

Draft prepared for the January 17, 2020 COPRAC Meeting

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

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

DIGEST: Mental impairment in this opinion refers to the impediment of a person's mental capacity, which could be temporary or permanent and of varying degrees of severity. A lawyer is mentally impaired if s/he does not possess the mental capacity to perform the duties and obligations necessary to competently and diligently provide legal services as required under the CRPC and the State Bar Act. Some causes of mental impairment can be, but are not limited to, a disease or illness that impacts mental facilities, stress, lack of sleep, alcoholism, substance abuse, or traumatic life events.¹ Although the cause, severity and duration of impairment may be factors to consider under such circumstances, a lawyer's ethical responsibilities are primarily determined by the impaired lawyer's conduct. A lawyer who knows that s/he or an impaired colleague has violated or will violate the CRPC or the State Bar Act in the course of representing a client has an ethical responsibility to take reasonable steps to act promptly and take any necessary remedial action to protect any client whose representation has been or will be impacted by the lawyer's impermissible conduct by preventing or mitigating any violations and resulting consequences. Remedial actions could include, but may not be limited to, investigating the matter, notifying another lawyer within the firm who has supervisory or managerial responsibilities, confronting the impaired lawyer, notifying the client and ending the impaired lawyer's representation of the client as appropriate under the CRPC and the State Bar Act.

The scope of action depends on, but may not be limited to, the nature of the client's representation, whether the impaired lawyer has violated or

¹ See American Bar Association ("ABA") Formal Opinion ("Opn.") 03-429 (June 11, 2003), fn. 2, for discussion of mental impairments that affect lawyers.

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will violate the CRPC or State Bar Act, the severity of the lawyer's conduct, whether the client has been harmed or will be harmed by the lawyer's conduct, the nature of the lawyer's impairment, the size of the law firm and the resources available, and the lawyer's position within the firm.

AUHORITIES

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

STATEMENT OF FACTS

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

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

The case progressed without incident for some time, but over the last several months, Subordinate Lawyer has become concerned about Impaired Lawyer's ability to competently represent Client. Impaired Lawyer has often appeared confused concerning Client's matter, has missed Client meetings without explanation, has failed to respond to Client inquiries and when Impaired Lawyer has responded to Client's correspondence it has reflected facts and strategies that obviously do not apply to Client's matter. Impaired Lawyer did not independently recognize the mistakes made in the correspondence and was argumentative with the Client when the Client questioned Impaired Lawyer's communications. Client expressed being distressed by Impaired Lawyer's behavior to Impaired Lawyer and Subordinate Lawyer in writing on multiple occasions, all of which were ignored by Impaired Lawyer.

At a hearing on the opposing party's motion for summary judgment ("MSJ") over one month ago, Impaired Lawyer attempted to argue against the motion on Client's behalf, but appeared frazzled and confused, citing facts and law to the court that were not applicable to Client's matter. Clearing noticing an issue, the court allowed Subordinate Lawyer, who had drafted the opposition brief, to step in and argue on behalf of Client's position. Client did not attend the hearing on the MSJ. Opposing party's MSJ was ultimately denied. After the order was rendered, opposing counsel communicated a written, reasonable settlement offer to Impaired Lawyer. Impaired Lawyer ignored the correspondence. When opposing counsel followed up on the offer over the phone with Impaired Lawyer weeks later, Impaired Lawyer said he would communicate the offer to Client, but never did. Subordinate Lawyer recently learned of the offer through a

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91 follow-up letter from opposing counsel, which mentioned that no response was received from
92 Impaired Lawyer by the deadline provided so the offer had expired.

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94 Subordinate Lawyer addressed all of these issues directly with Impaired Lawyer and
95 communicated related ethical concerns, including that it is Subordinate Lawyer's professional
96 judgment that Impaired Lawyer should not continue to work on Client's case based on Impaired
97 Lawyer's misconduct over the last several months, believing that a violation of the CRPC or the
98 State Bar Act had occurred and will continue to occur causing harm to the Client. Impaired
99 Lawyer vehemently denied having any issues or problems, mentioning only that the Impaired
100 Lawyer was currently handling a large case load and dealing with a never-ending, contentious
101 divorce. Impaired Lawyer insisted that no mistakes had been made, and that Client's needs were
102 adequately being served and will continue to be served by Impaired Lawyer. Impaired Lawyer
103 admonished Subordinate Lawyer for even suggesting there may be an issue in Impaired
104 Lawyer's handling of Client's case. Impaired Lawyer refused to make any changes regarding the
105 strategy and case handling. Impaired Lawyer further adamantly instructed Subordinate Lawyer
106 not raise any concerns with Client, as that could cause Client to lose confidence in the firm's
107 representation and would lose the firm money if Client terminated the representation.

