

Draft prepared for the December 6, 2019 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
COLLEAGUE’S IMPAIRMENT**

ISSUES: What ethical obligations does a lawyer in a law firm have when the lawyer knows or reasonably believes a colleague’s mental impairment is negatively affecting the representation of a law firm client?

DIGEST: A lawyer who knows or [A1]reasonably [A2]believes a colleague is impaired has an ethical responsibility to take reasonable steps to investigate the matter and to take remedial action to protect any client whose representation has been or may be impacted by the lawyer’s conduct by preventing or mitigating any resulting consequences.

This obligation extends to all lawyers within a firm, who know or reasonably believe a colleague is impaired, and is not limited to only those in a supervisory or managerial capacity. The scope of action a lawyer must take depends on, but may not be limited to, the nature of the representation, the severity of a colleague’s impaired conduct, the size of the law firm, the lawyer’s position within the firm and the resources available.

If the impaired lawyer has already, or other firm lawyer(s) know or reasonably should know that the impaired lawyer’s representation will result in a breach of duties to the client(s) and/or violate California’s Rules of Professional Conduct (“CRPC”) or the State Bar Act (Business & Professions (“B&P”) Code, Chapter 4 §§ 6001.1, *et. al.*), or if the lawyer’s mental impairment renders it unreasonably difficult for the impaired lawyer to effectively carry out the representation of the client(s), then the impaired lawyer cannot continue to represent the client and the other lawyer(s) in the law firm must promptly act and protect the client against incompetent representation. This may entail, among other actions, alerting the appropriate individuals within the firm who have supervisory or management authority. Reporting the impairment may only be a first step, because simply reporting a colleague’s impairment internally does not address the more fundamental duty to protect the client(s). In addition, the [A3]client(s) must be notified this significant development [A4]relating

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the representation. The impaired lawyer's right of privacy and other legal rights must be considered when notifying the client(s) and statements made to client(s) must be limited to those with a factual foundation that are related to the representation. The firm will then need to obtain the client's informed, written consent to a change in representation, including whether: (1) the firm can continue to offer competent representation to the client, either by other firm lawyers or by the impaired lawyer under the careful supervision of the other firm lawyers; (2) the firm can continue competent representation of client with assistance from outside counsel; or (3) the firm cannot continue to competently represent client and must withdraw from the representation. The choice of counsel is the client's decision alone. [A5]

If a colleague's impairment has not harmed the client, there is no evidence that the impaired lawyer's continuation of the representation will breach duties to the client(s) or otherwise violate the CRPC or State Bar Act, and the circumstances of the client(s) matter(s) allow, then it *may* be possible for the impaired lawyer to seek treatment for or otherwise address the causes of his or her impairment before any significant event occurs requiring notice to the client(s).

AUHORITIES

INTERPRETED: Rules 1.1, 1.2, 1.3, 1.4, 1.6, 1.7, 1.10, 1.16, 5.1, 5.2, and 8.4 of the Rules of Professional Conduct of the State Bar of California; Section 6068, subdivisions (e)(1) and (m) of Business and Professions Code (State Bar Act).

STATEMENT OF FACTS

Senior Partner is a rainmaker for the law firm and an established trial lawyer, who has earned a strong reputation within the community as a litigator of complex matters. Senior Partner is the lead counsel on a complex litigation matter for Senior Partner'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. [A6] Senior Partner has conducted party and expert depositions, and has been the primary point of contact with the Client. Senior Partner is expected to try the case if it proceeds to trial.

Senior Associate 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, Senior Associate has worked closely under Senior Partner's direction and has performed research, propounded and responded to discovery, taken some minor witness depositions, appeared at Case Management Conferences and at hearings regarding discovery motions, drafted motions revised and approved by Senior Partner, and communicated with the Client on a limited basis.

At the outset of Client's litigation, Senior Partner and Senior Associate met and created a strategy and litigation plan for Client's matter. After the initial meeting, Senior Partner and

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92 Senior Associate met at least weekly to discuss the case in detail. The case progressed without
93 incident for some time.

