

Draft prepared for the June 5, 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 who know of the impaired lawyer's conduct. 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. An impaired lawyer and/or the impaired lawyer's colleague, who knows or reasonably should know that the impaired lawyer has violated or is likely to violate the CRPC or the State Bar Act, each have ethical obligations to any affected client(s). These ethical obligations include, but are not limited to, communicating significant developments related to the lawyer's conduct 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 is likely to violate the CRPC or State Bar Act, the severity of the impaired lawyer's conduct, whether the client has been harmed or will be harmed by the impaired lawyer's conduct, the nature of the lawyer's impairment, the size of the law firm and the resources available, and each lawyer's position within the firm.

AUHORITIES

INTERPRETED: Rules 1.1, 1.2, 1.3, 1.4, 1.4.1, 1.6, 1.7, 1.10, 1.16, 5.1, 5.2 and 8.4 of the Rules of Professional Conduct of the State Bar of California; Sections 6068, subdivisions (e)(1) and (m), 6103.5(a) of Business and Professions Code (State Bar Act).

STATEMENT OF FACTS

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 Impaired Lawyer's correspondence and was argumentative with Client when Client questioned the unrelated facts and strategies in Impaired Lawyer's communications. Client has expressed concerns with Impaired Lawyer's handling of the matter 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 the offer would be communicated to Client, but it never was. 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 Impaired Lawyer's actions and related ethical concerns directly with Impaired Lawyer. Subordinate Lawyer stated that in Subordinate Lawyer's professional judgment, Impaired Lawyer's recent conduct demonstrate that Impaired

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Lawyer is not competent to continue to work on Client's matter 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 the State Bar Act and that Subordinate Lawyer is concerned that Impaired Lawyer's conduct will continue to cause harm to the Client. Impaired Lawyer vehemently denied having any issues or problems, mentioning only that Impaired Lawyer was currently handling a large case load and dealing with a contentious divorce. Impaired Lawyer insisted that no mistakes had been made on Client's matter and that 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 handling of Client's matter. 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 resulting in the firm's loss of revenue 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 has 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 fitness to competently and diligently engage in the practice of law 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; problematic substance use; 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

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).

law.”⁴ The Committee recognizes that there could be some tension between a lawyer’s ethical obligations under the CRPC and the State Bar Act (Business & Professions (“B&P”) Code, Chapter 4 §§ 6001.1-6213), and substantive law regarding employment, 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. In other words, the existence of a mental impairment does not allow that impaired lawyer to represent clients with any lesser amount of duty and professional care than an unimpaired lawyer. ABA Formal Opn. 03-429 at 2. 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. *Id.* at 3 (citing George Edward Bailey, *Impairment, The Profession and Your Law Partner*, 11 No. 1 Prof. Law. 2 (1999) at 2).

Competence & Diligence

A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence or diligence.⁵

Rule 1.1(a). “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).⁶ 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. Competence specifically includes a mental component. Rule 1.1(a)(ii). “Thus, if Attorney’s mental or emotional state prevents her from performing an objective evaluation of her client’s legal position, providing unbiased advice to her client, or performing her legal representation according to her client’s directions, then Attorney would violate the duty of competence.” Cal. State Bar Form. Opn. 2003-162 at 3 (citing *Blanton v. Womancare* (1985) 38 Cal.3d 396, 407-408 [212 Cal.Rptr. 151]; *Considine v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 765 [232 Cal.Rptr. 250]; Cal. State Bar Formal Opn. No. 1984-77; and L.A. Cty. Bar Assn. Formal Opn. No. 504 (2001)).

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

⁵ Specific intent is not required to find a violation of [CRPC 1.1](#); only a “general purpose or willingness to commit the act or permit the omission is necessary.” *King v. State Bar* (1990) 52 Cal.3d 307, 313-314 (decided under former rule); *Matter of Respondent G* (Rev. Dept. 1992) 2 Cal. State Bar Crt. Rptr. 175, 178 (decided under former rule).

⁶ ABA Model Rule 1.3, Comment [5], which was not adopted by California, states that attorney competence includes anticipating events or circumstances that may adversely affect client representation. By planning ahead for the orderly disposition of his or her law practice, an attorney can ensure that clients will continue to be represented without significant interruption in the event the attorney dies or becomes incapacitated.

