this conflict may not be permissible under 1.7(d), subsections (1) or (2).

227 condition renders it *unreasonably difficult* to carry out the representation effectively.” (Rule  
 228 1.16(a)(3)). Under either of these circumstances, the lawyer must withdraw from representing  
 229 the client in accordance with Rule 1.16(a). A lawyer may, but is not required to, withdraw from  
 230 representing a client if the lawyer (1) believes “the continuation of the representation is *likely* to  
 231 result in a violation of [the CRPC] or the State Bar Act” (Rule 1.16(b)(9)); and/or (2) “the  
 232 lawyer’s mental condition renders it *difficult* for the lawyer to carry out the representation  
 233 effectively[,]” (Rule 1.16(b)(8)). Thus, in situations where a lawyer has a mental condition that  
 234 actually or potentially impairs the provision of legal services, the distinction between mandatory  
 235 and permissive withdrawal is whether the impaired lawyer *will* or is *likely* to violate the CRPC or  
 236 the State Bar Act,<sup>11</sup> as well as the degree of difficulty the lawyer faces in continuing the  
 237 representation.<sup>12</sup>

238  
 239 Here, under Rule 1.16(a)(2) Impaired Lawyer reasonably should know that continued  
 240 representation of the client in the manner that Impaired Lawyer proposed will result in ongoing  
 241 violations of the CRPC and the State Bar Act. In addition, under Rule 1.16(a)(3), without  
 242 changes in the staffing of the case, Impaired Lawyer’s condition will render it unreasonably  
 243 difficult for Impaired Lawyer to carry out the representation effectively. For both reasons,  
 244 Impaired Lawyer’s failure to end Impaired Lawyer’s representation of Client when required  
 245 could be a further violation of the CRPC subjecting Impaired Lawyer to discipline.

246

247 **Responsibilities of Other Lawyers**

248

249 When an impaired lawyer is “unable or unwilling to deal with the consequences of his [or her]  
 250 impairment,” firm lawyers and the impaired lawyer’s supervisors who know of the impaired  
 251 lawyer’s conduct have an obligation to take steps to protect the client and ensure the impaired  
 252 lawyer’s compliance with the CRPC and the State Bar Act. ABA Formal Ethics Opn. 03-429, 19  
 253 Law. Man. Prof. Conduct 380 (2003). The other lawyers owe responsibilities to the affected  
 254 client and to the impaired lawyer and the firm. Although a lawyer’s paramount obligation is to  
 255 take steps to protect the interests of the client(s), other ethical obligations cannot be ignored. *Id.*  
 256 at 4.

257

258 Each lawyer in a firm has an independent ethical obligation to protect the interests of the firm’s  
 259 clients. Generally, when a client retains a law firm, the client’s relationship extends to all  
 260 attorneys in the firm.<sup>13</sup> “Every attorney, including an associate . . . , must exercise professional

---

<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.)

<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

261 judgment in the best interest of his clients and must take steps which are necessary to assure  
262 competent representation for his client[.]” LA County Bar Assoc. Form. Opn. No. 383  
263 (December 11, 1979). An impaired lawyer’s failure to fulfill ethical responsibilities and/or take  
264 appropriate action to protect a client does not excuse other lawyers who know of the impaired  
265 lawyer’s conduct and relevant facts from fulfilling their own professional responsibilities,  
266 including taking reasonable remedial measures to protect the client.

267  
268 Multiple factors may affect the duties of lawyers to act in the face of a colleague’s impairment,  
269 including, but not limited to, the impaired lawyer’s actions or inactions; the nature of the client  
270 matter; the urgency of the situation; the nature, severity and permanence of the lawyer’s  
271 impairment; the size of the firm and the resources available; and the role within the firm of each  
272 non-impaired lawyer who knows of the impaired lawyer’s actions and the relevant  
273 circumstances.<sup>14</sup> Those obligations are clearest with respect to subordinate and managerial  
274 lawyers with knowledge of the impaired lawyer’s conduct.<sup>15</sup>

275  
276 Reasonable remedial action should be determined on a case-by-case basis, considering the nature  
277 and seriousness of the misconduct and the nature and immediacy of its harm. Rule 5.1,  
278 Comment [6]. Remedial actions may include notifying another lawyer within the firm who has  
279 supervisory or managerial responsibilities, confronting the impaired lawyer, notifying the client,  
280 ending impaired lawyer’s representation of the client or adjusting the impaired lawyer’s  
281 responsibilities as appropriate under the CRPC and the State Bar Act, and referring the client to  
282 new counsel to handle the matter. See Rules 1.4, 1.4.1, 1.7 and 1.16; and B&P Code sections  
283 6068(m) and 6103.5. The details of these forms of remediation are discussed more fully below.

