

Draft prepared for the April 16, 2020 COPRAC Meeting

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

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

DIGEST: Mental impairment in this opinion refers to the impediment of a lawyer’s mental capacity necessary to competently and diligently perform legal services as required under the CRPC and the State Bar Act. A lawyer’s impairment does not excuse compliance with the CRPC and the State Bar Act. An impaired lawyer’s conduct can trigger obligations for the lawyer’s supervisors and colleagues. Although the cause, severity and duration of an impairment may be factors to consider under such circumstances, a lawyer’s ethical responsibilities are primarily determined by the effect of the impairment, if any, on the lawyer’s conduct and ability to practice law. A lawyer who knows that s/he is impaired or knows that 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 obligation to communicate significant developments to the client and to promptly take reasonable remedial action to prevent or mitigate any adverse consequences resulting from an impaired lawyer’s actions. The required scope of each lawyer’s action depends on the nature of the client’s representation, whether the impaired lawyer has violated or 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,

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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 Client and is expected to try the case if it proceeds to trial.

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

Over the last several months, Subordinate Lawyer has observed significant changes in Impaired Lawyer's behavior and has become concerned about Impaired Lawyer's ability to competently and diligently represent Client. Impaired Lawyer has often appeared confused concerning Client's matter, has missed Client meetings without explanation, has failed to promptly respond to Client inquiries, and Impaired Lawyer's responses to Client's correspondence concern facts and strategies that obviously do not apply to Client's matter. Impaired Lawyer did not recognize the mistakes made in the correspondence and was argumentative with Client when Client questioned Impaired Lawyer's communications. Client has expressed concerns with Impaired Lawyer's behavior to both 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. Clearly 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 MSJ hearing. 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 follow-up letter from opposing counsel, which mentioned that no response was received from Impaired Lawyer by the deadline provided, so the offer had expired.

After much concern, Subordinate Lawyer addressed all of these issues and related ethical concerns directly with Impaired Lawyer. Subordinate Lawyer stated that in Subordinate Lawyer's professional judgment Impaired Lawyer should not continue to work on Client's matter based on Impaired Lawyer's recent pattern of behavior and conduct and that the lawyers should seek the help of another lawyer to take over or assist with the Client's matter. Subordinate Lawyer also communicated Subordinate Lawyer's belief that Impaired Lawyer's conduct has violated the CRPC and Subordinate Lawyer's concerns that Impaired Lawyer's conduct would

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continue to cause harm to the Client. Impaired Lawyer vehemently denied having any issues or problems, mentioning only that the Impaired Lawyer was currently handling a large case load and dealing with a contentious divorce. Impaired Lawyer insisted that no mistakes had been made and that Client's needs were adequately being served and would continue to be served by Impaired Lawyer. Impaired Lawyer admonished Subordinate Lawyer for even suggesting there may be an issue in Impaired Lawyer's handling of Client's case. Impaired Lawyer refused to make any changes regarding the strategy and case handling. Impaired Lawyer further adamantly instructed Subordinate Lawyer not to raise any concerns with Client, which could cause Client to lose confidence in the firm's representation and the firm would lose money if Client terminated the representation.

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

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

DISCUSSION

This opinion deals only with mental impairment that appears to impede a lawyer's ability to competently and diligently represent a client in accordance with the CRPC and State Bar Act.¹ Mental impairment can be temporary or permanent and of varying degrees of severity. Mental impairment can result from a disease or illness that impacts mental faculties, such as mental illness, depression, anxiety or dementia; stress; lack of sleep; alcoholism², substance abuse, or traumatic life events.³ "It is not the impairment that concerns the regulation and disciplinary system but only the effect, if any, on the lawyer's fitness and ability to practice law."⁴ The Committee recognizes that there could be some tension between a lawyer's ethical obligations

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."

² 2016 ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," Krill, Patrick R. JD, LL.M.; Johnson, Ryan MA; Albert, Linda MSSW ("Attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations.")