94
95 Over the last several months, Senior Associate has become concerned about Senior Partner's
96 ability to execute the litigation plan and to serve Client's best interests. Senior Partner has often
97 appeared confused concerning Client's matter and is also distracted by personal issues, including
98 a pending divorce. Senior Partner has missed at least two meetings with the Client without
99 explanation, has failed to respond to inquiries from Senior Associate and Client, and Senior
100 Partner's direction to Senior Associate has become infrequent, superficial, and incomplete.
101 Senior Partner has also sent multiple emails to Senior Associate and Client reflecting facts and
102 strategy that obviously do not apply to Client's matter. Senior Partner did not independently
103 recognize the mistakes made in these emails, but only became aware of the mistakes after being
104 informed by Senior Associate. Client expressed concern to both Senior Partner and Senior
105 Associate about the inaccurate information in these emails and Senior Partner's failure to attend
106 the meetings with Client. Senior Partner brushed off the concerns raised by Client and Senior
107 Associate about the emails and missed meetings, and proceeded with the representation as if
108 nothing happened. Senior Associate ultimately corrected the inaccurate information in Senior
109 Partner's emails when both lawyers were questioned by the Client and Senior Partner failed to do
110 so. Senior Associate also made efforts to diffuse the Client's concerns revealing personal or
111 private information about Senior Partner.

112
113 At a recent hearing on the opposing party's motion for summary judgment ("MSJ"), Senior
114 Partner attempted to argue on Client's behalf against the motion, but appeared obviously frazzled
115 and confused, citing facts and law to the court that were not applicable to Client's matter.
116 Clearing noticing an issue, the court allowed Senior Associate, who had drafted the opposition
117 brief, to step in and argue on behalf of Client's position. Client did not attend the hearing on the
118 MSJ. Opposing party's MSJ was ultimately denied.

119
120 After the MSJ hearing, Senior Associate again expressed concern to Senior Partner about Senior
121 Partner's representation of Client at the hearing and over the last several months and whether the
122 firm should continue handling Client's case. Senior Partner vehemently denied not being able to
123 adequately serve Client's needs and admonished Senior Associate for even suggesting there may
124 be an issue in handling Client's case. Senior Partner refused to make any changes regarding the
125 strategy and case handling. Senior Partner further adamantly instructed Senior Associate not
126 raise a concern with Client, as that could cause Client to lose confidence in the firm's
127 representation and would lose the firm money if Client terminated the representation.

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129 Scenario #1: Senior Partner and Senior Associate are affiliated with Big Firm, an 850-lawyer
130 international law firm. Big Firm includes both a management committee and a risk management
131 committee.

132
133 Scenario #2: Senior Partner and Senior Associate work in Senior Partner's Small Firm with only
134 one other lawyer, Junior Associate. Junior Associate has practiced law for only one year and
135 works exclusively on transactional matters. Junior Associate has never worked on Client's
136 litigation matter.

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Client's trial is 150 days away^[A7]. What are Senior Associate's ethical obligations in either scenario?

DISCUSSION

This opinion deals only with mental impairment^[A8] that appears to impede a lawyer's ability to competently and diligently represent a client under the CRPC and State Bar Act.¹ The committee recognizes that there could be some tension between a lawyer's ethical obligations under the CRPC and the State Bar Act (Business & Professions ("B&P") Code, Chapter 4 §§ 6001.1-6213), and substantive law regarding employment and privacy, among other legal rights. This opinion is limited to addressing ethical obligations, but advises that lawyers and law firms should be aware of the other law that may apply to these difficult situations.
[Rule 8.4.1 – "mental disability" = protected class?].^[A9]

Duty of Competence & Diligence

"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 legal services 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). A lawyer's mental condition, whether permanent or temporary, may impair a lawyer's duty of competence and diligence, among other ethical obligations and duties owed to a client, resulting in or likely to result in a violation of the CRPC or State Bar Act (Rule 1.16, subsections (a)(2) and (b)(9)), and/or making it difficult or unreasonably difficult for the lawyer to provide legal services effectively (Rule 1.16, subsections (a)(3) and (b)(8)).

Impaired lawyers have the same ethical obligations as other lawyers. American Bar Association ("ABA") Formal Opinion ("Opn.") 03-429 (June 11, 2003). In other words, impairment does not excuse the lawyer from complying with the CRPC and the State Bar Act. For example, a lawyer who fails to act with competence or diligence in representing a client, or who fails to

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

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communicate to a client a significant development relating to the representation, violates his or her ethical obligations even if that failure is due to impairment.

