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

ISSUES: What ethical obligations does an attorney in a law firm have when s/he knows or reasonably suspects a colleague's impairment is negatively affecting the representation of a law firm client?

DIGEST: An attorney who knows or reasonably suspects a colleague is impaired has an ethical responsibility to take reasonable steps to investigate the matter and to protect any clients whose representation may be negatively affected by preventing such an impairment from causing breaches of duties owed to the firm's clients before harm occurs or to mitigate any harm that may have already occurred.

This obligation extends to all attorneys within a firm, who know or reasonably suspect a colleague is impaired, and is not limited to only those in a supervisory or managerial capacity, although there may be practical differences in terms of the scope of action an attorney may take based upon his or her position within a law firm and the resources available.

The extent of an attorney's obligation and ability to act may be affected by the nature of the representation, as well as the severity of a colleague's impairment, the size of the law firm, and the resources available. If an attorney in a law firm has become sufficiently impaired so that s/he may no longer be able to continue a client representation, the other attorneys in the law firm must safeguard against incompetent client representation. This may entail alerting the appropriate individuals in a firm with management authority, such as a managing partner or in-house risk management/ethics counsel. Such action may only be a first step, as simply reporting a colleague's impairment internally does not address the more fundamental concern of protecting the client(s). The other attorney(s) in the firm may need to assume the representation themselves, bring in outside counsel, or withdraw from the representation.

If a colleague's impairment does not significantly or immediately affect any current client representation(s), it may be possible for the impaired attorney to seek treatment for or otherwise address the causes of his or her

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impairment before needing to alert the client. However, if under any circumstances, the impairment has already, or will immediately and significantly impact the client's representation, then the client must be notified of this significant development. The impaired lawyer's right of privacy must be considered when notifying the client or third parties. If continued representation by the firm is an option, either by the impaired attorney under the careful supervision of the firm or by other lawyers in the firm, then client consent must be obtained.

AUHORITIES

INTERPRETED: Rules 1.1, 1.2, 1.3, 1.4, 5.1, 5.2, and 1.16 of the Rules of Professional Conduct of the State Bar of California, Business and Professions Code, section 6068, subdivision (m)

STATEMENT OF FACTS

Attorney is a fifth-year associate assigned to assist with a complex litigation matter. Attorney has propounded and responded to discovery, taken some depositions, appeared at Case Management Conferences and at hearings regarding discovery motions, and communicated with the Client on a limited basis.

The matter is also staffed by Partner, an established trial attorney, who has earned a strong reputation within the community as a litigator of complex matters. He has conducted party and expert depositions, and has been the primary point of contact with the Client. Partner will try the case, if necessary.

At the outset of the litigation, Partner and Attorney met and created a strategy and litigation plan for Client's matter. After the initial meeting, Partner and Attorney met at least weekly to discuss the case in detail. The case progresses without incident for some time.

As trial approaches, Attorney becomes concerned about the firm's ability to execute the litigation plan and to serve Client's best interests.

Partner appears distracted by personal issues, including a pending divorce. Partner has missed two meetings with the Client without explanation, has failed to respond to inquiries from Attorney and Client, and his direction to Attorney has become infrequent, superficial, and incomplete. At a recent hearing on the opposing party's motion for summary judgment, Partner appeared frazzled and confused. The court allowed Attorney, who had drafted the opposition, to step in and address the points the court adopted when rejecting the motion.

Attorney expresses to Partner her concern with the firm's representation of Client. Partner vehemently denies he not able to adequately serve Client's needs. He admonishes Attorney for even suggesting he needs help, and refuses to make any changes regarding the case handling. Partner adamantly instructs Attorney to not raise a concern with to Client, as that could cause Client to lose confidence in the firm's representation.

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Scenario #1: Partner and Attorney are affiliated with Big Firm, an 850-attorney international law firm. Big Firm includes both a management committee and a risk management committee.

Scenario #2: Partner and Attorney work with a fourth attorney, Junior Associate, in Small Firm. Junior Associate has practiced one year and works exclusively on transactional matters. She has never worked on Client's litigation matter.

Trial is 30 days away. What are Attorney's ethical obligations in either scenario?