³ See American Bar Association ("ABA") Formal Opinion ("Opn.") 03-429 (June 11, 2003), fn. 2, for discussion of mental impairments that affect lawyers; ABA Formal Opn. 03-431 (August 8, 2003) at 1; D.C. Bar Ethics Opn. 377 at 1; see also Virginia Bar Legal Ethics Opn. 1886 (December 15, 2016) at page 2 and authorities cited at fns. 4-6; Lawyers' Manual of Professional Conduct ("Law. Man. Prof. Conduct"): Practice Guides: Misconduct and Discipline, Disciplinary Process, Impairment 101:3301 at page 1 (2020).

⁴ Law. Man. Prof. Conduct 101:3301 at page 1 (2020).

under the CRPC and the State Bar Act (Business & Professions (“B&P”) Code, Chapter 4 §§ 6001.1-6213), and substantive law regarding employment, disability and privacy, among other legal rights. This opinion is limited to addressing ethical obligations, but lawyers and law firms should be aware of other laws that may apply to these difficult situations.

Responsibilities of the Impaired Lawyer

A lawyer’s impairment does not excuse the lawyer from complying with the CRPC and the State Bar Act. An impaired lawyer has the same ethical obligations as other lawyers. ABA Formal Opn. 03-429 at 2; VA Bar Legal Ethics Opn. 1886 (December 15, 2016) at 3. 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. ABA Formal Opn. 03-049 at 3.

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 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. In addition to potentially causing irreparable harm to clients, a violation of Rules 1.1 and 1.3 may result in State Bar discipline, malpractice and other civil liability.

Here, Impaired Lawyer’s conduct raises serious questions about whether Impaired Lawyer has competently and diligently represented Client, or is able to do so. While bristling at the suggestion that something is wrong, Impaired Lawyer has implied that a contentious divorce and a heavy case load are to blame for any potential issues in Impaired Lawyer’s performance⁵.

⁵ A heavy caseload does not generally excuse or mitigate an attorney’s failure to perform diligently and competently. *Blair v. State Bar* (1989) 49 Cal.3d 762, 780 (decided under former rule); *Carter v. State Bar* (1988) 44 Cal.3d 1091, 1101 (decided under former rule) [“Office workload and scheduling problems do not generally serve to substantially mitigate misconduct.”]; see also ABA Model Rule 1.3, Comment [2] [“A lawyer’s workload must be controlled so that each matter can be handled competently.”]

However, personal problems do not justify a lawyer's failure to perform services competently⁶. Importantly, regardless of the cause or nature of the mental impairment, Impaired Lawyer appears unable to recognize or appreciate the impact Impaired Lawyer's conduct is having on Impaired Lawyer's ability to perform legal services for Client. In addition, and because Impaired Lawyer's conduct is continuing, Subordinate Lawyer and Law firm will need to intervene to protect Client from harm. (See discussion below on Responsibilities of Others in Law Firm.)

Communication with Client(s)

Competent representation includes the lawyer's obligation to communicate with the client. *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782 (decided under former rule); *Matter of Peavey* (Rev. Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 491 (decided under former rule). 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. Rule 1.4(a)(2) further requires that a lawyer reasonably consult with the client about the means by which to accomplish the client's objectives in the representation. A lawyer shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the client's representation. Rule 1.4(b); see also *Lysick v. Walcolm* (1968) 258 Cal.App.2d 136 (decided under former rule) [A lawyer must disclose all facts and circumstances necessary to enable the client to make free and intelligent decisions regarding the subject matter of the representation.].

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, which includes promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed. Rule 1.4(a)(3). What constitutes a "significant development" depends on the purpose of the representation, the sophistication of the client, client expectations and other relevant factors. Rule 1.4, Comment [1]. A settlement offer qualifies as a significant development. 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. A lawyer is not required to communicate insignificant or irrelevant information to the client. Rule 1.4, Comment [1]. Thus, a "significant development" under Rule 1.4(a)(3) will not typically encompass minor or unexceptional circumstances that are not likely to impact the purpose or outcome of the representation.