Responsibilities of Other Lawyers in the Firm

Although an impaired lawyer is not personally excused from his or her ethical responsibilities, an impaired lawyer may fail to recognize the existence or extent of his or her impairment. An impaired lawyer's failure to recognize and/or address an impairment imposes an affirmative duty upon other lawyers in a firm to act to prevent harm to clients. As all lawyers in a firm owe duties to all clients of the firm, the impairment of one member may impose duties on all lawyer members of the firm to ensure a client's interests are protected, not just those lawyers who are working on a particular client matter. See State Bar of California Formal Opn. 2014-190.

Multiple factors may affect the duty of lawyers within a firm to act in the face of a colleague's impairment, including, but not limited to, the nature and severity of the impairment; the urgency of the situation, the size of the firm, the non-impaired lawyer's role within the firm and the resources available.

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

In accordance with Rule 5.1, firms should have enforceable policies and procedures in place to ensure that all lawyers within the firm comply with the CRPC and State Bar Act. Rule 5.1, Comments [1] & [4]. Such policies and procedures will vary depending on the size of the firm, its structure and the nature of its practice. Rule 5.1, Comment [2]. Any policies and procedures should account for situations where a firm lawyer is impaired, so that the steps to be taken in response to the impairment are in place and known by all lawyers of the firm before an issue arises. If permitted by applicable law, a firm should consider including in the policy a requirement as a condition of continued employment that the impaired lawyer seek appropriate assistance, such as medical care, counseling, or therapy, where the impairment is impeding the lawyer's ability to represent the client. Firms should also consider including procedures that encourage the reporting of concerns of impairment adversely affecting the representation of client(s) to the appropriate personnel. Such procedures could consider permitting anonymous reporting, perhaps through a hotline or through designating a neutral firm representative who does not supervise or manage subordinate lawyers. Rule 5.1(a), Comments [1], [2] and [4]; see also D.C. Bar Ethics Opn. 377. Supervisory or managerial lawyers within the firm are not responsible for the impaired lawyer's violation of the rules if reasonable efforts have been made to institute procedures designed to assure compliance with the CRPC and State Bar Act, unless they knew of the conduct at a time when they could have acted to avoid or mitigate the consequences and failed to take remedial action. Rule 5.1(c).

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Lawyers in supervisory or management positions within the firm are not the only ones who can be held responsible for the violations of an impaired lawyer. Under Rule 5.2(a), a subordinate lawyer “shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.” Rule 5.2(b) states, “[a] subordinate lawyer does not violate these rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer’s *reasonable resolution* of an arguable question of professional duty.” (emphasis added). However, if the subordinate lawyer believes that the supervisor’s proposed resolution of the question of professional duty is not reasonable and would result in a violation of the CRPC or the State Bar Act, the subordinate lawyer is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer. See Rule 5.2, Comment. If the supervisory lawyer is the impaired lawyer and the impairment prevents him or her from recognizing, understanding and/or reasonably addressing the issue, then a subordinate lawyer owes a duty to report the concern(s) to another lawyer or lawyers with supervisory or managerial responsibilities, which may include in-house ethics counsel, management committee member(s) or risk management committee member(s), to ensure that the continued representation of client(s) complies with the lawyer’s professional obligations. If no other lawyer with supervisory or managerial authority exists other than the impaired lawyer, or the non-impaired supervisor’s proposed resolution of the question of professional duty would result in a violation of the CRPC or the State Bar Act, then the subordinate lawyer must communicate his or her professional judgment to the supervisor and also has a duty to assume responsibility for taking reasonable steps to protect the client from any violation of the CRPC or State Bar Act. Rule 5.2, Comment.

Lawyers in a firm who knowingly allow an impaired lawyer to continue a client representation at a time when consequences could have been avoided or mitigated, but failed to take reasonable remedial action, whether or not the client has actually been harmed, breach their own ethical responsibilities under Rules 5.1 or 5.2, and may further violate the duties of competence and diligence under Rules 1.1 and 1.3 as well as other ethical rules. A violation of the CRPC or State Bar Act, or to knowingly assist, solicit or induce another to do so, or do so through the acts of others, is professional misconduct. Rule 8.4(a).