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

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

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116 What are Impaired Lawyer's ethical obligations in either scenario?

117 What are Subordinate Lawyer's ethical obligations in either scenario?

118 What are the Big Firm's ethical obligations in Scenario #1?

DISCUSSION

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122 This opinion deals only with mental impairment that appears to impede a lawyer's ability to
123 competently and diligently represent a client in accordance with the CRPC and State Bar Act.²
124 The committee recognizes that there could be some tension between a lawyer's ethical
125 obligations under the CRPC and the State Bar Act (Business & Professions ("B&P") Code,
126 Chapter 4 §§ 6001.1-6213), and substantive law regarding employment, disability and privacy,
127 among other legal rights. This opinion is limited to addressing ethical obligations, but advises
128 that lawyers and law firms should be aware of the other law that may apply to these difficult
129 situations.

² 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."

Ethical Obligations

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).

Communication with Client(s)

Rule 1.4(a)(1) requires lawyers to promptly inform the client of any decision or circumstance with respect to which disclosure and the client’s informed consent is required by the CRPC or the State Bar Act. For example, Rule 1.4.1 and B&P Code section 6103.5 each require that a lawyer shall promptly communicate to the client all amounts, terms and conditions of any written offer of settlement made to the client in all matters. Therefore, a lawyer’s failure to promptly communicate a written settlement offer to a client violates Rules 1.4 and 1.4.1, as well as B&P Code section 6103.5. Limiting the scope of representation (Rule 1.2(b)); a conflict under 1.7(b); or withdrawal from representation (Rule 1.16) also require the client’s informed consent to the change and, in certain circumstances, may require the client’s informed consent to be in writing.

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. See Cal. State Bar Formal Opn. No. 1985-86 (discussing obligation to provide clients timely and accurate notice of changes in employment status)].

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]. 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. A lawyer is not required to communicate insignificant or irrelevant information to the client. Rule 1.4, Comment [1].

Personal Interest Conflict

“A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk that lawyer’s representation of the client will be materially limited by ... the lawyer’s own interests.” Rule 1.7(b). If there is a significant risk that the lawyer’s representation of the client(s) will be materially limited by the lawyer’s impaired mental condition, then a conflict exists under Rule 1.7(b). Rule 1.7 paragraph (d) only permits the Rule 1.7(b) conflict to be waived by informed written consent of the client if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation.” Therefore, if the impaired lawyer cannot provide competent and diligent representation to the client(s) as required under Rules 1.1 and 1.3, then the conflict that exists under Rule 1.7(b) cannot be waived by the client and the impaired lawyer shall not represent the client(s). It is important to note, however, that the impaired lawyer’s personal interest conflict does not prohibit the representation of the client(s) by other lawyers of the firm. A conflict between the client(s) and the impaired lawyer is not imputed to other lawyers of the firm because the impaired lawyer’s diminished mental condition does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. Rule 1.10(a)(1).

Termination of Representation

A lawyer shall not represent or continue to represent a client if the lawyer (1) “knows or reasonably should know” that his/her actions during the representation of a client have or will violate the CRPC or the State Bar Act (Rule 1.16(a)(2)); and/or (2) “the lawyer’s mental condition renders it unreasonably difficult to carry out the representation effectively” (Rule 1.16(a)(3). Under these circumstances, the lawyer must withdrawal from representing the client.

A lawyer may withdraw from representing a client if the lawyer (1) believes “the continuation of the representation is likely to result in a violation of [the CRPC] or the State Bar Act (Rule 1.16(b)(9)); and/or (2) “the lawyer’s mental condition renders it difficult for the lawyer to carry out the representation effectively” (Rule 1.16(b)(8), then the lawyer may withdraw from the representation in accordance with Rule 1.16(b).