Here, Impaired Lawyer failed to communicate the opposing party's settlement offer to Client before it expired in violation of Rules 1.4, 1.4.1 and B&P Code section 6103.5. Facts indicate that Impaired lawyer also ignored Client's reasonable requests for information in violation of Rule 1.4(a)(3). These violations may cause harm to Client. Additionally, an error potentially giving rise to a legal malpractice claim, such as failing to communicate a settlement offer to Client, 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 [addresses duty

⁶ "Even in the face of serious personal problems, an attorney has a professional responsibility to fulfill his duties to his clients or to make appropriate arrangements to protect his clients' interests." *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 (decided under former rule).

to communicate a lawyer's error]. However, Impaired Lawyer does not appear to acknowledge these mistakes, let alone appreciate their potential impact on Client and Client's matter, which likely explains why Impaired Lawyer has not communicated these issues to Client. Nonetheless, Impaired Lawyer's failure to communicate these significant developments to Client is a breach if Impaired Lawyer's duty to Client.

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). A conflict under Rule 1.7(b) may only 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." Rule 1.7(d)(1). 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 a conflict that exists under Rule 1.7(b) cannot be waived by the client and the impaired lawyer cannot represent the client(s).

The impaired lawyer's personal interest conflict, however, 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 mental impairment 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).

Here, Subordinate Lawyer communicated Subordinate Lawyer's professional judgment to Impaired Lawyer concerning Impaired Lawyer's actions, and Impaired Lawyer denied any misconduct, refused to stop working on the case and instructed Subordinate Lawyer not to communicate those concerns to Client because Impaired Lawyer did not want to risk losing the money from the representation. Impaired Lawyer's conduct reflects -a conflict between Impaired Lawyer and Client under Rule 1.7(b) because the Impaired Lawyer put Impaired Lawyer's own personal interests above Client's interests and created a significant risk that Impaired Lawyer's continued representation of Client will be materially limited by Impaired Lawyer's personal interests. Under these facts, the conflict is also unwaivable as to Impaired Lawyer. However, Impaired Lawyer's personal interest conflict is not imputed to the firm because it does not present a significant risk of materially limiting the representation of Client by other firm lawyers. Therefore, other lawyers of the firm are not prohibited from representing Client. 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 either of these circumstances, the lawyer must withdraw from representing the client in accordance with Rule 1.16(a).

A lawyer may, but is not required to, 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)).

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. An impaired lawyer’s actions should be evaluated in determining the degree of difficulty. Impairment can become a disciplinary issue under Rule 1.16(a)(3) if the impaired lawyer continues client representations when the lawyer is not mentally capable of competently practicing law.

Under such circumstances, 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, 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 information 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.

Here, under Rule 1.16(a)(2), Impaired Lawyer cannot continue to represent Client because Impaired Lawyer reasonably should know that a violation of the CRPC and the State Bar Act has occurred. As the facts indicate, Impaired Lawyer has denied any misconduct and Impaired Lawyer’s problematic conduct has continued and become more egregious. While Impaired Lawyer has also rejected Subordinate Lawyer’s recommendation that Impaired Lawyer should no longer represent Client, this is likely because Impaired Lawyer cannot appreciate, or is in denial, that Impaired Lawyer’s conduct has resulted in a breach of duties to Client. However, under these facts, Impaired Lawyer’s failure to end Impaired Lawyer’s representation of Client when required is a further violation of the CRPC, specifically Rule 1.16(a).

Responsibilities of the Other Lawyers in the Firm

When an impaired lawyer is “unable or unwilling to deal with the consequences of his [or her] impairment,” firm lawyers and the impaired lawyer’s supervisors who know of the impaired lawyer’s conduct have an obligation to take steps to ensure the impaired lawyer’s compliance with the CRPC and the State Bar Act. ABA Formal Ethics Opn. 03-429, 19 Law. Man. Prof. Conduct 380 (2003). This imposes two sets of responsibilities: (1) responsibilities to the affected

client(s); and (2) responsibilities to the impaired lawyer and the firm, if any.⁷ Although a lawyer's paramount obligation is to take steps to protect the interests of the client(s), other ethical obligations cannot be ignored. See ABA Formal Opn. 03-429 at 4.