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 who intentionally, recklessly, repeatedly or with gross negligence fails to act with competence and/or diligence in representing a client violates lawyer’s 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. Harm to the client is not required to show a violation of the rules of professional conduct.⁷

Here, Impaired Lawyer’s conduct, which could be viewed as reckless, grossly negligent, repetitive, or perhaps even intentional, 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 performance⁸. However, like impairment, personal problems do not justify a lawyer’s failure to perform services competently⁹. 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, because Impaired Lawyer’s conduct is continuing, Subordinate Lawyer and any other lawyers in the Law Firm who know of Impaired Lawyer’s conduct 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*

⁷ A CRPC violation requires no showing of client injury or prejudice. See *Reznik v. State Bar* (1969) 1 Cal.3d 198, 203; *Garlow v. State Bar* (1982) 30 Cal.3d 912, 917; *Gadda v. State Bar* (1990) 50 Cal.3d 344, 355. The violation of a Rule of Professional Conduct does not automatically give rise to a civil cause of action. Rule 1.0(b)(3), Comment [1].

⁸ 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.”]

⁹ “Even in the face of serious personal problems, an attorney has a professional responsibility to fulfill his duties to his clients or to make appropriate arrangements to protect his clients’ interests.” *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 (decided under former rule); *Gary v. State Bar* (1988) 44 Cal.3d 820, 824 (decided under former rule) – alcohol problem; *Snyder v. State Bar* (1976) 18 Cal.3d 286, 293 (decided under former rule) – mental and emotional strain. However, serious personal problems, including marital difficulties or financial pressures, can interfere with the attorney’s performance of his or her professional responsibilities and result in a violation of the lawyer’s duty of competence under [CRPC 1.1](#), and could mandate withdrawal under Rule 1.16(a)(3). A. Sources of Duty of Competence, Cal. Prac. Guide Prof. Resp. Ch. 6-A.

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(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.¹⁰ 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].

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. Further, an error potentially giving rise to a legal malpractice claim, which could include the failure to communicate a settlement offer to client, is a significant development and creates a conflict relating to the representation that must be communicated. Rule 1.4(a)(3); see also Cal. State Bar Formal Opn. 2019-197 [addresses duty to communicate a lawyer's error].

Here, Impaired Lawyer failed to communicate the opposing party's written settlement offer to Client before it expired in violation of Rules 1.4(a)(2), 1.4.1(a)(2) and B&P Code section 6103.5(a). The facts also demonstrate a pattern of conduct whereby Impaired Lawyer has repeatedly failed to address client's concerns about Impaired Lawyer's misstatements of key information and strategies related to the matter. 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. However, Impaired Lawyer does not acknowledge these mistakes, let alone appreciate their potential impact on Client and Client's matter.

As discussed, Impaired Lawyer's failure to communicate these matters to Client is a breach of Impaired Lawyer's duty to Client, which is not excused by Impaired Lawyer's mental impairment. There is also a strong likelihood that more violations will occur because Impaired Lawyer refuses to recognize and acknowledge Impaired Lawyer's misconduct. Under these circumstances, other lawyers in the Law Firm will likely need to intervene to protect Client from harm.

¹⁰ Failure to communicate with a client regarding important matters is ground for State Bar discipline. *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 127; *Spindell v. State Bar* (1975) 13 Cal.3d 253, 260.

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). 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 an impaired lawyer cannot provide competent and diligent representation to the client per Rule 1.7(d)(1) 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.

An impaired lawyer’s personal interest conflict, however, does not prohibit the representation of the client by other lawyers of the firm. A conflict between the client 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 fees incurred from the representation should Client terminate the firm. Impaired Lawyer’s decision to favor Impaired Lawyer’s finances over Impaired Lawyer’s duty to communicate with Client (among other duties) reflects a conflict under Rule 1.7(b) between Impaired Lawyer’s personal interests and Client’s best interests, creating a significant risk that Impaired Lawyer’s continued representation of Client will be materially limited by Impaired Lawyer’s personal interests. Client may not waive this conflict to permit Impaired Lawyer’s representation because Impaired Lawyer’s violations of the CRPC and the State Bar Act, including Impaired Lawyer’s failure and continued refusal to communicate the settlement offer to Client in violation of Rules 1.4(a)(3), 1.4.1(a)(2) and B&P Code §6103.5(a), evidence 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 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 lawyer’s actions during the representation of a client *will* result in violation the CRPC or the State Bar Act (Rule 1.16(a)(2)); and/or (2) “the lawyer’s mental or physical 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)). Any lawyer seeking to terminate a representation of a client under Rule 1.16(a) or (b), must also comply with 1.16(c) and (d).

In situations where a lawyer has a mental condition impairing the legal services provided, the distinction between mandatory and permissive withdrawal is whether the impaired lawyer *will* or is *likely* to violate the CRPC or the State Bar Act,¹¹ as well as the degree of difficulty the lawyer faces in continuing the representation.¹² An impaired lawyer’s actions should be evaluated under these standards. A disciplinary issue could occur under either Rule 1.16(a)(2) or (a)(3) if an impaired lawyer continues client representation when the lawyer is not mentally capable of competently practicing law.