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. Withdrawal may be contingent upon permission of the tribunal, if required. Rule 1.16(c).

A lawyer shall not withdraw until the lawyer 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); see also Cal. State Bar Form. Opn. 2019-220; 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.

Responsibilities of the Impaired Lawyer

Impaired lawyers have the same ethical obligations as other lawyers. ABA Formal Opn. 03-429. In other words, a lawyer's impairment does not excuse the lawyer from complying with the CRPC and the State Bar Act. However, a lawyer's mental impairment may prevent or inhibit a lawyer from recognizing and/or appreciating the existence or extent of the impairment and its effect on the lawyer's performance of legal services, such as any resulting violation(s) of the CRPC or State Bar Act and/or harm suffered by the client(s).

Although the existence of an impairment does not excuse a lawyer's ethical obligations, if a lawyer's mental capabilities are compromised, this could impede the lawyer's ability to act competently and/or diligently. A lawyer who fails to act with competence and/or diligence in representing a client violates his or her ethical obligations even if that failure is due to impairment. Rules 1.1 and 1.3.

The facts clearly indicate that Impaired Lawyer has violated Rules 1.4, 1.4.1 and B&P Code section 6103.5 because Impaired Lawyer failed to communicate the opposing party's settlement offer to Client. These violations may cause harm to Client. Additionally, an error potentially giving rise to a legal malpractice claim creates a conflict and is a significant development relating to the representation that must be communicated. Rule 1.4(a)(3); see also Cal. State Bar Formal Opn. 2019-197 regarding the communication to the client of a lawyer's error.

Additionally, when Subordinate Attorney communicated his or her professional judgment to Impaired Lawyer and Impaired Lawyer denied any misconduct, refused to stop working on the case and instructed Subordinate Lawyer not to communicate any of these issues or concerns to Client because Impaired Lawyer did not want to risk losing the money from the representation, Impaired Lawyer's proposed resolution to the issues of professional duty were not only unreasonable (see Rule 5.2 discussed below), but also confirmed a conflict between Impaired Lawyer and Client under Rule 1.7(b) because the Impaired Lawyers continued representation of Client will be materially limited by Impaired Lawyer's personal interests. There is no possibility for Client to provide informed written consent to waive the conflict since Impaired Lawyer's violation of the CRPC and the State Bar Act clearly indicates that Impaired Lawyer cannot provide competent and diligent representation to Client as required under Rule 1.7(d)(1). Impaired lawyer's personal interest conflict is not imputed to the firm and does not prohibit the representation of Client by other lawyers of the firm. Rule 1.10(a)(1).

Further, under Rule 1.16(a)(2), Impaired Lawyer cannot continue to represent Client because Impaired Lawyer knows or reasonably should know that a violation of the CRPC and the State Bar Act has occurred. An impaired lawyer's failure to end his or her representation of a client when necessary is a further violation of the CRPC. As the facts indicate, Impaired Lawyer has

denied any misconduct and has refused to stop representing Client. Therefore, the firm will have to act in the best interest of the client as discussed below.

Responsibilities of the Other Lawyers in the Firm

Under the CRPC and the State Bar Act, when a colleague is impaired, the other lawyer(s) of the law firm must evaluate his or her personal responsibilities under two separate categories: (1) responsibilities to the affected client(s); and (2) responsibilities to the impaired lawyer, if any.³ A lawyer's paramount obligation is to take steps to protect the interests of the client(s). See ABA Formal Opn. 03-429 at 4.

Each lawyer is independently responsible for adhering to his or her ethical obligations and protecting the interests of the client(s). An impaired lawyer's failure to recognize his or her own inability to fulfill ethical responsibilities and/or take appropriate action to protect the client does not excuse the other applicable lawyer(s) from their own professional responsibilities. When a client retains a law firm, the client's relationship generally extends to all attorneys in the firm.⁴ Thus, lawyers in the firm who are not directly involved in the representation of a particular client may also have certain ethical responsibilities as discussed below.

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 impaired lawyer's actions or inactions; the nature of the client matter; the urgency of the situation; the nature, severity and permanence of the lawyer's impairment; the size of the firm and the resources available; and the non-impaired lawyer's role within the firm.