Each lawyer has independent ethical obligations to protect the interests of clients. Generally, when a client retains a law firm, the client's relationship extends to all attorneys in the firm.⁸ "Every attorney, including an associate . . . , must exercise professional judgment in the best interest of his clients and must take steps which are necessary to assure competent representation for his client[.]" LA County Bar Assoc. Form. Opn. No. 383 (December 11, 1979). An impaired lawyer's failure to fulfill ethical responsibilities and/or take appropriate action to protect the client does not excuse other lawyers from their own professional responsibilities, including taking reasonable remedial measures to protect the client. Remedial actions may include investigating the matter, notifying another lawyer within the firm who has supervisory or managerial responsibilities, confronting the impaired lawyer, notifying the client and ending impaired lawyer's representation of the client or adjusting the impaired lawyer's responsibilities as appropriate under the CRPC and the State Bar Act.

Multiple factors may affect the duties 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. See D.C Bar Ethics Opn. 377 ["Depending on the nature, severity, and permanence (or likelihood of periodic reoccurrence) of the lawyer's impairment, management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to the clients of the firm."]. Some circumstances may allow accommodations to be made for the impaired lawyer, so long as reasonable steps have been taken to prevent or mitigate any resulting consequences and assure compliance with the CRPC and the State Bar Act. See ABA Formal Opn. 03-429 at 4. 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 through reasonable remedial action, breach their own ethical responsibilities under Rules 5.1 or 5.2, whether or not the client has actually been harmed. Professional misconduct includes a violation of the CRPC or State Bar Act, knowingly assisting, soliciting or inducing another to do so, or doing so through the acts of others. Rule 8.4(a).

⁷ 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: (1) to adopt measures to prevent the impaired attorneys from violating ethical obligations, and (2) 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. As discussed herein, these obligations also apply under the California Rules.

⁸ See State Bar of California Formal Opn. 2014-190 [accepting "the basic premise that all attorneys in a law firm owe duties – including ethical duties – to each of the firm's clients. What will differ, however, among attorneys is what steps those attorneys must take to discharge those duties."] (citing Cal. State Bar Formal Opn. No. 1981-64 [opining that all attorneys employed by a legal services program owe identical professional responsibilities to clients of the program] and several California cases in the legal malpractice context).

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 responsible for fulfilling their own responsibilities and obligations under the CRPC and the State Bar Act. Rule 5.2, Comment; see *In re Maloney & Virsik* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-797 (decided under former rule) [associate attorney disciplined along with supervising partner for misrepresentations misleading the court and failing to obey a court order.]

If a subordinate lawyer believes his or her supervisor (or another lawyer in the firm) is incompetent to handle a client matter because of a mental impairment, then the subordinate lawyer should communicate his or her concerns to the impaired lawyer or an unimpaired supervisory lawyer within the law firm, or both. See Rule 5.2, Comment; see also LA County Bar Form. Opn. No. 383 (December 11, 1979) (construing former rule) [“When an associate attorney has concluded that a partner in the firm has committed malpractice or is incompetent with respect to the handling of a client’s affairs, the matter should be brought to the attention of the partnership in an effort to agree upon a course of conduct with regard to the client which will insure competent representation.”].⁹ Lawyers within the law firm who have supervisory or managerial responsibilities may include in-house ethics counsel, management committee member(s) or risk management committee member(s). Importantly, a subordinate lawyer’s communication of professional judgment to a supervisory lawyer imparts knowledge to the supervisory lawyer(s) of the impaired lawyer’s conduct, triggering the responsibilities of the supervisory lawyer(s) under Rule 5.1. Further, a lawyer with supervisory authority who has knowledge of the impaired lawyer’s actions, should have access to additional resources available to address the situation and to ensure that the continued representation of Client complies with the CRPC and the State Bar Act.

