

HEADLINE: Proposed Formal Opinion Interim No. 14-0001 (Colleague Impairment)

SUBHEAD: The State Bar seeks public comment on Proposed Formal Opinion Interim No. 14-0001 (Colleague Impairment).

Deadline: November 25, 2020

Background

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with applicable State Bar policy and procedure, the Committee shall publish proposed formal opinions for public comment (See, State Bar Board of Trustee Resolutions July 1979 and December 2004. See also, Board of Trustee Resolution November 2016).

On May 10, 2018, the California Supreme Court issued [an order](#) approving 69 new Rules of Professional Conduct, which will go into effect on November 1, 2018. Information about the new rules is available at the [State Bar website](#). Proposed Formal Opinion Interim No. 16-0002 interprets the new Rules of Professional Conduct.

Discussion/Proposal

Proposed Formal Opinion Interim No. 14-0001 considers: What ethical obligations does a lawyer have when the lawyer or a lawyer in that lawyer's law firm has violated, is violating or will violate California's Rules of Professional Conduct or the State Bar Act in the course of representing a client as a result of the lawyer's possible mental impairment?

The opinion interprets 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; Business and Professions Code sections 6068(e)(1), 6068(m), and 6103.5(a).

The opinion digest states: Mental impairment in this opinion refers to the diminution of a lawyer's mental capacity necessary to competently and ethically perform legal services as required under the California Rules of Professional Conduct and the State Bar Act. A lawyer's impairment does not excuse that lawyer's compliance with the California Rules of Professional Conduct and the State Bar Act. An impaired lawyer's conduct can also trigger obligations for the impaired lawyer's subordinates, supervisors and other colleagues who know of the impaired lawyer's conduct. These ethical obligations may include, but are not limited to, communicating significant developments related to the lawyer's conduct to the client and promptly taking 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, the severity of the impaired lawyer's unethical 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.

At its July 24, 2020 meeting and in accordance with their procedures, the State Bar Standing Committee on Professional Responsibility and Conduct tentatively approved Proposed Formal Opinion Interim No. 14-0001 for a 90-day public comment distribution.

Any fiscal/personnel impact

None

Background material

Proposed Formal Opinion Interim No. 14-0001

Source

State Bar Standing Committee on Professional Responsibility and Conduct

Deadline

November 25, 2020

Direct comments to

Comments should be submitted using the [online Public Comment Form](#). The online form allows you to input your comments directly and can also be used to upload your comment letter and/or other attachments.

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

ISSUES: What ethical obligations does a lawyer have when the lawyer or a lawyer in that lawyer's law firm has violated, is violating, or will violate California's Rules of Professional Conduct or the State Bar Act 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 diminution of a lawyer's mental capacity necessary to competently and ethically perform legal services as required under the rules and the State Bar Act. A lawyer's impairment does not excuse that lawyer's compliance with the rules and the State Bar Act. An impaired lawyer's conduct can also trigger obligations for the impaired lawyer's subordinates, supervisors and other colleagues who know of the impaired lawyer's conduct. These ethical obligations may include, but are not limited to, communicating significant developments related to the lawyer's conduct to the client and promptly taking 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, the severity of the impaired lawyer's unethical 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.¹

Business and Professions Code sections 6068, subdivisions (e)(1) and (m), and 6103.5, subdivision (a).

¹ Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

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, when responding to such inquiries, has discussed facts and strategies that obviously do not apply to Client's matter. Impaired Lawyer did not recognize these problems and was argumentative with Client when Client raised them.

At a recent hearing on the opposing party's motion for summary judgment ("MSJ"), 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. Recognizing the problem, the court allowed Subordinate Lawyer, who had drafted the opposition brief, to step in and argue Client's position. Opposing party's MSJ was ultimately denied. After the denial, opposing counsel communicated a written settlement offer to Impaired Lawyer. Impaired Lawyer ignored the offer and failed to communicate the offer to Client. 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.

Thereafter, Subordinate Lawyer raised ethical concerns about Impaired Lawyer's conduct directly with Impaired Lawyer. Subordinate Lawyer said that Impaired Lawyer's recent conduct demonstrated that Impaired Lawyer is no longer competent to handle the role of lead counsel for Client and that continuing to do so would violate the duties of competence and diligence owed to Client. Subordinate Lawyer also said that Impaired Lawyer's failure to communicate with Client, both about the settlement offer and the lawyer's own impairment, violated the duty to communicate with Client. Subordinate Lawyer expressed concern that continuing the representation without addressing those ethical issues would result in harm to Client.