DISCUSSION

Many factors may affect an attorney's judgment, reasoning and insight. Temporary or permanent impairment could be caused by life events, such as accidents, current events, injury or disease, mental illness, and unhealthy lifestyle, including, but not limited to, lack of sleep, stress, alcoholism and/or substance abuse. Such impairment may impede an attorney's ability to exercise the skills necessary to competently and diligently practice law in such a significant way that a client's interests become imperiled.¹ Signs of potential impairment include repeated memory lapses, failing to plan and prepare for events adequately without explanation or justification, or inexplicable, inconsistent direction or inability to focus.

Duty of Competence & Diligence

California Rules of Professional Conduct ("CRPC"), Rule 1.1 addresses attorney competence. "Competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service. (Rule 1.1(b)). Rule 1.0.1(h) defines "reasonably" when used in relation to conduct by a lawyer as the conduct of a reasonably prudent and competent lawyer. A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence. (Rule 1.1(a)).

A lawyer is also obligated to perform with "reasonable diligence," meaning that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer. (Rule 1.3(b)). A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client. (Rule 1.3(a)). Impairment, whether permanent or temporary, can negatively affect an attorney's competence and diligence.

Impaired attorneys have the same ethical obligations as other attorneys. (American Bar Association ("ABA") Formal Opinion ("Op.") 03-429 (June 11, 2003); see, also, *Columbus Bar*

¹ Attorneys are also 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.

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133 *Ass'n v. Korda*, 760 N.E.2d 824 (Ohio 2002).) In other words, impairment does not excuse the
134 lawyer from providing competent and diligent representation. For example, an attorney who
135 fails to act with diligence in representing a client, or who fails to communicate a significant
136 development relating to the representation of a client violates his or her ethical obligations, even
137 if that failure is due to impairment.

138
139 A lawyer may withdraw from representing a client if the lawyer's mental or physical condition
140 renders it difficult for the lawyer to carry out the representation effectively. (Rule 1.16(b)(8)).
141 When an impaired lawyer's condition makes it unreasonably difficult to continue to represent a
142 client effectively, the lawyer must cease the representation. (Rule 1.16(a)(3)).

143 Responsibilities of Other Lawyers in the Firm

145 Although an impaired lawyer is not personally excused from his or her ethical responsibilities, an
146 impaired lawyer may fail to recognize the existence or extent of his or her impairment. An
147 impaired attorney's failure to recognize and/or address an impairment imposes an affirmative
148 duty upon other attorneys in a firm to act to prevent harm to clients.

149 Multiple factors may affect the duty of attorneys within a firm to act in the face of a colleague's
150 impairment, including the nature and severity of the impairment; the urgency of the situation,
151 and the non-impaired attorney's role within the firm. Attorneys in a firm who knowingly allow a
152 impaired attorney to continue a client representation in violation of ethical responsibilities,
153 whether or not the client has actually been harmed, breach their own ethical responsibilities and
154 duty of loyalty under Rules 5.1 or 5.2, and may further be in violation of the duties of
155 competence and diligence under Rules 1.1 and 1.3 and other ethical rules. As all attorneys in a
156 firm owe duties to all clients of the firm, the impairment of one member may impose additional
157 duties on all attorney members of the firm to ensure a client's interests are protected, not just
158 those attorneys working on a particular client matter,. (See State Bar of California Formal Opn.
159 2014-190.) Thus, non-impaired attorneys within a firm owe a duty to investigate a colleague's
160 perceived or suspected impairment, and may owe a further duty to act in the face of the evidence
161 learned through such an investigation. An attorney's role within a law firm affects the duty to act
162 and the extent thereof. The Rules of Professional Conduct impose certain duties upon
163 "managerial" and "supervisory" lawyers as well as those in a "subordinate" capacity.

164 A lawyer who individually or together with other lawyers possesses managerial authority in a
165 law firm, or who has direct supervisory authority over another lawyer, must make reasonable
166 efforts to ensure that the firm's lawyers comply with the CRPC and State Bar Act. (Rule 5.1 (a-
167 b)). A lawyer who has direct supervisory authority over another lawyer shall be held responsible
168 for the other lawyer's violations of the CRPC and State Bar Act if the supervisory lawyer orders
169 or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct
170 involved, or knows of the conduct at a time when its consequences can be avoided or mitigated
171 but fails to take reasonable remedial action. (Rule 5.1(c)).