284  
285 **Responsibilities of Subordinate Lawyer**

---

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). See also *Blackmon v. Hale* (1970) 1 Cal.3d 548, 558; State Bar of California Formal Opn. 1981-64 [stating that attorneys of a private law firm share responsibilities with their firm for representation of their clients]

<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. 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].

CLEAN

286 Rule 5.2(a) requires a lawyer to comply with the CRPC and the State Bar Act “notwithstanding  
287 that the lawyer acts at the direction of another lawyer or other person.” A subordinate lawyer  
288 does not, however, violate the CRPC or the State Bar Act if that lawyer acts in accordance with a  
289 supervisory lawyer’s “reasonable resolution of an arguable question of professional duty.” Rule  
290 5.2(b). Under this Rule, a supervisory lawyer and a subordinate lawyer are each independently  
291 responsible for fulfilling their own ethical obligations. Rule 5.2, Comment; see *In re Maloney &*  
292 *Virsik* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-797 (decided under former rule)  
293 [associate attorney disciplined along with supervising partner for misrepresentations misleading  
294 the court and failing to obey a court order.] When an ethical question “can reasonably be  
295 answered only one way the duty of both lawyers is clear and both are responsible for performing  
296 it.” Rule 5.2, Comment. Where the question can reasonably be answered more than one way, the  
297 supervisory lawyer may assume responsibility for determining which of the reasonable courses  
298 to select, and the subordinate may abide by that resolution. *Id.* “If the subordinate lawyer  
299 believes that the supervisor’s proposed resolution of the question of professional duty would  
300 result in a violation of [the CRPC] or the State Bar Act, the subordinate is obligated to  
301 communicate his or her professional judgment regarding the matter to the supervisory lawyer.”  
302 Rule 5.2, Comment.

303 It is unreasonable for a subordinate lawyer to be ordered to engage in unethical conduct, so the  
304 Subordinate Lawyer cannot follow that order. Moreover, if the ethical violation is ongoing, the  
305 subordinate has an obligation to take reasonable remedial measures to try to correct the violation  
306 and to protect the client from harm. The subordinate lawyer may consider communicating with  
307 other supervisory lawyers within the firm about these issues. Depending on the circumstances,  
308 such other lawyers may include, among others, in-house ethics counsel, members of the firm’s  
309 executive committee or risk management committee, a partner in charge of the client matter(s) at  
310 issue, or, in smaller or less structured firms, any senior colleague whom the lawyer trusts to take  
311 a constructive view of the problem. See Rule 5.2, Comment; see also LA County Bar Form.  
312 Opn. No. 383 (December 11, 1979) (construing former rule) [“When an associate attorney has  
313 concluded that a partner in the firm has committed malpractice or is incompetent with respect to  
314 the handling of a client’s affairs, the matter should be brought to the attention of the partnership  
315 in an effort to agree upon a course of conduct with regard to the client which will insure  
316 competent representation.”].<sup>16</sup> Where the subordinate reasonably believes that notifying other  
317 lawyers within the firm would be ineffective, or in an emergency situation where consultation is  
318 not feasible, a subordinate lawyer should take such action as may be required to preserve the  
319 client’s rights. Los Angeles Bar Ass’n Form. Opn. 348 (June 19, 1975) (construing former rule).

320  
321 In a situation where the only supervisory lawyer is the impaired lawyer and the question of  
322 professional judgment as to the lawyers’ responsibilities under the CRPC and the State Bar Act  
323 can reasonably be answered in only one way, the subordinate lawyer must take necessary  
324 remedial measures to protect the client, which will normally involve communicating to the client

---

<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.