Under Scenario #1, after Senior Partner failed to respond reasonably to Senior Associate’s communicated concerns to avoid violation of the CRPC and State Bar Act, Senior Associate has a duty under Rule 5.2 to communicate her concern(s) to another lawyer within Big Firm who has supervisory or managerial responsibilities. The factual scenario states that Big Firm includes both a management committee and a risk management committee, so Senior Associate could report to a lawyer on either of these committees. Such reporting to a lawyer with supervisory or managerial capacity does not fully discharge Senior Associate’s duties, as Senior Associate separately owes duties to the Client and is not relieved from those duties by internally reporting the concerns. However, by Senior Associate appropriately reporting such concerns internally, it should make additional resources available to address the situation. If the supervisory or managerial lawyer(s) with knowledge of Senior Associate’s concerns propose a reasonable resolution to the question of professional duty, then Senior Associate can work with the supervisory or managerial lawyer(s) to investigate the concerns expressed and evaluate proposed solutions(s) to avoid ethical misconduct and to protect the Client. If the same supervisory or managerial lawyer(s) fail to take reasonable remedial action after being provided notice of the impaired lawyer’s behavior and resulting risks to Client’s interests, then those lawyers are in

violation of Rule 5.1(c) and Rule 8.4(a), and Senior Associate must communicate his or her professional judgment regarding the matter to the supervisory or managerial lawyer(s) under Rule 5.2, and will be obligated to personally act to protect Client's interests.

Under Scenario #2, because there is no other lawyer in Small Firm who has supervisory or managerial responsibilities other than Senior Partner, if the question of professional judgment as to the lawyers' responsibilities can be answered only one way, and Senior Partner fails to respond reasonably to the Senior Associate's communicated concerns, Senior Associate must take reasonable steps to prevent violation(s) of the CRPC and State Bar Act, including preventing or mitigating any harm to the Client. Rule 5.2, Comment. Lawyers can seek guidance about professional responsibilities from the legal ethics hotline of the California State Bar² or the hotlines of local bar associations where available, or from appropriate legal ethics advisors within or outside of a lawyer's firm.

Reasonable Remedial Action

The non-impaired lawyer(s) with supervisory or managerial authority within a firm, who know of the relevant facts and conduct of another firm lawyer's suspected impairment, are required to take reasonable remedial action to avoid or mitigate any consequences. A lawyer cannot act on conjecture or conflicting reports, so the prudent first step is to investigate the colleague's perceived impairment to confirm the accuracy of the report(s); determine if the lawyer's mental condition has harmed or may harm the client(s) (Rule 5.1); analyze if there has been a violation of any rules or the State Bar Act (Rule 1.16(a)(2)), or if the impaired lawyer's continuation of the representation(s) will likely result in a violation of the rules or the State Bar Act (Rule 1.16(b)(9)); and evaluate if the lawyer's mental condition makes it difficult or unreasonably difficult for that lawyer to carry out the representation(s) effectively (Rule 1.16, subsections (a)(3) and (b)(8)).³

Each situation of impairment must be analyzed and addressed based on the specific circumstances. "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). When investigating what should be done in response to a lawyer's apparent impairment, it may be helpful for those in the firm who are responsible for ensuring the client's interest are protected, to consult a mental health professional for advice. See ABA Formal Opn. 03-429.⁴ As advised in ABA Formal Op. 03-429,

² California State Bar Legal Ethics Hotline: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Hotline>

³ 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

⁴ As the ABA Opinion notes, the extent to which information concerning the impaired lawyer may be communicated without his consent may be limited by the Americans with Disabilities Act ("ADA"), Fair Employment and Housing

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[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.

Lawyers cannot diagnose the cause or extent of a colleague's mental impairment, but must make a reasonable effort to ensure the impaired lawyer's compliance with the rules and act to avoid or mitigate any consequences that affect the interests of the client. An investigation by a law firm is meant to confirm relevant facts and specific conduct, determine if a client has been harmed, and to gain insight into the situation in order to take reasonable remedial action as required under Rule 5.1(c). The investigation cannot be limited to particular client matters, but must analyze any and all legal services provided by the impaired lawyer to establish if other client matters are affected by the colleague's impairment. This entails a duty to identify and audit other client's files where the impaired lawyer is involved to ensure the firm's representation complies with applicable ethical duties.

The severity of the impaired lawyer's conduct, the duration of such conduct and whether the lawyer's conduct may be able to be resolved or improved should be considered in an analysis of whether the lawyer's condition renders it difficult or unreasonably difficult for the impaired lawyer to carry out legal representation effectively. The investigating lawyers must be careful to not reveal the impaired lawyer's private information or impair any other legal rights when speaking with other lawyers or staff within the firm as necessary to investigate the lawyer's condition and resulting impact.