If the subordinate lawyer believes that the supervisor’s proposed resolution would result in a violation of the CRPC of the State Bar Act, the subordinate lawyer must communicate his or her professional judgment to the supervisory lawyer. Comment to Rule 5.2. If the supervisor and the subordinate lawyer “cannot agree on a method of providing competent representation to the client and protecting the client from any adverse effect” of the impaired lawyer’s actions, and the question of professional judgment can be reasonably be answered only one way, the subordinate lawyer is responsible to uphold his or her duties to the client(s), notwithstanding an objection by the supervisory lawyer. See Rule 5.2, Comment to Rule 5.2.¹⁰ The subordinate lawyer must

⁹ See also Cal. Prac. Guide Prof. Resp. (December 2019) Ch. 6 Professional Competence and Professional Liability, C. Other Duties Related to Competence, 6:153.2.

¹⁰ See also LA County Bar Form. Opn. No. 383 (December 11, 1979) (construing former rule) [“[I]f the associate and the partnership cannot agree on a method of providing competent representation to the client and protecting the client from any adverse effect of past malpractice, the disagreement regarding representation or the impairment to the client’s interest as a result of the incompetent lawyer’s actions must be thoroughly disclosed to the client, notwithstanding an objection by the partnership, for the client’s resolution, and the decision of the client shall control the action to be taken.”] While this Committee does not agree with this LA County Bar Association opinion to the extent it states the disagreement between the associate and the firm must be disclosed to the client, we agree that the impaired lawyer’s misconduct, its consequences and proposed remedial actions must be discussed with the client to allow the client to make an informed decision regarding continued representation.

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take necessary remedial measures to protect the client, including communicating to the client any information required under Rule 1.4. In an emergency situation, a subordinate lawyer should take such action as may be required to preserve the client's rights. Los Angeles Bar Ass'n Form. Opn. 348 (June 19, 1975) (construing former rule). After the emergency situation has subsided, subordinate lawyer should follow the procedures outlined in the prior paragraph. *Id.*

California did not adopt Model Rule 8.3 or any rule which requires a lawyer to report another lawyer to the California State Bar if the lawyer knows that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Therefore, California lawyers may, but are not required to, report another lawyer's misconduct to the California State Bar. A lawyer's impairment, on its own, does not necessarily violate the CRPC or State Bar Act. San Diego Bar Ass'n Form. Opn. 1992-2; Los Angeles Bar Ass'n Form. Opn. 440 (1986) [attorney should consider seriousness of other lawyer's offense and potential impact on public and the profession]. However, to the extent 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 Americans with Disabilities Act, Fair Employment and Housing Act and any other applicable laws that implicate the impaired lawyer's legal rights. See North Carolina 2013 Formal Ethics Opn. 8, fn. 8.

Here, Impaired Lawyer has clearly violated the CRPC and the State Bar Act by failing to timely communicate the settlement offer to Client, among other possible violations. In accordance with Rule 1.16(a)(2) and Rule 1.7, the Impaired Lawyer is required to end his or her representation of Client. The facts state that Subordinate Lawyer communicated to Impaired Lawyer this professional judgment. Impaired Lawyer has refused to end his or her representation and instructed Subordinate Lawyer not to communicate these issues to Client because Impaired Lawyer does not want Client to terminate the representation. Impaired Lawyer's proposed actions will result in continued violations of the CRPC and State Bar Act, namely violations of Rule 1.4, 1.7 and Rule 1.16, which may result in harm to Client.