172 In accordance with Rule 5.1, firms should have enforceable policies and procedures in place to
173 ensure that all lawyers within the firm comply with the CRPC and State Bar Act. Such policies
174 and procedures will vary depending on the size of the firm, its structure and the nature of its

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175 practice. Any policies and procedures should account for situations where a firm lawyer is
176 impaired, so that the steps to be taken are in place and all lawyers of the firm know and
177 understand the firm's applicable policies before an issue arises. The policy should require that
178 the impaired lawyer seek appropriate assistance, such as medical care, counseling, therapy or
179 other appropriate treatment as a condition to continued employment with the firm as permitted
180 by law.

181 Lawyers in supervisory or management positions within the firm are not the only ones who can
182 be held responsible for the violations of an impaired lawyer. Under Rule 5.2(a) a subordinate
183 lawyer "shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts
184 at the direction of another lawyer or other person." Under Rule 5.2(b), "[a] subordinate lawyer
185 does not violate these rules or the State Bar Act if that lawyer acts in accordance with a
186 supervisory lawyer's reasonable resolution of an arguable question of professional duty."
187 However, if the subordinate lawyer believes that the supervisor's proposed resolution of the
188 question of professional duty would result in a violation of these rules or the State Bar Act, the
189 subordinate lawyer is obligated to communicate his or her professional judgment regarding the
190 matter to the supervisory lawyer. (See Rule 5.2, Comment). If the supervisory lawyer's
191 impairment makes him or her unable to recognize and/or reasonably address the issue, then a
192 subordinate lawyer owes a duty to report the concern(s) to another lawyer with supervisory or
193 managerial responsibilities as appropriate, which may include in-house ethics counsel, to ensure
194 that the representation of client continues in an effective and competent manner. If no other
195 lawyer with supervisory or managerial authority exists, then the subordinate lawyer has a duty to
196 assume responsibility for determining what action is necessary to protect the client from any
197 violation of the CRPC or State Bar Act. (Rule 5.2, Comment). Therefore, under Scenerio #1,
198 after Associate communicated her concerns to Partner and, because of his impairment or
199 refusal/inability to recognize his impairment, the Partner failed to respond reasonably to avoid
200 violation of the CRPC and State Bar Act, Associate has a duty under Rule 5.2 to communicate
201 her concern(s) to another lawyer within the firm who has supervisory or managerial
202 responsibilities in order to ensure the representation continues in an effective and competent
203 manner. Such reporting to a lawyer with supervisory or managerial capacity does not ameliorate
204 or fully discharge Attorney's duties to Client, as he separately owes those duties and is not
205 relieved from those duties simply by internally reporting his concerns.. However, appropriately
206 reporting her concern internally should make additional resources available to address the
207 situation. Associate can then work with the other supervisory or managerial lawyer(s) to
208 investigate the concerns expressed and evaluate proposed resolution(s) in order to protect the
209 client.

210
211 Under Scenerio #2, because there is no other lawyer in the Small Firm who has supervisory or
212 managerial responsibilities, if the question of professional judgment as to the lawyers'
213 responsibilities can be answered only one way, and Partner fails to respond reasonably to the
214 Associate's communicated concerns, Associate has a clear duty and equal responsibility to use
215 her professional judgment to act to prevent violation(s) of the CRPC and State Bar Act, including
216 preventing any harm to the client. (Rule 5.2, Comment).

Investigation & Reparation

Each situation is unique and must be analyzed and addressed based on the specific circumstances. An investigation must not only include an analysis of whether the lawyer is impaired, the severity of the impairment, the duration of the impairment and whether or not the impairment can be resolved or improved, but also, importantly, whether any client has been harmed. “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 Op. 03-431 (August 8, 2003). When investigating the condition of the apparent impaired lawyer and deciding what should be done in response to this issue, it may be helpful for those in the Firm responsible for ensuring the client’s interest are protected to consult a mental health professional for advice about identifying mental impairment and to inquire about possible assistance for the impaired lawyer. See ABA Formal Op. 03-429. As advised in ABA Formal Op. 03-429,

[t]he 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.