In response, Impaired Lawyer denied having any 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 no staffing changes were necessary to ensure competent representation of Client. Impaired

Lawyer denied that any ethical violations had occurred, and admonished Subordinate Lawyer for suggesting otherwise. Impaired Lawyer further instructed Subordinate Lawyer not to raise any concerns with Client, since doing so could cause Client to lose confidence in the firm's representation, potentially resulting in financial and reputational harm to Impaired Lawyer and the firm.

Scenario #1: Impaired Lawyer and Subordinate Lawyer are employed at 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 only addresses mental impairment that appears to impede a lawyer's fitness to competently and diligently engage in the practice of law in accordance with the rules and State Bar Act.² Mental impairment can be temporary or permanent and can vary in severity. It can result from a disease or illness that impacts mental faculties, such as mental illness, depression, anxiety or dementia; stress; lack of sleep; alcoholism;³ problematic substance use; or traumatic life events.⁴ A mental impairment, standing alone, does not raise ethical issues. "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."⁵ The Committee recognizes that there could be some tension between a lawyer's ethical obligations under the rules and the State Bar Act, and

² Lawyers are not immune from normal and short-term variations in efficiency, moods, energy, confidence, and decisionmaking 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."

³ Krill, Patrick R. JD, LL.M.; Johnson, Ryan MA; Albert, Linda MSSW, 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" ("Attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations.").

⁴ See American Bar Association ("ABA") Formal Opinion No. 03-429 (June 11, 2003), fn. 2, for discussion of mental impairments that affect lawyers; ABA Formal Opn. No. 03-431 (August 8, 2003) at 1; D.C. Bar Ethics Opn. No. 377 at 1; see also Virginia State Bar Legal Ethics Opn. 1886 (December 15, 2016) at p. 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 p. 1 (2020).

⁵ Law. Man. Prof. Conduct 101:3301 (2020) at p. 1.

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.

A. Responsibilities of the Impaired Lawyer

A lawyer's impairment does not excuse the lawyer from complying with the rules and the State Bar Act. An impaired lawyer has the same ethical obligations as other lawyers. ABA Formal Opn. No. 03-429 at p. 2; Virginia State Bar Legal Ethics Opn. 1886 (2016) at p. 3. "Simply stated, mental impairment does not lessen a lawyer's obligation to provide competent and ethical representation." ABA Formal Opn. No. 03-429 at p. 2. A lawyer's mental impairment may, however, 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 p. 3 (citing George Edward Bailley, *Impairment, The Profession and Your Law Partner*, 11 No. 1 Prof. Law. 2 (1999) at p. 2).

1. Competence and Diligence

A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence or diligence.⁶ Rule 1.1(a). "Competence" means to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of the service in question. Rule 1.1(b).⁷ 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 both mental and emotional components. 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 Formal Opn. No. 2003-162 at p. 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 Los Angeles County Bar Assn. Formal Opn. No. 504 (2001)). A lawyer is also obligated to perform legal services with "reasonable diligence," meaning that a lawyer acts with

⁶ Specific intent is not required to find a violation of rule 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 [276 Cal.Rptr. 176] (decided under former rule); *Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 178 (decided under former rule 3-110).

⁷ 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.

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).

Here, Impaired Lawyer's proposed course of conduct involves, at a minimum, reckless, grossly negligent or repetitive violations of the duties of competence and diligence. Impaired Lawyer has recently failed to perform competently both in court and in dealings with the client. Moreover, Impaired Lawyer has been unable to recognize any misconduct, or any possibility that it might call for a change in the staffing or organization of the case. 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 performance.⁸ Whether the lawyer's performance is due to impairment or personal problems, however, it does not excuse failing to meet obligations to the client.⁹

2. Communication with the Client

Competent representation includes the lawyer's obligation to communicate with the client. *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782 [1 Cal.Rptr.2d 684]; *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 491. 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 rules 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 [65 Cal.Rptr. 406] [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.].

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 [263 Cal.Rptr. 641]; *Carter v. State Bar* (1988) 44 Cal.3d 1091, 1101 [245 Cal.Rptr.628] ["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 [213 Cal.Rptr. 236]; *Gary v. State Bar* (1988) 44 Cal.3d 820, 824 [244 Cal.Rptr. 482] – alcohol problem; *Snyder v. State Bar* (1976) 18 Cal.3d 286, 293 [133 Cal.Rptr. 864] – 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 rule 1.1, and could mandate withdrawal under rule 1.16(a)(3). Tuft et. al, *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2019) Ch. 6-A Sources Duty of Competence.