Here, under Rule 1.16(a)(2) and/or (a)(3), Impaired Lawyer should not continue to represent Client because Impaired Lawyer reasonably should know, for the reasons stated above, that continued representation will result in violations of the CRPC and the State Bar Act and Impaired Lawyer’s condition has demonstrated that it is unreasonably difficult for Impaired Lawyer to carry out the representation effectively. Impaired Lawyer has denied any misconduct, refuses to communicate significant developments to Client, has insisted that Subordinate Lawyer not communicate required information to Client, and Impaired Lawyer’s problematic conduct is continuing and becoming more egregious. It appears Impaired Lawyer cannot appreciate, or is in denial, that Impaired Lawyer’s conduct has resulted in the breach of Impaired Lawyer’s duties to Client. Under these facts, Impaired Lawyer’s failure to end Impaired Lawyer’s representation of Client when required could be a further violation of the CRPC subjecting Impaired Lawyer to discipline.

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

¹¹ Rule 1.16(a)(2) imposes a *duty* to withdraw where there is a *prospective* violation of another Rule of Professional Conduct (e.g., rule against representing conflicting interests) or a provision of the State Bar Act. This rule does *not* mandate withdrawal for *past violations* (although past violations may result in disqualification by court order). Withdrawal is mandatory only where continued employment “*will result*” in ethical violations (i.e., where it is *reasonably clear* that the rules will be violated). Withdrawal is permissive, not mandatory, where such violations are merely “*likely*” (CRPC 1.16(b)(9)). B. Withdrawal (Termination) by Lawyer, Cal. Prac. Guide Prof. Resp. Ch. 10-B.

¹² “An attorney who is physically or mentally unable to serve the client effectively must withdraw. (Rules of Professional Conduct, Rule 1.16(a)(3).) These unfortunate situations range from alcohol and drug problems to terminal illnesses.” Mandatory withdrawal—Inability to proceed, Younger on California Motions § 17:4 (2d ed.)

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lawyer's conduct have an obligation to take steps to protect the client and 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 for the other lawyer(s): (1) responsibilities to the affected client(s); and (2) responsibilities to the impaired lawyer and the firm, if any. Although a lawyer's paramount obligation is to take steps to protect the interests of the client(s), other ethical obligations cannot be ignored. *Id.* 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 the firm.¹³ "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 a client does not excuse other lawyers, who know of the impaired lawyer's conduct and relevant facts, from fulfilling their own professional responsibilities, including taking reasonable remedial measures to protect the client. See further discussion re remedial measures at page 13.

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 role within the firm of each non-impaired lawyer who knows of the impaired lawyer's actions and the relevant circumstances.¹⁴ In some situations where the impairment does not materially affect the lawyer's work, accommodations may be able 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. For example, a lawyer with an anxiety disorder may be able to competently function if assigned to transactional work rather than courtroom litigation. *Id.* Lawyers in a firm who knowingly allow an impaired lawyer to continue a client representation at a time when negative 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.¹⁵

¹³ 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).

¹⁴ 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."].

¹⁵ 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.¹⁵ A lawyer's impairment, on its own, does not necessarily violate the CRPC or State Bar Act.

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 a supervisory lawyer and a subordinate lawyer is 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.] However, a subordinate lawyer does not violate the CRPC or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of professional duty. Rule 5.2(b).

“If the subordinate lawyer believes 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 is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.” Rule 5.2, Comment. The subordinate lawyer must exercise reasonable discretion to satisfy Rule 5.2, including determining which supervisory lawyer the subordinate lawyer should communicate the subordinate lawyer’s professional judgment to, if more than one supervisory lawyer exists. Lawyers within the law firm who have supervisory or managerial responsibilities may include in-house ethics counsel, executive committee member(s), risk management committee member(s) and the partner in charge of the client matter(s) at issue. Therefore, if a subordinate lawyer believes that subordinate lawyer’s direct supervisor is incompetent to handle a client matter, then the subordinate lawyer could communicate subordinate lawyer’s concerns to the impaired lawyer and/or another unimpaired supervisory lawyer. 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.”]¹⁶ Communicating the impaired lawyer’s actions to an unimpaired lawyer supervisor triggers the obligations of that lawyer. See further discussion of supervisory lawyer’s duties at page 13.

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.*

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].

¹⁶ 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.