If those in the Firm responsible for ensuring the client’s interest confirm that a colleague’s impairment is precluding the affected attorney from providing competent representation, those responsible must act to prevent harm to the client’s interests and mitigate any harm that has already been caused.

“Depending on the nature, severity and permanence (or likelihood of periodic recurrence) of the lawyer’s impairment, [those in the Firm responsible for ensuring the client’s interest] ha[ve] an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to clients of the firm.” Id. The firm must determine if it is able to work around or accommodate the impaired lawyer while protecting the interests of its clients. For example, the firm may be able to reduce the impaired lawyer’s workload; specify the matters or tasks that are suitable for the impaired lawyer, perhaps those without strict deadlines or other pressures, or where client communications can be limited or completely eliminated; and/or require supervision or monitoring. See ABA Formal Op. 03-429; Virginia LEO 1886, approved by the Supreme Court of Virginia on December 15, 2016.

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Referring the impaired lawyer to the confidential State Bar of California’s Lawyer Assistance Program (“LAP”), or making a confidential report to LAP in order to get guidance, may also be an appropriate step to consider.²

Those in the Firm responsible for ensuring the client’s interest must also determine if other client matters may be affected by a colleague’s impairment. This entails a duty to identify and audit other client’s files of the impaired lawyer to ensure the firm’s representation complies with applicable ethical duties.

California did not adopt Model Rule 8.3 or any version thereof, which requires a lawyer who 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, to report that lawyer to the appropriate professional authority. Therefore, California lawyers may, but are not required to, report another lawyer’s misconduct to the California State Bar or other appropriate professional authority. A lawyer’s impairment, on its own, does not necessarily violate the CRPC or State Bar Act. However, to the extent the impaired lawyer has violated the CRPC and/or the State Bar Act and the impaired lawyer’s misconduct is reported, information otherwise protected by Rule 1.6 cannot be disclosed unless otherwise permitted by the rules or applicable law or the client’s consent is obtained. (Rule 1.6). The reporting lawyer must also be careful to avoid violating the Americans with Disabilities Act (“ADA”). See North Carolina 2013 Formal Ethics Op. 8, fn. 8.

Under Scenario #1, Attorney remains ethically bound to ensure the competent representation of Client. For the pending litigation, this likely entails working with other lawyers in Big Firm to prepare the case for trial. Given Attorney’s relationship with Client, Big Firm may also call on her to facilitate the introduction of new attorneys to Client and to provide continuity with respect to the representation. Ultimately, if the firm refuses to take appropriate action, Attorney should consider disclosing the facts to Client and, as a last resort, withdrawing from the representation. (See *Ibid.*³)

² Related ethics opinions published by the ABA and other states also suggest contacting a lawyer assistance program for help. See ABA Formal Op. 03-429 (June 11, 2003); Virginia LEO 1886 (approved by the Supreme Court of Virginia on December 15, 2016); North Carolina 2013 Formal Ethics Op. 8, fn. 8 (July 25, 2014); Kansas Bar Association Ethics Op. No. 14-01 (July 1, 2014).

³ ABA Formal Opinion 03-429 states that attorneys have three different obligations arising under the Model Rules when an attorney in the same firm is mentally impaired. These are (1) to adopt measures to prevent the impaired attorneys from violating ethical obligations, (2) to report violations to the appropriate professional authority, and (3) to advise existing clients of facts surrounding the withdrawal of an impaired attorney that are necessary to enable an informed decision about selection of counsel. Model Rule 8.3(a) imposes an affirmative duty to report not currently found in the California Rules of Professional Conduct. “A lawyer who 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, *shall* inform the appropriate professional authority.” (Emphasis added.)

Duty to Keep Client Informed of Significant Developments

Rule 1.4(a)(3) and Business and Professions (“B&P”) Code section 6068(m), require attorneys to keep their clients reasonably informed about significant developments relating to the representation. What constitutes a “significant development” is fact dependent and may be influenced by the purpose of the representation, the sophistication of the client, client expectations and numerous other variables. [cite]. To determine whether a colleague’s impairment is a “significant development” requiring disclosure, attorneys may ask themselves how much the impairment has impacted their colleague’s performance to date, how much the impairment is likely to impact future performance, what the impact on the client is likely to be, and how long the impairment is likely to last. In most situations, a “significant development” under Rule 1.4(a)(3) will not encompass minor or unexceptional circumstances that are not likely to impact the purpose or outcome of the representation.