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. A lawyer's impairment, on its own, does not necessarily violate the CRPC or State Bar Act. However, to the extent the impaired lawyer's conduct has violated the CRPC and/or the State Bar Act and the impaired lawyer's misconduct is reported to the State Bar, information protected by Rule 1.6 and B&P Code § 6068(e) 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 impaired lawyer's privacy rights, the ADA, FEHA and any other applicable legal rights. See North Carolina 2013 Formal Ethics Opn. 8, fn. 8.

Under Scenario #1, Senior Associate's reported concerns about Senior Partner's conduct to the appropriate supervising or managerial lawyer(s) has triggered Big Firm's investigation into Senior Associate's concerns and whether Client's matter has been harmed or any other matters

Act ("FEHA") or other applicable law. In addition, the ADA, FEHA and other applicable law may impose restrictions on obtaining a diagnosis of the impaired lawyer.

being handled by Senior Partner have been impacted. Although Senior Partner's conduct does not appear to have directly harmed Client's case, Senior Partner's conduct described above shows that Senior Partner is repeatedly failing to perform legal services with competence and diligence. Rules 1.1 and 1.3. This consistent or worsening conduct over a period of several months evidences that Senior Partner's condition prevents Senior Partner from effectively providing legal services to Client, and it is reasonable to conclude that Senior Partner's impairment will not disappear or otherwise improve within the time period to permit Senior Partner to represent Client in the trial as lead counsel. The supervisory or managerial lawyers of Big Firm and Senior Associate remain ethically bound to ensure the competent representation of Client. Big Firm may seek to work with Senior Associate to determine a strategy for Client's case moving forward, particularly including whether Big Firm can continue to represent Client. Given Senior Associate's relationship with Client, Big Firm may also call on Senior Associate to facilitate communications with Client and to provide any continuity with respect to the representation.⁵

Under Scenario #2, in the absence of another supervisory or managerial lawyer in Small Firm to whom Senior Associate can report Senior Partner's conduct and facilitate an investigation, Senior Associate must investigate and determine a course of conduct to protect the client. Senior Associate should determine whether any other mistakes have been made as to Client's case and whether any other client matters have been impacted. Under the circumstances, Senior Associate will be responsible for determining not only a reasonable resolution as to Client's case, but also as to any other client matters being handled by Senior Partner. Senior Associate may consider speaking with Junior Associate as part of the investigation, but should be cautious about what information is revealed to Junior Associate concerning Senior Partner's impairment in an effort to respect Senior Partner's privacy and other legal rights.

Duty to Communicate with Client

Rule 1.4(a)(3) and B&P Code section 6068(m), require lawyers 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. Rule 1.4, Comment [1]. To determine whether a colleague's impairment is a "significant development" requiring disclosure, lawyers may consider 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

⁵ ABA Formal Opn. 03-429 states that attorneys have two different obligations under the Model Rules when an attorney in the same firm is mentally impaired, and which are also applicable under California rules: to adopt measures to prevent the impaired attorneys from violating ethical obligations, and 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 CRPC: "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).

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 a lawyer working on a matter, particularly an impairment that precludes a lead or supervising lawyer 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 impaired lawyer's conduct (including, but not limited to, changing the client's primary legal representative, changing the client's legal team to ensure adequate supervision of the impaired lawyer, hiring outside counsel, or withdrawing from the representation)), qualifies as a significant development that must be communicated to the client.⁶ A lawyer is not required to communicate insignificant or irrelevant information to the client. Rule 1.4, Comment [1].

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)); a conflict due to a significant risk the lawyer's representation of the client will be materially limited by the lawyer's own conduct (Rule 1.7(b))^[A11]; 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.

If the impaired lawyer 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 conflict and a significant development relating to the representation. Cal. State Bar Formal Opn. 2019-197; ^[A12]Rule 1.4(a). However, the lawyer is not permitted to provide legal advice to the client on the merits of any such claim the client may have against the lawyer because to do so would be providing legal advice to the client on an issue on which the lawyer's interests conflict with the client's.⁷ Id. Instead, under Rules 1.4 and 1.7 the lawyer only

⁶ 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.*)

⁷ 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.").

has a duty to disclose the conflict and the resulting limitations on lawyer's ability to advise the client. Id. The lawyer should also consider advising the client to consult independent counsel concerning the circumstances.