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 (Rule 1.1), diligence (Rule 1.3) and communication (Rule 1.4), among 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).

Some circumstances may allow accommodations to be made for the impaired lawyer, so long as efforts have been made to prevent or mitigate any resulting consequences and procedures have

³ 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.

⁴ See State Bar of California Formal Opn. 2014-190 (citing Cal. State Bar Formal Opn. No. 1981-64 (opining that all attorneys employed by a legal services program owe identical professional responsibilities to clients of the program) as well as various California cases in the legal malpractice context stating: "We believe the value of these cases is somewhat limited in our hypothetical context. Nonetheless, we do accept the basic premise that all attorneys in a law firm owe duties – including ethical duties – to each of the firm's clients. What will differ, however, among attorneys is what steps those attorneys must take to discharge those duties.")

been instituted to assure compliance with the CRPC and the State Bar Act. See ABA Formal Opn. 03-429 at 4.

Responsibilities of Subordinate Lawyer

Rule 5.2(a) requires that a lawyer must comply with the CRPC and the State Bar Act “notwithstanding that the lawyer acts at the direction of another lawyer or other person.” Therefore, both the supervisory lawyer and the subordinate lawyer are each equally responsible for fulfilling their own responsibilities and obligations under the CRPC and the State Bar Act. Rule 5.2, Comment. However, if a subordinate lawyer acts in accordance with a supervisory lawyer’s “reasonable resolution to an arguable question of professional duty” than the subordinate lawyer does not violate the CRPC nor the State Bar Act. Rule 5.2(b). On the other hand, if the subordinate lawyer believes⁵ that the supervisor’s proposed resolution of the question of professional duty would result in a violation of the CRPC or the State Bar Act, the subordinate lawyer is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

If the subordinate attorney’s supervisory lawyer is the impaired lawyer and the subordinate lawyer believes that the impaired lawyer’s proposed resolution will result in a violation of the CRPC or the State Bar Act, then, under Rule 5.2, the subordinate lawyer is obligated to communicate his or her professional judgment regarding the matter to the impaired lawyer. Under the circumstances, the subordinate lawyer should consider also communicating the matter and his or her professional judgment to another lawyer or lawyers with supervisory or managerial responsibilities, if possible, in an effort to ensure that the continued representation of client(s) complies with the CRPC and the State Bar Act and that the client’s interests are protected. Lawyers within the law firm who have supervisory or managerial responsibilities may include, but are not limited to, in-house ethics counsel, management committee member(s) or risk management committee member(s).

In Scenario #1, Subordinate Lawyer communicated his or her professional judgment to Impaired Lawyer regarding Impaired Lawyer’s misconduct and other ethical concerns in accordance with Rule 5.2. In consideration of Impaired Lawyer’s clear violation of the CRPC and the State Bar Act by failing to communicate the settlement offer to Client, among other possible violations, the matter of professional judgment can only be answered one way in accordance with Rule 1.16(a)(2) and Rule 1.7, thus requiring Impaired Lawyer to end his or her representation of Client. Rule 5.2, Comment. Impaired Lawyer has refused to do so.

Subordinate Lawyer has independent duties to Client to fulfill the necessary action, which includes, but may not be limited to, communicating the required information to Client and ending Impaired Lawyer’s representation of Client. Rule 5.2(a), Comment. In this scenario, Subordinate Lawyer works for Big Firm, so Subordinate Lawyer should also consider communicating the matter and his or her professional judgment to another lawyer or lawyers with supervisory or managerial responsibilities in an effort to receive additional assistance and to ensure that the continued representation of Client complies with the CRPC and the State Bar Act.

⁵ “Belief” or “believes” means that the person involved actually supposes the fact in the question to be true. A person’s belief may be inferred from circumstances. Rule 1.0.1(a).