Rule 1.4(a)(2) further requires that a lawyer must reasonably consult with the client about the means by which to accomplish the client’s objectives in the representation. Clearly, a client expects a lawyer to act competently and with diligence, and a lawyer has the ethical obligation to do so. The impairment of an attorney working on a matter, particularly an impairment that precludes a lead or supervising attorney from providing competent legal services, resulting in an adjustment to the strategy (Rule 1.2(a)), scope of representation (1.2(b)), or re-staffing a client matter as necessary because of the temporary or permanent absence of the impaired attorney (including but not limited to, changing the client’s legal team to ensure adequate supervision of the impaired lawyer, whether it be hiring outside counsel, withdrawing from the representation, and/or any other efforts that must be taken by the firm to ensure that the client’s matter is handled competently and diligently), qualifies as significant developments that must be communicated to the client.⁴

Further, under Rule 1.4(a)(1) a lawyer must promptly inform the client of any decision or circumstance with respect to which disclosure or the client’s informed consent is required by these rules or the State Bar Act. Limiting the scope of representation (Rule 1.2(b)); any change in fees owed by the client, perhaps due to the need to hire outside counsel (Rule 1.5); or, withdrawal from representation (Rule 1.16) requires the client’s informed consent to the change and certain circumstances may require the client’s informed consent to be in writing. A lawyer is not required to communicate insignificant or irrelevant information to the client. (Rule 1.4, Comment [1]).

⁴ The ABA has concluded the duty to communicate may not end even if the impaired attorney leaves the firm but intends to practice elsewhere. Because current clients may consider leaving with the attorney, a law firm is required to advise departing clients of the facts surrounding an attorney’s withdrawal due to an impairment to the extent disclosure is necessary for the clients to make an informed decision regarding their choice of counsel. (ABA Formal Opinion 03-429; see, also Model Rule 1.4). Those statements must be limited to those “for which there is a reasonable factual foundation.” (*Ibid.*) This duty does not extend to notifying former clients who already elected to continue having the departed, impaired attorney represent them. (*Ibid.*) But the firm should not make any statements that could be construed as an endorsement of the impaired attorney. (*Ibid.*)

If circumstances exist requiring communication with the client, the lawyer must be truthful and cannot be misleading. (Rule 7.1(a)). However, the lawyer must also be conscious of the privacy rights of the impaired lawyer. Under Rule 1.4(a)(3), a lawyer is only required to communicate significant developments to the client that relate to the representation. Further, under Rule 1.4(b), a lawyer is only obligated to explain the matter to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Disclosing the fact that Partner cannot serve as lead trial counsel and the impact it will have on the representation is the only information that is ethically required to be communicated to the client. Partner's private information, which could include his personal and/or medical information concerning the impairment, are not required to be disclosed to the client under the ethics rules. Should a client demand to know more information, it is the choice of the impaired lawyer whether or not to reveal such private information to client. Disclosure of such private facts by Associate, or any person of the firm other than the impaired lawyer, may violate privacy laws, and such information should not be disclosed absent informed consent from the impaired lawyer.

If the impaired attorney has already harmed the client, such information may be required to be communicated to client if it is significant development. An error potentially giving rise to a legal malpractice claim is a "significant development relating to the representation." Other authorities generally support this view. ABA Formal Opn. No. 481 (2018); Restatement (Third) of the Law Governing Lawyers § 20 Comment c. (2000); New Jersey Supreme Court Advisory Committee on Professional Ethics Opn. No. 684 (1998) ("Clearly RPC 1.4 [communication] requires prompt disclosure in the interest of allowing the client to make informed decisions."). The duty of communication requires, among other things, the attorney to disclose the material facts potentially giving rise to any legal malpractice claim against the attorney. Cal. State Bar Formal Opn. 2009-178 at p. 4 (citing *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 514 [66 Cal.Rptr.3d 52] ("attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice.")); see also *Edwards Wildman Palmer LLP v. Superior Court* (2014) 231 Cal.App.4th 1214, 1234 [180 Cal.Rptr.3d 620] (duty to report acts of malpractice to clients). This conclusion is supported by rule 1.4, paragraph (a). However, the attorney is not permitted to provide legal advice to the client on the merits of any such claim the client may have against the attorney because to do so would be providing legal advice to the client on an issue on which the attorney's interests squarely conflict with the client's.⁵ Instead, as more fully described below, under rules 1.4 and 1.7(b), the attorney has a duty to disclose the conflict and the resulting limitations on her ability to advise the client. The attorney should also consider advising the client to consult independent counsel concerning the circumstances.