CLEAN

325 any material information about the lawyer’s conduct that impacts the client’s interest as required  
326 by Rule 1.4.<sup>17</sup>

327  
328 In Scenario #1, Subordinate Lawyer works for Big Firm, which has both an executive committee  
329 and a risk management committee. Here, Subordinate Lawyer communicated Subordinate  
330 Lawyer’s professional judgment concerning Impaired Lawyer’s actions and the handling of  
331 Client’s matter to Impaired Lawyer directly. Given that the question of professional judgment  
332 can only be answered one way and Impaired Lawyer’s response would result in violations of the  
333 CRPC or State Bar Act, Subordinate Lawyer must act in accord with Subordinate Lawyer’s  
334 independent duties to Client. If it is reasonable to do so, Subordinate Lawyer may seek to fulfill  
335 that obligation by communicating with one or more unimpaired supervisory lawyers at Big Firm.  
336 By appropriately reporting Subordinate Lawyer’s concerns internally to an unimpaired  
337 supervisory lawyer at Big Firm, Subordinate Lawyer triggers the responsibilities of the  
338 unimpaired supervisory lawyer or lawyers under Rule 5.1. Subordinate Lawyer should then be  
339 able to work with the supervisory or managerial lawyers of Big Firm to investigate the matter  
340 and evaluate reasonable remedial measures to avoid further ethical misconduct and protect the  
341 Client, as discussed more fully below in the Section on Supervisory and Managerial Lawyers.

342  
343 Internally reporting the Impaired Lawyer’s actions to an unimpaired lawyer with supervisory  
344 authority does not fully discharge the Subordinate Lawyer’s duties. Subordinate Lawyer  
345 continues to owe the Client an independent set of ethical obligations which requires the  
346 Subordinate Lawyer to ensure that the ethical concerns have been addressed. If the supervisory  
347 lawyer adopts remedial measures which represent a reasonable resolution of the ethical questions  
348 that the subordinate lawyer has raised and reasonably protects the client moving forward, then  
349 the subordinate has satisfied that obligation to the Client. Rule 5.2, Comment. If the subordinate  
350 concludes, however, that the firm’s resolution of the matter is not a reasonable resolution of the  
351 underlying ethical issues, the Subordinate may be obliged to pursue further measures, including  
352 contacting the Client directly.

353  
354 In Scenario #2, Subordinate Lawyer does not have an unimpaired supervisory lawyer to  
355 communicate with about Impaired Lawyer’s actions and resulting consequences to Client’s  
356 representation. Impaired Lawyer has denied there is any problem, has refused to communicate  
357 necessary information to Client, and has refused to consider stepping away from the Client  
358 matter. Under these circumstances, and because Impaired Lawyer refuses to answer the question  
359 of professional judgment in a reasonable way, Subordinate Lawyer must act in accordance with  
360 Subordinate Lawyer’s duties to Client and take timely reasonable remedial measures despite  
361 Impaired Lawyer’s insistence that such actions not be taken.

---

<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 lawyer’s misconduct, the consequences, and proposed remedial actions, must be discussed with the client to allow the client to make an informed decision regarding continued representation.

362  
363 Here, Subordinate Lawyer will need to communicate to the Client significant developments and  
364 other information reasonably necessary to permit the Client to make informed decisions  
365 regarding the ongoing representation. Rule 1.4(a)(2-3) and (b). When it is possible to do so, the  
366 Subordinate Lawyer should consider maintaining the privacy and other legal rights of Impaired  
367 Lawyer<sup>18</sup> when communicating with Client, unless Impaired Lawyer authorizes his private  
368 information to be shared. Rule 1.4(b); see also Rule 7.1(a). This may necessitate  
369 communicating to Client only that Impaired Lawyer is unable to continue as counsel on Client’s  
370 matter, focusing on the facts of Impaired Lawyer’s conduct specific to Client’s matter and  
371 avoiding any disclosure of Impaired Lawyer’s personal and private information. For example,  
372 Subordinate Lawyer should disclose to Client that Impaired Lawyer failed to timely  
373 communicate the settlement demand, the details of the offer, and the impact it may have on the  
374 Client’s matter. Subordinate Lawyer could also disclose that Impaired Lawyer was unable to  
375 effectively argue before the court on behalf of Client’s opposition to the MSJ.