Big Firm has both a management committee and a risk management committee, so communication by Subordinate Lawyer to any one or more members of either of those committees should be appropriate. By appropriately reporting such concerns internally, Subordinate Lawyer will provide knowledge to the supervisory lawyers of Big Firm, triggering their responsibilities under Rule 5.1. This should make additional resources available to address the situation. Subordinate Lawyer should then be able to work with the supervisory or managerial lawyer(s) to investigate the matter and evaluate proposed solutions to avoid further ethical misconduct and to protect the Client, including whether Big Firm is able to continue to represent Client. Given Subordinate Lawyer's involvement in Client's matter, Big Firm may also ask Subordinate Lawyer to facilitate communications with Client and to provide any continuity with respect to the representation.⁶

Reporting to a lawyer with supervisory or managerial capacity does not fully discharge the Subordinate Lawyer's duties, as Subordinate Lawyer separately owes duties to the Client and is not relieved from those duties by internally reporting the matter. Rule 5.2, Comment. Should Big Firm not act in whole or in part in accordance with the required ethical responsibilities to Client, then Subordinate Lawyer is independently responsible to act in order to fulfilling his or her obligations to Client. This may include further investigation to determine a course of conduct to protect Client as well as to determine whether any other mistakes have been made by Impaired Lawyer in Client's case as well as any other client matters that have been handled by Impaired Lawyer. See Rule 8.4(a).

In Scenario #2, Subordinate Lawyer does not have any other supervisory or managerial lawyers to communicate with about Impaired Lawyer and associated responsibilities under the CRPC and State Bar Act. Under either scenario, a lawyer may consider seeking additional guidance about professional responsibilities from the legal ethics hotline of the California State Bar⁷, the hotlines of local bar associations where available, or from appropriate legal ethics advisors within or outside of a lawyer's firm. Lawyers may also consider speaking confidentially with a mental health professional, LAP or a lawyer mentor for additional insight. Under the circumstances in this scenario, Subordinate Lawyer must take remedial measures, including any investigation of Client's matter as well as the other cases being handled by Impaired Lawyer, communicating to Client all information and developments relating to the representation as required under the CRPC and the State Bar Act, specifically including the expired settlement offer and a necessary change in lead counsel as a result of Impaired Attorney's actions. See Rules 1.4, 1.4.1, 1.7 and 1.16; and B&P Code sections 6068(m) and 6103.5. These developments must be truthfully explained 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 Impaired Lawyer, unless Impaired Lawyer 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 Impaired Lawyer is unable to continue as counsel on Client's matter, avoiding any disclosure of Impaired Lawyer's personal information and relying only the facts of Impaired Lawyer's

⁶ 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).

⁷ California State Bar Legal Ethics Hotline: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Hotline>

conduct specific to Client's matter. By way of example, Subordinate Lawyer may wish to disclose to Client that Impaired Lawyer failed to timely communicate the settlement demand and was unable to argue before the court on behalf of Client's opposition to the MSJ; therefore, Impaired Lawyer will not be able to continue representing Client through trial. Subordinate Lawyer should not offer the personal or private details as to why. Should Client demand to know more information, Subordinate Lawyer may evaluate whether it is appropriate to direct Client to communicate with Impaired Lawyer.

Subordinate Lawyer could further advise Client how the matter could be handled as a result of these developments, including whether Subordinate Lawyer believes he or she is competent to continue handling Client's case and further inform Client of any other necessary adjustments that it believes should be made as a result of this significant development. If Subordinate Lawyer does not have sufficient learning and skill to take over the representation, pursuant to Rule 1.1(c), Subordinate Lawyer 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. Subordinate Lawyer could 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. 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); see also Rules 1.2 and 1.16(a)(4).

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 an 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, 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.

Lawyer(s) with Managerial or Supervisory Authority

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).⁸

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).

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. Rule 5.1(c)(2). 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

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

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471 unreasonably difficult for that lawyer to carry out the representation(s) effectively (Rule 1.16,
472 subsections (a)(3) and (b)(8)).⁹

473 Each situation of impairment must be analyzed and addressed based on the specific
474 circumstances. Lawyers cannot diagnose the cause or extent of a colleague's mental impairment,
475 but must make a reasonable effort to ensure the impaired lawyer's compliance with the rules and
476 act to avoid or mitigate any consequences that affect the interests of the client. The investigation
477 cannot be limited to particular client matters, but must analyze any and all legal services
478 provided by the impaired lawyer to establish if other client matters are affected by the
479 colleague's impairment. See Rules 5.1(b-c) and 8.4(a). This entails identifying and auditing
480 other client's files where the impaired lawyer is involved to ensure the firm's representation
481 complies with applicable ethical duties. Id.