⁵ See Colorado Formal Ethics Opn. No. 113 (November 19, 2005) ("[t]he lawyer need not advise the client about whether a claim for malpractice exists, and indeed the lawyer's conflicting interest in avoiding liability makes it improper for the lawyer to do so."); North Carolina 2015 Formal Ethics Opn. No. 4, p. 3 (when an attorney has committed an error in a client representation, the attorney must disclose the facts but "[t]he lawyer should not disclose to the client whether a claim for malpractice exists or provide legal advice about malpractice.").

Here, Although the facts do not indicate that Client has been harmed by Partner, Partner's impairment has already affected two court hearings and his everyday work on the case. In consideration of Partner's vehement denial that he is impaired and his refusal to make any changes, his impairment will very likely not improve, and will continue to affect his ability to represent Client. Further, Partner plays a lead role in the Client's matter and is expected to primarily handle the trial scheduled to begin within thirty (30) days. Under the circumstances, Partner's impairment is materially impacting the representation and is a significant development that must be communicated to the client under Rule 1.4. (See e.g. Cal. State Bar Formal Opn. No. 1985-86 [discussing obligation to provide clients timely and accurate notice of changes in employment status].)

Therefore, under Scenario #1, after Partner's impairment is communicated by Associate to an attorney in the Firm with supervisory or managerial authority, and an investigation confirms that Partner is impaired, with the client's trial only a month away, if it is determined that Partner cannot immediately resolve his impairment to ensure that he can provide competent representation to client as lead counsel in preparation for and during the trial through the conclusion of the case as the client expects, then the change in lead counsel (whether or not Partner is able to continue to participate on the client's matter in any capacity) is a significant development that must be communicated to the client under Rule 1.4. The Firm (or the Associate if Firm fails to adequately address the issue internally after meaningful efforts by Associate) must truthfully explain the significant development to the client only to the extent reasonably necessary to permit the client to make informed decisions regarding the representation while maintaining the privacy of Partner, unless Partner authorizes his private information to be shared. (Rule 1.4(b)). This may necessitate communicating only to the client that Partner is unable to continue as lead trial counsel on client's matter without expressing the reasons why since client does not need to know why in order to make an informed decision as to who will serve as lead trial counsel in place of Partner. Should the client ask for more information, the Firm and/or Associate may decide to disclose the specific actions that have occurred affecting the representation. By way of example, firm management and/or Attorney may wish to disclose to Client that Partner was late to court, but not offer the specific details as to why. Should Client demand to know more information, it should be evaluated whether it is appropriate to direct Client to communicate with Partner..

Firm may make suggestions to the client as to how it believes the case should be re-staffed and further inform the client of any other necessary adjustments that should be made as a result of this significant development, but a decision on any matter that will affect the client's substantive rights, including who serves as counsel on behalf of client, is within the client's sole authority. *Maddox v. City of Costa Mesa* (2011) 193 Cal.App.4th 1098, 1105 [122 Cal.Rptr.3d 629].

Under Scenario #2, because there is no other supervisory or managerial attorney within Small Firm to assist Associate in investigating and addressing Partner's behavior and determining the extent of his impairment, if any, and the only other attorney in Small Firm is Junior Associate, who is not working on Client's matter and is not a litigator, and she is unlikely to be helpful either in addressing the concerns of impairment or in assisting in any possible continued representation, Associate is ultimately responsible for determining what must be done, if anything, to ensure the client's interests are protected. (Rule 5.2, Comment). Associate should