376  
377 Subordinate Lawyer should further advise Client how Subordinate Lawyer believes Client’s  
378 matter could be handled as a result of these developments. This may include Subordinate  
379 Lawyer’s recommendation to Client that Subordinate Lawyer is competent to continue handling  
380 Client’s case. If Subordinate Lawyer does not have sufficient learning and skill to take over the  
381 representation, Subordinate Lawyer may suggest to Client that Subordinate Lawyer can continue  
382 to provide competent representation by associating with or, where appropriate, professionally  
383 consulting with another lawyer; Subordinate Lawyer may also recommend referring the matter to  
384 another lawyer whom the Subordinate Lawyer reasonably believes is competent. Rule 1.1(c). A  
385 decision on any matter that will affect Client’s substantive rights, including who serves as lead  
386 counsel for Client, must be discussed with the Client, and the Client’s decision will be  
387 controlling.<sup>19</sup>  
388

389 In order to help fulfill Subordinate Lawyer’s obligations to Client, Subordinate Lawyer may  
390 consider seeking confidential guidance about professional responsibilities from the legal ethics  
391 hotline of the California State Bar,<sup>20</sup> the hotlines of local bar associations where available, or  
392 appropriate legal ethics advisors within or outside of a lawyer’s firm. Subordinate Lawyer may  
393 also consider speaking confidentially with an appropriate mental health professional, the State  
394 Bar of California’s confidential Lawyer Assistance Program (“LAP”),<sup>21</sup> or a lawyer mentor for  
395 additional insight.

---

<sup>18</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>19</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).

<sup>20</sup> California State Bar Legal Ethics Hotline: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Hotline>

<sup>21</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

396  
397**Responsibilities of Lawyer(s) with Managerial or Supervisory Authority**

398 A lawyer who, individually or together with other lawyers, possesses managerial or supervisory  
399 authority in a law firm must make reasonable efforts to ensure that the firm’s lawyers comply  
400 with the CRPC and State Bar Act. Rule 5.1 (a-b). A lawyer who possesses managerial authority  
401 within a law firm where the impaired lawyer practices or who has direct supervisory authority  
402 over that lawyer is responsible for the other lawyer’s violations of the CRPC and State Bar Act if  
403 the supervisory lawyer orders or, with knowledge of the relevant facts and of the specific  
404 conduct, ratifies the conduct involved, or knows of the conduct at a time when its consequences  
405 can be avoided or mitigated but fails to take reasonable remedial action. Rule 5.1(c).<sup>22</sup> A  
406 lawyer’s failure to supervise other lawyers can result in attorney discipline. *Matter of Whitehead*  
407 (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 368-369; *Matter of Phillips* (Rev. Dept. 2001) 4  
408 Cal. State Bar Ct. Rptr. 315, 335-336.

409 In accordance with Rule 5.1, firms should have enforceable policies and procedures in place to  
410 ensure that all lawyers within the firm comply with the CRPC and State Bar Act. Rule 5.1,  
411 Comments [1] & [4]. Such policies and procedures will vary depending on the size of the firm,  
412 its structure and the nature of its practice. Rule 5.1, Comment [2]. Each firm should consider  
413 whether compliance with Rule 5.1 requires it to have policies and procedures addressing  
414 situations where non-compliance could result from a lawyer’s mental impairment, so that the  
415 steps to be taken in response to the impairment are in place and known by all lawyers of the firm  
416 before an issue arises.<sup>23</sup>

417 If permitted by applicable law, a firm should consider including in its policies a requirement that  
418 conditions continued employment on an impaired lawyer’s seeking and receiving appropriate  
419 assistance, such as medical care, counseling, or therapy, where the impairment is impeding the  
420 lawyer’s ability to competently represent the client(s). Firms should also consider including  
421 procedures that encourage firm lawyers to report to the appropriate personnel concerns of a  
422 lawyer’s impairment adversely affecting representation of client(s), perhaps facilitated through a  
423 hotline or by designating a neutral firm representative who does not supervise or manage  
424 subordinate lawyers. See Rule 5.1(a), Comments [1], [2] and [4]; see also D.C. Bar Ethics Opn.  
425 377. Anonymous reporting within a law firm could encourage lawyers, particularly subordinate  
426 lawyers, to report any concerns they may have about their superiors and other colleagues without

---

qualified medical professional. See <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program>

<sup>22</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.”