In Scenario #1, Subordinate Lawyer works for Big Firm, which has both an executive committee and a risk management committee. Here, Subordinate Lawyer communicated Subordinate Lawyer's professional judgment concerning Impaired Lawyers actions and the handling of Client's matter to Impaired Lawyer directly. Given, Impaired Lawyer's response, and the nature of Subordinate Lawyer's concerns that Impaired Lawyer is mentally impaired and is unable to appreciate the nature of Impaired Lawyer's conduct, Subordinate Lawyer should also consider communicating Subordinate Lawyer's concerns to one or more members of either of these committees. By appropriately reporting such concerns internally, Subordinate Lawyer will provide knowledge to the supervisory lawyer(s) of Big Firm, triggering his/her/their responsibilities under Rule 5.1. Subordinate Lawyer should then be able to work with the supervisory or managerial lawyer(s) to investigate the matter and evaluate reasonable remedial measures to avoid further ethical misconduct by Impaired Lawyer and to protect the Client. This could include evaluating whether Big Firm is able to continue to represent Client, how and what

to communicate to Client, how to communicate with Impaired Lawyer¹¹, and Impaired Lawyer's role with Big Firm moving forward, if any. 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.

Reporting the Impaired Lawyer's actions to a lawyer with supervisory authority does not fully discharge the Subordinate Lawyer's duties. Subordinate Lawyer owes separate duties to Client and is not relieved from those duties by internally reporting the matter. Rule 5.2, Comment. Should Subordinate Lawyer believe that Big Firm's proposed resolution(s) to the question(s) of professional duties are not reasonable and would result in a violation of the CRPC and the State Bar Act, then Subordinate Lawyer "is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer." Rule 5.2, Comment. Subordinate Lawyer may not comply with an unreasonable resolution that would result in ethical violations. *Id.*; see also Rule 8.4(a). Subordinate Lawyer is independently responsible to act in order to fulfill his or her ethical obligations to Client as discussed below under Scenario 2. A lawyer may always consider seeking guidance about professional responsibilities from the legal ethics hotline of the California State Bar¹², 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 an appropriate mental health professional, the State Bar of California's confidential Lawyer Assistance Program ("LAP")¹³, or a lawyer mentor for additional insight.

In Scenario #2, Subordinate Lawyer does not have any other supervisory lawyer to communicate with about Impaired Lawyer's actions and resulting consequences to Client's representation. Impaired Lawyer has denied there is any problem and refused to consider getting the help of another lawyer or stepping away from the Client matter. Under these circumstances, Subordinate Lawyer must act in accordance with his or her duties to Client and take reasonable remedial measures, which may include an investigation of Impaired Lawyer's actions, review 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, such as the expired settlement offer and the need to change lead counsel as a result of Impaired Lawyer'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 to Client only that Impaired Lawyer is unable to continue as counsel on Client's matter, focusing on the facts of Impaired Lawyer's conduct specific to Client's matter and avoiding any disclosure of Impaired Lawyer's personal and

¹¹ See, e.g., "How to Approach Cognitively Impaired Colleagues," Oregon State Bar Bulletin, November 2014.

¹² California State Bar Legal Ethics Hotline: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Hotline>

¹³ California's LAP: <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program>

private information. For example, Subordinate Lawyer could disclose to Client that Impaired Lawyer failed to timely communicate the settlement demand and was unable to effectively argue before the court on behalf of Client's opposition to the MSJ.

Subordinate Lawyer should further advise Client how Subordinate Lawyer believes Client's matter should be handled as a result of these developments, including whether Subordinate Lawyer believes he or she is competent to continue handling Client's case as well as any actions that should be considered as a result of these significant developments. If Subordinate Lawyer does not have sufficient learning and skill to take over the representation, Subordinate Lawyer may provide competent representation by associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, or referring the matter to another lawyer whom the lawyer reasonably believes to be competent. Rule 1.1(c). A decision on any matter that will affect Client's substantive rights, including who serves as lead counsel for Client, is something that should be discussed with the Client as it is within Client's sole authority.¹⁴

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 is 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).¹⁵

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]. The 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. 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

¹⁴ *Echlin v. Superior Court of San Mateo County* (1939) 13 Cal.2d 368; *Heller Ehrman v. Davis Wright*, 4 Cal.5th 467, 479 (2018) (citing *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790, 100 Cal. Rptr. 385; Code of Civ. Proc., section 284; 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).

¹⁵ 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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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).