consider speaking confidentially with a mental health professional, LAP or attorney mentor for advice. Associate could again confront Partner with her concerns and remind Partner of his ethical duties as well as the independent ethical duty Associate owes to Client, notwithstanding her subordinate role. Associate may also confirm that she will have a duty to inform the Client herself if Partner does not address the impairment issue consistent with ethical requirements. Due to the unique circumstance presented by the approaching trial, if Partner is capable, he may recognize the seriousness of the situation presented, which may make him more receptive to Associate's position. If Partner again refuses to reasonably address the situation in accordance with his ethical obligations, and Associate determines that Partner's impairment prevents him from competently and diligently representing client, particularly as lead counsel in the trial which is only one month away, thus, necessitating a change in who will handle the trial, then Associate must communicate this significant development to client pursuant to Rule 1.4. The Associate could advise the client how she believes the matter should be handled as a result of this development; however, as stated above, the client has the sole authority to make any decisions about representation and objectives of representation. See also Rule 1.2

Duty to withdraw

Rule 1.16(b) provides that withdrawal is permissive (upon permission of the tribunal, if required), if an attorney's continued involvement is *likely to* result in a violation of the Rules or State Bar Act (rule 1.16(b)(8)), or if the attorney's mental or physical condition renders it *difficult* for the member to carry out the employment effectively (rule 1.16(b)(9)). (Emphasis added). Rule 1.16(a) provides that withdrawal is mandatory (again, upon permission of the tribunal if required), if an attorney *knows or reasonably should know* that continued involvement *will* result in a violation of the Rules or the State Bar Act (rule 1.16(a)(2)), or if the member's mental or physical condition renders it *unreasonably difficult* to carry out the employment effectively (rule 1.16(a)(3)). (Emphasis added).

In situations where an attorney has a mental, physical, or emotional impairment, the distinction between mandatory and permissive withdrawal is the degree of difficulty the attorney faces in continuing the representation – mandatory if it is *unreasonably* difficult (rule 1.16(b)(3); *Gary v. State Bar* (1988) 44 Cal.3d 820, 824 [alcoholism]; *Snyder v. State Bar* (1976) 18 Cal.3d 286, 293 [mental or emotional strain]), or permissive if it is merely difficult, but not unreasonably so (rule 1.16(b)(8)). If the impairment does not make it difficult to continue the representation, then it does not provide grounds for withdrawal.

Given the nature of impairment, however, the affected attorney may deny impairment altogether or may not adequately recognize the degree to which he or she is impaired, unreasonably believing that the impairment is not of sufficient pervasiveness that it makes continued representation unreasonably difficult. Thus, decisions regarding continued representation by the firm or withdrawal, may have to be made between the client and other attorney members of the firm if the impaired lawyer is unable to make reasonable determinations about how his or her impairment may affect the representation.

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In any withdrawal, whether mandatory or permissive, a member shall not withdraw until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients. (Rule 1.16(d).)

In addressing this situation, Firm and Associates should be mindful of the potential prejudice each step may have on the Client. Especially because trial is quickly approaching, Client presumably has a strong interest in preserving the continuity of his representation as much as possible, particularly because the trial is scheduled to begin within 30 days. The Client has choice of counsel and the sole authority to make any decisions about representation and objectives of representation. See also Rule 1.2.

In Scenario #1, Big Firm may have sufficient internal resources available to assign a new attorney or attorneys to replace or supplement Partner, albeit with client consent.

In Scenario #2, available internal options are limited given Attorney's subordinate role and the composition of the firm. Associate may suggest to Client that (1) she can be the lead counsel for the trial if she believes she can do so competently and diligently in accordance with Rules 1.1 and 1.3, perhaps with Partner's assistance to the extent possible; (2) outside counsel should be engaged in to work with Associate (and Partner to the extent possible); or (3) Small Firm must withdraw and client must obtain new counsel. Again, although Associate may advise client as to . . .

CONCLUSION

Regardless of its nature or source, a colleague's impairment may trigger ethical obligations not just for the impaired attorney, but also for attorneys who practice in the same firm. Although the impact of many impairments may be addressed and resolved through internal procedures, to the extent they significantly affect the representation of a client, such impairments trigger a duty to communicate those impacts to clients and may trigger a duty for re-staffing and/or for the impaired attorney to withdraw from the representation. The available resources and options to address a concern may differ from firm to firm and depend on the nature of the representation, but the duties owed by counsel who have knowledge of an impairment remain.

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