<sup>23</sup> D.C. Bar Ethics Opn. 377 at 2 [A written policy regarding impairment is not required in order to comply with Rule 5.1; however, “even if a written policy is reasonably determined to be unnecessary, firms and agencies may want to have a written policy to provide consistency in the guidance available to lawyers and other firm or agency personnel.”].

## CLEAN

427 the fear of any backlash, and it could also encourage an impaired lawyer to self-report and  
428 hopefully get timely assistance.

429 Lawyers cannot diagnose the cause or extent of a colleague's mental impairment, but when  
430 alerted to a specific instance of unethical conduct stemming from an impairment, reasonable  
431 remedial action must be taken to eliminate any ongoing violation and to avoid or mitigate any  
432 consequences that affect a client's interests.<sup>24</sup> In order to evaluate what is "reasonable remedial  
433 action" under Rule 5.1(c)(2), a lawyer would likely need to investigate a colleague's perceived  
434 impairment to evaluate the accuracy of the report(s); the severity and duration of the impaired  
435 lawyer's unethical conduct; whether the lawyer's conduct can be resolved or improved; and  
436 whether the lawyer's condition renders it difficult or unreasonably difficult for the impaired  
437 lawyer to carry out legal representation effectively. ABA Formal Opn. 03-429 at 3.<sup>25</sup> The law  
438 firm may also need to closely supervise the conduct of the impaired lawyer and assess whether  
439 the other client matters being handled by the impaired lawyer have been affected by the  
440 colleague's impairment. See Rules 5.1(b-c) and 8.4(a). This may entail identifying and auditing  
441 other client's files where the impaired lawyer is involved to ensure no violations of the ethics  
442 rules have occurred and to avoid or mitigate any consequences of the impaired lawyer's conduct.  
443 *Id.* The investigating lawyers should be careful to not reveal the impaired lawyer's private  
444 information or impair any other legal rights when speaking with other lawyers or staff within the  
445 firm as necessary to investigate the lawyer's condition and resulting impact.

446

447 In some situations where the impairment does not materially affect the lawyer's work,  
448 accommodations may be able to be made for the impaired lawyer, so long as reasonable steps  
449 have been taken to prevent or mitigate any resulting consequences and assure compliance with  
450 the CRPC and the State Bar Act. See ABA Formal Opn. 03-429 at 4. For example, a lawyer  
451 with an anxiety disorder may be able to competently function if assigned to transactional work  
452 rather than courtroom litigation. *Id.* "If a lawyer's mental impairment can be accommodated by  
453 changing the lawyer's work environment or the type of work that the lawyer performs, such steps  
454 also should be taken." NC Bar 2013 Form. Opn. 8; see also VA Bar LEO 1886 at 4. However,  
455 "if such episodes of impairment have an appreciable likelihood of recurring, lawyers who  
456 manage or supervise the impaired lawyer may have to conclude that the lawyer's ability to  
457 represent clients is materially impaired." ABA Formal Opn. 03-429.<sup>26</sup>

---

<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.

<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

CLEAN

458

459 Under Scenario #1, knowledge by an unimpaired supervisory or managerial lawyer of Impaired  
460 Lawyer’s actions will trigger the obligations of the supervisory or managerial lawyer under Rule  
461 5.1(c)(2), requiring the supervisory lawyer to take reasonable remedial action to avoid or  
462 mitigate any resulting consequences. Before acting, a supervisory or managerial lawyer ought to  
463 review Big Firm’s policies and procedures which should address these situations.

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

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

474

CONCLUSION

475

476  
477 Regardless of its nature or source, a mental impairment that impedes a lawyer's ability to  
478 competently and ethically provide legal services as required under the CRPC and the State Bar  
479 Act triggers ethical obligations not just for the impaired lawyer, but also for lawyers who know  
480 of the conduct. Although it may be possible to reduce or eliminate the impact of an impairment  
481 through internal procedures, often communication to the client may be required and  
482 representation by the impaired lawyer may need to end, resulting in the firm’s re-staffing or  
483 withdrawal from the representation. The available resources and options to remediate this type of  
484 situation may differ from firm to firm and will depend on the particular facts and circumstances,  
485 but the duties and ethical responsibilities owed by the lawyers who have knowledge of an  
486 impairment remain.

487

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

---

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