If permitted by applicable law, a firm should consider including in its policies a requirement as a condition of continued employment that an 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(s). Firms should also consider including procedures that encourage the reporting of concerns of impairment adversely affecting the representation of client(s) to appropriate personnel, such as anonymous reporting, perhaps through a hotline or through designating a neutral firm representative who does not supervise or manage subordinate lawyers. See Rule 5.1(a), Comments [1], [2] and [4]; see also D.C. Bar Ethics Opn. 377. Anonymous reporting may not only encourage subordinate lawyers to report any concerns they may have about their superiors, but it may also encourage an impaired lawyer to self-report and hopefully get timely assistance.

Lawyers with supervisory or managerial authority within a firm, who know of relevant facts and conduct relating to another firm lawyer's suspected impairment, are required to take reasonable remedial action to avoid or mitigate any consequences. Rule 5.1(c)(2). Whether remedial action is appropriate depends on the nature and seriousness of the misconduct, as well as the nature and immediacy of its harm. Rule 5.1, Comment [6]. A lawyer's failure to supervise other lawyers can result in attorney discipline. *Matter of Whitehead* (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 368-369; *Matter of Phillips* (Rev. Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 335-336.

Each situation of impairment must be analyzed and addressed based on the specific circumstances. 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(s). "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). 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 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 effectively (Rule 1.16, subsections (a)(3) and (b)(8)).¹⁶ As advised in ABA Formal Op. 03-429,

¹⁶ 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

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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.

The investigation 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. See Rules 5.1(b-c) and 8.4(a). This entails identifying and auditing other client's files where the impaired lawyer is involved to ensure the firm's representation complies with applicable ethical duties. *Id.* 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.

The severity of the impaired lawyer's conduct, the duration of such conduct and whether the lawyer's conduct can 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. ABA Formal Opn. 03-429 at 3. "If a lawyer's mental impairment can be accommodated by changing the lawyer's work environment or the type of work that the lawyer performs, such steps also should be taken." NC Bar 2013 Form. Opn. 8; see also VA Bar LEO 1886 at 4. However, "if such episodes of impairment have an appreciable likelihood of recurring, lawyers who manage or supervise the impaired lawyer may have to conclude that the lawyer's ability to represent clients is materially impaired." ABA Formal Opn. 03-429.

Under Scenario #1, knowledge by a supervisory or managerial lawyer of Impaired Lawyer's actions at a time when the consequences can be avoided or mitigated will trigger the obligations of the supervisory or managerial lawyer under Rule 5.1(c)(2), requiring the lawyer to take reasonable remedial action to avoid or mitigate any resulting consequences. Before acting, a supervisory or managerial lawyer should review Big Firm's policies and procedures which address these situations.

An investigation should be conducted to confirm the facts, to determine whether violations of the CRPC and State Bar Act have occurred, and to evaluate if Impaired Lawyer's condition renders it difficult or unreasonably difficult for Impaired Lawyer to carry out the representation of Client effectively and if Impaired Lawyer's continued representation will or is likely to result in additional violations of ethical obligations. Further, Impaired Lawyer's demand that his or her misconduct not be communicated to Client creates a personal conflict under Rule 1.7(b) requiring that Impaired Lawyer's representation of Client end. Thus, a change in lead counsel is necessary and is a significant development that must be communicated to the client under Rule 1.4, along with other significant information such as the expired settlement offer.

the "unreasonably difficult" standard for mandatory withdrawal and the "difficult" standard for permissive withdrawal.

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Big Firm should also make suggestions to Client as to how it believes the case should be re-staffed and further inform Client of any other necessary actions that it believes should be taken 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 in consultation with Client.

CONCLUSION

Regardless of its nature or source, a mental impairment that impedes a lawyer's ability 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 can be addressed and resolved through internal procedures, to the extent the impairment significantly affects the representation of a client, the impairment triggers a duty to communicate significant events to the client 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 this type of situation may differ from firm to firm and will depend on the nature of each representation, but the duties and ethical responsibilities owed by lawyers who have knowledge of an impairment are the same.

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.