Here, although the facts do not indicate that Client's case has been directly harmed by Senior Partner, Senior Partner's impairment has clearly prevented Senior Partner from personally participating in Client's representation effectively over the last several months and his conduct is unlikely to improve prior to trial. [REDACTED] also resulting in a nonwaivable conflict between Senior Partner and Client prohibiting Senior Partner's continued representation of Client because Senior Partner cannot provide competent and diligent representation as required under Rule 1.7(d). However, it is important to note that a conflict created by Senior Partner's personal interest, specifically the impaired condition, is not imputed to other lawyers of the firm because a conflict under Rule 1.7 does not exist as to the other non-impaired lawyers of the firm. [REDACTED] [REDACTED] Rule 1.10(a)(1). A change in Client's representation, whether by other lawyers within the firm or outside counsel, is a significant development that must be communicated to 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)].

Under Scenario #1, after Senior Partner's impairment is communicated by Senior Associate to a supervisory or managerial lawyer in Big Firm, an investigation confirms that Senior Partner is impaired and his condition renders it unreasonably difficult for Senior Partner to carry out the representation of Client effectively, particular as lead counsel in preparation for and during the trial through the conclusion of the case as the Client expects. Thus, a change in lead representation is necessary and is a significant development that must be communicated to the client under Rule 1.4. Big Firm or the Senior Associate must truthfully explain the significant development to Client only to the extent reasonably necessary to permit Client to make informed decisions regarding the representation while balancing and maintaining the privacy and other legal rights of Senior Partner, unless Senior Partner authorizes his private information to be shared. Rule 1.4(b); see also Rule 7.1(a). This may necessitate communicating only to Client that Senior Partner is unable to continue as counsel on Client's matter, avoiding any disclosure of Senior Partner's personal information and relying only the facts of Senior Partner's conduct specific to Client's matter. By way of example, representatives of Big Firm and/or Senior Associate may wish to disclose to Client that Senior Partner was unable to argue before the court on behalf of Client's opposition to the MSJ, and therefore will not be able to continue Client's representation through trial, but not offer the personal or private 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.

Big Firm may also make suggestions to Client as to how it believes the case should be re-staffed and further inform Client of any other necessary adjustments that it believes should be made as a result of this significant development, but a decision on any matter that will affect Client's substantive rights, including who serves as counsel on behalf of Client, is within Client's sole authority. *Echlin v. Superior Court of San Mateo County* (1939) 13 cal.2d 368; *Heller Ehrman v. Davis Wright*, Cal. Supreme Court Case No. s236208, March 5, 2018 (citing *Fracasse v. Brent*

(1972) 6 Cal.3d 784, 790, 100 Cal. Rptr. 385; Code of Civ. Proc., section 284; and *General Dynamics v. Superior Court (Rose)* (1994) 7 Cal.4th 1164, 1174-1175, 32 Cal. Rptr.2d 1); Rule 1.2, Comment [1] (citing *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404, 212 Cal. Rptr. 151, 156); *Maddox v. City of Costa Mesa* (2011) 193 Cal.App.4th 1098, 1105, 122 Cal.Rptr.3d 629 (A decision on any matter that will affect the client's substantive rights is within the client's sole authority.) see also Rule 1.16(a)(4). [A15]

Under Scenario #2, because there is no other supervisory or managerial lawyer within Small Firm to assist Senior Associate in investigating and addressing Senior Partner's behavior, and the only other lawyer in Small Firm is Junior Associate, who is not working on Client's matter and is not a litigator, Senior Associate is ultimately responsible for determining what must be done, if anything, to ensure Client's interests are protected. See Rule 5.2, Comment. Senior Associate should consider speaking confidentially with a mental health professional, LAP or a lawyer mentor for advice. Senior Associate could again confront Senior Partner with Senior Associate's concerns and remind Senior Partner of his ethical duties as well as the independent ethical duty Senior Associate owes to Client, notwithstanding Senior Associate's subordinate role. Senior Associate may also confirm that if Senior Partner does not address the impairment issue consistent with ethical requirements and communicate to Client, then Senior Associate has a duty to inform Client. If Senior Partner again refuses to reasonably address the situation in accordance with ethical obligations,[A16] then Senior Associate must communicate to Client significant developments relating to the representation resulting from Senior Partner's impaired conduct, such as a recommended change in lead counsel due to Senior Partner's inability to competently represent the Client. See Rule 1.4. Senior Associate could advise Client how the matter could be handled as a result of this development; however, as stated above, Client has the sole authority to choose counsel and objectives of representation. See also Rule 1.2 and Rule 1.16(a)(4).