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In a situation where the only supervisory lawyer is the impaired lawyer and the question of professional judgment as to the lawyers' responsibilities under the CRPC and the State Bar Act can reasonably be answered in only one way, the supervisory lawyer and subordinate lawyer are equally responsible for fulfilling that duty. Rule 5.2, Comment. Therefore, the subordinate lawyer is responsible to uphold subordinate lawyer's duties to the client, notwithstanding an objection by the supervisory lawyer. See Rule 5.2(a), Comment to Rule 5.2.¹⁷ The subordinate lawyer must take necessary remedial measures to protect the client, including communicating to the client any information required under Rule 1.4. See further discussion re remedial action at page 13.

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 Lawyer's actions and the handling of Client's matter to Impaired Lawyer directly. Given that the question of professional judgment can only be answered one way and Impaired Lawyer's response would result in violation(s) of the CRPC or State Bar Act, Subordinate Lawyer must uphold Subordinate Lawyer's independent duties to Client. Subordinate Lawyer also has the discretion to communicate Subordinate Lawyer's professional judgment to one or more unimpaired supervisory lawyers at Big Firm. By appropriately reporting Subordinate Lawyer's concerns internally to an unimpaired supervisory lawyer at Big Firm, Subordinate Lawyer triggers the responsibilities of the unimpaired supervisory lawyer(s) under Rule 5.1. Subordinate Lawyer should then be able to work with the supervisory or managerial lawyer(s) of Big Firm 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 an investigation and evaluation of whether Big Firm is able to continue to represent Client, how and what to communicate to Client, how to communicate with Impaired Lawyer¹⁸, and Impaired Lawyer's role with Big Firm moving forward, if any. Given Subordinate Lawyer's involvement in Client's matter, Big Firm may ask Subordinate Lawyer to assist with the remedial measures, such as facilitating communications with Client and to provide any continuity with respect to the representation. See discussion of the duties of Lawyers with Managerial or Supervisory Authority beginning at page 13.

Internally reporting the Impaired Lawyer's actions to an unimpaired lawyer with supervisory authority does not fully discharge the Subordinate Lawyer's duties. Subordinate Lawyer owes separate duties to Client and is independently responsible to fulfill those ethical obligations to Client as discussed below under Scenario 2. Rule 5.2, Comment. If a reasonable resolution to

¹⁷ 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.

¹⁸ See, e.g., "How to Approach Cognitively Impaired Colleagues," Oregon State Bar Bulletin, November 2014.

an arguable question of professional duty is proposed by a supervisory lawyer to fulfill the lawyers' duties to Client, then Subordinate Lawyer will not violate the CRPC or State Bar Act if Subordinate Lawyer acts in accordance with that reasonable resolution. Subordinate Lawyer should not comply with an unreasonable resolution to a question of professional judgment that would result in ethical violations. *Id.*; see also Rule 8.4(a).

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

Here, Subordinate Lawyer will need to communicate significant developments and other information reasonably necessary to permit the Client to make informed decisions regarding the ongoing representation. Rule 1.4(a)(2-3) and (b). When it is possible to do so, the Subordinate Lawyer should consider maintaining the privacy and other legal rights of Impaired Lawyer¹⁹ when communicating with Client, 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 private information. For example, Subordinate Lawyer should disclose to Client that Impaired Lawyer failed to timely communicate the settlement demand, the details of the offer, and the impact it may have on the Client's matter. Subordinate Lawyer could also disclose that Impaired Lawyer 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 could be handled as a result of these developments. This may include Subordinate Lawyer's recommendation to Client that Subordinate Lawyer is competent to continue handling Client's case. If Subordinate Lawyer does not have sufficient learning and skill to take over the representation, Subordinate Lawyer may suggest to Client that Subordinate Lawyer can continue to provide competent representation by associating with or, where appropriate, professionally consulting with another lawyer; Subordinate Lawyer may also recommend referring the matter to another lawyer whom the Subordinate Lawyer reasonably believes is 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.²⁰

¹⁹ ABA Formal Opn. 03-429 at 6 ("In discussions with the client, the lawyer must act with candor and avoid material omissions, but to the extent possible, should be conscious of the privacy rights of the impaired lawyer.").

²⁰ *Heller Ehrman v. Davis Wright*, 4 Cal.5th 467, 479 (2018) (citing *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790, 100 Cal. Rptr. 385; Code of Civ. Proc., section 284; Rule 1.2, Comment [1] (citing *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404, 212 Cal. Rptr. 151, 156); see also Rules 1.2 and 1.16(a)(4).