482 The severity of the impaired lawyer's conduct, the duration of such conduct and whether the
483 lawyer's conduct may be able to be resolved or improved should be considered in an analysis of
484 whether the lawyer's condition renders it difficult or unreasonably difficult for the impaired
485 lawyer to carry out legal representation effectively. "Because lawyers are not health care
486 professionals, they cannot be expected to discern when another lawyer suffers from mental
487 impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist.
488 Nonetheless, a lawyer may not shut his eyes to conduct reflecting generally recognized
489 symptoms of impairment (e.g. patterns of memory lapse or inexplicable behavior not typical of
490 the subject lawyer, such as repeated missed deadlines)." ABA Formal Opn. 03-431 (August 8,
491 2003). As advised in ABA Formal Op. 03-429,

492 [t]he Firm's paramount obligation is to take steps to protect the interest of its
493 clients. The first step may be to confront the impaired lawyer with the facts of
494 his impairment and insist upon steps to assure that clients are ethically
495 represented notwithstanding the lawyer's impairment. Other steps include
496 forcefully urging the impaired lawyer to accept assistance to prevent future
497 violations or limiting the ability of the impaired lawyer to handle legal matters
498 or deal with clients.

499
500 The investigating lawyers must be careful to not reveal the impaired lawyer's private information
501 or impair any other legal rights when speaking with other lawyers or staff within the firm as
502 necessary to investigate the lawyer's condition and resulting impact.
503

504
505 Under Scenario #1, knowledge by a supervisory or managerial lawyer of Impaired Lawyer's
506 actions at a time when the consequences can be avoided or mitigated, whether by Subordinate
507 Lawyer's communication of Impaired Lawyer's actions and related ethical concerns or
508 otherwise, will trigger the obligations of the supervisory or managerial lawyer(s) under Rule

⁹ The ABA's Model Rule 1.16(a)(2) differs from CRPC Rule 1.16(a)(3) because it requires withdrawal if "(2) the lawyer's physical or mental condition *materially impairs* the lawyer's ability to represent the client." (italics added for emphasis). The ABA's ethics opinions cited herein use the "materially impair" standard, while California uses the "unreasonably difficult" standard for mandatory withdrawal and the "difficult" standard for permissive withdrawal

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5.1(c)(2), requiring the lawyer(s) to take reasonable remedial action to avoid or mitigate any resulting consequences. Based on the stated facts revealing clear violations of the CRPC and State Bar Act, an investigation should confirm that Impaired Lawyer is incompetent to perform legal services, the CRPC and State Bar Act have been violated, Impaired Lawyer's condition renders it unreasonably difficult for Impaired Lawyer to carry out the representation of Client effectively and Impaired Lawyers continued representation will, or in the very least, will likely result in additional violations of ethical obligations. Further, Impaired Lawyer's demand that his misconduct not be communicated to Client creates a conflict under 1.7 requiring that Impaired Lawyers representation of Client cannot continue. Thus, a change in lead representation is necessary and is a significant development that must be communicated to the client under Rule 1.4, along with other information such as the expired settlement offer. As discussed above, such communications with Client should be careful to focus on the Impaired Lawyer's actions and avoid communicating the personal or private information of Impaired Lawyer that is not necessary to permit the Client to make informed decisions regarding the representation. Rule 1.4(b).

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 these significant developments. Big Firm may have sufficient internal resources available to assign a new lawyer or lawyers within Big Firm to replace Impaired Lawyer on Client's case. 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 as detailed above.

CONCLUSION

Regardless of its nature or source, a colleague's impairment that prevents the lawyer from performing the duties and obligations necessary to competently and diligently provide legal services as required under the CRPC and the State Bar Act triggers ethical obligations not just for the impaired lawyer, but also for lawyers who know of the conduct at a time when the consequences can be avoided or mitigated. Although the impact of an impairment may try to 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 significant events and may require client's representation by the impaired lawyer to end, resulting in the firm's re-staffing or withdrawal from the representation. The available resources and options to address such a situation may differ from firm to firm and depend on the nature of each representation, but the duties and ethical responsibilities owed by lawyers 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.