Duty to Withdraw

Therefore, in situations where a lawyer has a mental condition impairing the legal services provided, the distinction between mandatory and permissive withdrawal is the degree of difficulty the lawyer faces in continuing the representation. Rule 1.16, subsections (a)(3) and (b)(8); *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]. Rule 1.16(b) provides that withdrawal is *permissive* if a lawyer'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 lawyer's mental or physical condition renders it *difficult* for the member to carry out the representation effectively (Rule 1.16(b)(9)). (Emphasis added). Rule 1.16(a) provides that withdrawal is *mandatory* if a lawyer *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 representation effectively (Rule 1.16(a)(3)). (Emphasis added). Withdrawal may be contingent upon permission of the tribunal, if required. Rule 1.16(c).

Given the nature of impairment, however, the affected lawyer may deny impairment altogether or may not adequately recognize the degree to which he or she is impaired. Thus, the firm will have to decide whether the impaired lawyer may or must stop representing client under Rule

1.16, and whether the firm has other lawyers who may be able to competently and diligently represent Client moving forward.

Should the firm need to withdraw, whether mandatory, permissive, or with consent of Client, a member shall not withdraw until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the Client. Rule 1.16(d). When seeking permission to withdraw under paragraph (c), lawyers must comply with their ethical obligations to the client(s) and the court (Rule 3.3). Lawyers are bound to preserve client confidences even when seeking to be relieved as counsel. B&P Code §6068(e); Rule 1.6; Rule 1.16, Comment [4]; see California Rules of Court (“CRC”) 3.1362(c)). A lawyer may disclose to the court only as much as reasonably necessary to demonstrate the need to withdraw. Cal. State Bar Form. Opn. 2015-192 (decided under former rule). It is permissible to state that the lawyer has been discharged and/or that withdrawal is required or permitted under Rule 1.16(a) and/or (b). Several California State Bar opinions conclude that “embarrassing” or “detrimental” information must be treated as a client “secret” that cannot be disclosed under the lawyer's duty of confidentiality. [Cite COPRAC opinions]; B&P Code §6068(e)(1). Further, the impaired lawyer’s privacy and other legal rights must be considered and cannot be violated when seeking to be removed as counsel. If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal’s order. Rule 1.16, Comment [4], citing B&P Code §§6068(d) and 6103.

In addressing this situation, the facts indicate that Senior Partner’s mental condition renders it unreasonably difficult for Senior Partner to carry out Client’s representation effectively, requiring Senior Partner’s representation to end. Rule 1.16(a)(3). Firm and Senior Associate should be mindful of the potential prejudice withdrawal may have on Client, especially because trial is approaching. Client presumably has a strong interest in preserving the continuity of the representation as much as possible.

If Partner leaves Firm, managerial or supervisory lawyers may have a duty to any current client of the firm who is represented by the departing lawyer to ensure that the client has sufficient information to make an informed decision about representation moving forward.

[Confront lawyer, if impaired lawyer solicits clients = rule 1.4 disclosure of information necessary and material information to clients, balancing truthful disclosures with impaired lawyer’s privacy rights under substantive lawyer, firm should avoid action that might be interpreted as endorsement of the impaired lawyer, such as sending a joint notice letter of Partner’s departure (cannot reasonably prevent impaired lawyer from communicating with clients, providing that such communications are consistent with the departing lawyer’s ethical, legal and contractual obligations.). If impaired lawyer leaves firm, and firm later learns that a former client has retained the impaired lawyer, then the law firm has no duty to communicate to those former clients facts about the lawyer’s impairment, so long as the law firm avoids actions that could be interpreted as an endorsement of the impaired lawyer’s services or competence.][A17][A18]

In Scenario #1, Senior Partner shall not represent Client, but Big Firm may have sufficient internal resources available to assign a new lawyer or lawyers within Big Firm to replace Senior Partner. However, Big Firm is obligated to advise Client of the proposed new lead lawyers,

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Client's right to choice of counsel and allow Client to decide whether to retain the representation of Big Firm with newly assigned Big Firm lawyers, or select new counsel outside of Big Firm.