In order to help fulfill Subordinate Lawyer's obligations to Client, Subordinate Lawyer may consider seeking confidential guidance about professional responsibilities from the legal ethics hotline of the California State Bar,²¹ the hotlines of local bar associations where available, or appropriate legal ethics advisors within or outside of a lawyer's firm. Subordinate Lawyer may also consider speaking confidentially with an appropriate mental health professional, the State Bar of California's confidential Lawyer Assistance Program ("LAP"),²² or a lawyer mentor for additional insight.

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).²³ 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.

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 designed to assure compliance with the CRPC and State Bar Act, unless they knew of the

²¹ California State Bar Legal Ethics Hotline: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Hotline>

²² California's LAP does not provide legal advice, but can discuss the problem, provide a free and confidential professional mental health assessment, and provide direction to the caller as to available services. The LAP also offers professional monitoring to satisfy specific monitoring or verification requirements. A Support Lawyer Assistance Program is also offered for lawyers who are interested in weekly group meetings and the support of a qualified medical professional. See <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program>

²³ 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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476 conduct at a time when they could have acted to avoid or mitigate the consequences and failed to
477 take remedial action. Rule 5.1(c).

478 If permitted by applicable law, a firm should consider including in its policies a requirement that
479 conditions continued employment on an impaired lawyer's seeking and receiving appropriate
480 assistance, such as medical care, counseling, or therapy, where the impairment is impeding the
481 lawyer's ability to competently represent the client(s). Firms should also consider including
482 procedures that encourage firm lawyers to report to the appropriate personnel concerns of a
483 lawyer's impairment adversely affecting representation of client(s), perhaps facilitated through a
484 hotline or by designating a neutral firm representative who does not supervise or manage
485 subordinate lawyers. See Rule 5.1(a), Comments [1], [2] and [4]; see also D.C. Bar Ethics Opn.
486 377. Anonymous reporting within a law firm could encourage lawyers, particularly subordinate
487 lawyers, to report any concerns they may have about their superiors and other colleagues without
488 the fear of any backlash, and it could also encourage an impaired lawyer to self-report and
489 hopefully get timely assistance.

490 Lawyers cannot diagnose the cause or extent of a colleague's mental impairment, but must make
491 a reasonable effort to ensure the impaired lawyer's compliance with the rules, and must act to
492 avoid or mitigate any consequences that affect a client's interests.²⁴ A lawyer cannot act on
493 conjecture or conflicting reports, so the prudent first step is to investigate the colleague's
494 perceived impairment to evaluate the accuracy of the report(s); the severity and duration of the
495 impaired lawyer's conduct; whether the lawyer's conduct can be resolved or improved; and
496 whether the lawyer's condition renders it difficult or unreasonably difficult for the impaired
497 lawyer to carry out legal representation effectively. ABA Formal Opn. 03-429 at 3.²⁵ The
498 investigation must analyze any and all legal services provided by the impaired lawyer to
499 establish if other client matters are affected by the colleague's impairment. See Rules 5.1(b-c)
500 and 8.4(a). This entails identifying and auditing other client's files where the impaired lawyer is
501 involved to ensure the firm's representation complies with applicable ethical duties. *Id.* The
502 investigating lawyers must be careful to not reveal the impaired lawyer's private information or
503 impair any other legal rights when speaking with other lawyers or staff within the firm as
504 necessary to investigate the lawyer's condition and resulting impact.

505 Reasonable remedial action should be determined on a case-by-case basis and consider the
506 nature and seriousness of the misconduct and the nature and immediacy of its harm. Rule 5.1,
507 Comment [6]. Remedial actions may include notifying another lawyer within the firm who has

²⁴ "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).

²⁵ 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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supervisory or managerial responsibilities, confronting the impaired lawyer, notifying the client of all information relevant to the representation as required under the CRPC and the State Bar Act, 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, and referring the client to new counsel to handle the matter. See Rules 1.4, 1.4.1, 1.7 and 1.16; and B&P Code sections 6068(m) and 6103.5.

"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. 03-429.²⁶

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

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

Big Firm can make suggestions to Client as to how it believes the case should be re-staffed and 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 competent 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

²⁶ "The Firm's paramount obligation is to take steps to protect the interest of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are ethically represented notwithstanding the lawyer's impairment. Other steps include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients." ABA Formal Op. 03-429

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542 impact of an impairment can try to be addressed and resolved through internal procedures,
543 communication to the client may be required and representation by the impaired lawyer may
544 need to end, resulting in the firm's re-staffing or withdrawal from the representation. The
545 available resources and options to remediate this type of situation may differ from firm to firm
546 and will depend on the particular facts and circumstances, but the duties and ethical
547 responsibilities owed by the lawyers who have knowledge of an impairment remain.

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551 California, its Board of Trustees, any persons, or tribunals charged with regulatory
552 responsibilities, or any member of the State Bar.