In Scenario #2, Senior Partner shall not represent Client, and Small Firm's internal options are limited given Senior Associate's subordinate role and the composition of Small Firm. If Senior Associate does not have sufficient learning and skill to take over the representation, pursuant to Rule 1.1(c), Senior Associate may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes to be competent. Senior Associate may suggest one or more of the following alternatives to Client for Client's consideration: (1) Senior Associate believes that Senior Associate can provide competent and diligent representation and, therefore, can be lead counsel for the trial (perhaps with Senior Partner's assistance to the extent possible); (2) outside counsel should be engaged to work with Senior Associate (and Senior Partner to the extent possible); or (3) Small Firm must withdraw and Client must obtain new counsel. Small Firm must comply with any requirements to notify the court of any changes to Client's representation.

CONCLUSION

Regardless of its nature or source, a colleague's impairment impacting a client's representation triggers ethical obligations not just for the impaired lawyer, but also for lawyers who practice in the same firm. Although the impact of an impairment may be addressed and resolved through internal procedures, to the extent the impairment significantly affects the representation of a client, such an impairment triggers a duty to communicate those impacts to clients and may trigger a duty for re-staffing and/or withdrawal 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 and ethical responsibilities 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.

Main document changes and comments

Comment [A1]

Author

See my notes in the email, but you raise a good question about the standard. We could use “reasonably believes” or “reasonably should know” which are both defined terms in the new rules. I agree that “knows” is in Rule 5.1(c)(2), but it relates to knowledge of conduct, not of impairment. Standard shouldn’t be “know” of impairment cuz none of us are doctors, so it must be knowledge of conduct which leads attorney to believe that attorney cannot perform legal services with competence and might be impaired.

Comment [A2]

Author

“reasonably suspects” is not in Rule 5.1 or 5.2. Only standard is “knows” Rule 5.1(c)(2).

Comment [A3]

Author

This seems to be inconsistent with the paragraph below where we suggest that in certain circumstances, the impaired lawyer may be able to continue to represent the client under close supervision by other firm lawyers.

Comment [A4]

Author

The inclusion of the deleted point was in reference to a significant development. Whether a significant development exists to require communication to a client is dependent on the circumstances. It is my understanding that the digest is supposed to summarize the opinion based on the factual scenario. In this factual scenario the advice is that the impaired attorney cannot continue the representation.

Comment [A5]

Author

Awkward

Comment [A6]

Author

For discussion with the committee – should facts be changed from 30 days before trial?

Comment [A7]

Author

Too soon for fact pattern? I think better to have it further out.

Comment [A8]

Author

I don’t think we need to go into this level of detail, which seems outside the scope of an ethics opinion.

Comment [A9]

Author

We could also note that CRPC 8.4.1(b) may also apply to the extent a colleague's mental impairment qualifies as a perceived or actual mental disability under applicable law. In dealing with the impaired colleague, firm lawyers should avoid any conduct that may be considered unlawful discrimination or harassment, but this opinion is not intended to address what type of conduct may be considered unlawful discrimination or harassment under applicable law.

Comment [A10]

Author

I really don’t like this advice as the underlying diagnosis is not relevant. What is relevant is the conduct. Also, employment laws (FMLA/CFRA) prohibit employers from requiring the diagnosis of a covered employee. I added a footnote to address my concerns, but we should consider deleting.

Comment [A11]

Author

See note below. Not sure this applies here.

Comment [A12]

Author

I think we should just cite to our recent ethics opinion on this 2019-197 and avoid this repeat analysis in this paragraph. Just reduce to 1-2 sentence and see that opinion.

Comment [A13]

Author

I wanted to talk through this issue. I don’t really see this as a 1.7(b) situation. Is the Firm really going to ask client to consent to working with impair attorney in a way that acknowledges it limits the representation? More likely, they use another attorney at the firm. Or withdraw. What is the exact conflict of interest here that attorney would be asking a client to waive?

Comment [A14]**Author**

I agree that this situation does not appear to present a material limitation conflict.

Comment [A15]**Author**

I made this comment before, but I don't believe this case stands for this proposition. I also don't think that all staffing decisions for a client need to be approved by the client. Perhaps we can discuss.

Comment [A16]**Author**

Include? From earlier draft, may not apply under new facts?

Comment [A17]**Author**

Do we want to address the situation where impaired attorney leaves firm and tries to solicit representation of client(s)?

I personally vote no, but we can take it to the committee.

Comment [A18]**Author**

I also vote no. There are many other laws implicated in this situation and I would prefer not to address even with appropriate cautionary language.