Rule 1.4(a)(3) and Business and Professions 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 Business and Professions Code section 6103.5 both require a lawyer to promptly communicate to the client all amounts, terms, and conditions of any written offer of settlement made to the client. 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. No. 2019-197 [discussing duty to communicate a lawyer’s error].

Here, Impaired Lawyer has 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 Business and Professions Code section 6103.5(a), and continues to refuse to do so. The facts also demonstrate a pattern of conduct in which Impaired Lawyer has repeatedly ignored Client’s reasonable requests for information in violation of rule 1.4(a)(3). Finally, Impaired Lawyer has barred any communication with Client about Impaired Lawyer’s own ability to continue to represent Client effectively, although that issue would clearly be significant to Client. These ongoing 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.

3. 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 to each affected client; [or] the representation is not prohibited by law . . .” Rule 1.7(d)(1)-(2).

¹⁰ Failure to communicate with a client regarding important matters is grounds for State Bar discipline. *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 127 [202 Cal.Rptr. 349]; *Spindell v. State Bar* (1975) 13 Cal.3d 253, 260 [118 Cal.Rptr. 480].

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, Impaired Lawyer has ordered Subordinate Lawyer not to communicate with Client concerning the issues that Subordinate Lawyer has identified because Impaired Lawyer did not want to risk the economic harm that would result were Client to terminate the firm. Impaired Lawyer's decision to place Impaired Lawyer's personal, economic, and reputational interests ahead of Client's interest to receive competent and ethical representation reflects an impermissible conflict of interest, because there is a significant risk that the representation of Client will be materially limited. Because this conflict has not been disclosed or client consent has not been sought, then continued representation is not permissible under rule 1.7(b).¹¹

4. Termination of Representation

A lawyer shall not continue to represent a client if the lawyer: (1) "knows or reasonably should know" that the lawyer's actions during the representation of a client *will* result in violation the rules 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), italics added.) 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 rules] 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)). (Italics added.) Thus, in situations where a lawyer has a mental condition that actually or potentially impairs the provision of legal services, the distinction between mandatory and permissive withdrawal is whether the impaired lawyer

¹¹ Under the facts presented in this opinion, consent to this conflict may not be permissible under rule 1.7(d)(1) or (d)(2).

will or is *likely* to violate the rules or the State Bar Act,¹² as well as the degree of difficulty the lawyer faces in continuing the representation.¹³

Here, under rule 1.16(a)(2), Impaired Lawyer reasonably should know that continued representation of the client in the manner that Impaired Lawyer proposed will result in ongoing violations of the rules and the State Bar Act. In addition, under rule 1.16(a)(3), without changes in the staffing of the case, Impaired Lawyer's condition will render it unreasonably difficult for Impaired Lawyer to carry out the representation effectively. For both reasons, Impaired Lawyer's failure to end Impaired Lawyer's representation of Client when required could be a further violation of the rules subjecting Impaired Lawyer to discipline.

B. Responsibilities of Other Lawyers

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 protect the client and ensure the impaired lawyer's compliance with the rules and the State Bar Act. ABA Formal Ethics Opn. No. 03-429; 19 Law. Man. Prof. Conduct 380 (2003). The other lawyers owe responsibilities to the affected client, the impaired lawyer, and the firm. 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 p. 4.

Each lawyer in a firm has an independent ethical obligation to protect the interests of the firm's clients. Generally, when a client retains a law firm, the client's relationship extends to all attorneys in the firm.¹⁴ "Every attorney, including an associate . . . , must exercise professional

¹² 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" (rule 1.16(b)(9)). Tuft et. al, *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2019) Ch. 10-B.

¹³ "An attorney who is physically or mentally unable to serve the client effectively must withdraw. (Rule of Professional Conduct 1.16(a)(3).) These unfortunate situations range from alcohol and drug problems to terminal illnesses." Younger, Younger on California Motions (2d. ed. 2019) § 17:4.

¹⁴ See Cal. State Bar Formal Opn. No. 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). See also *Blackmon v. Hale* (1970) 1 Cal.3d 548, 558 [83 Cal.Rptr. 194]; Cal. State Bar Formal Opn. No. 1981-64 [stating that attorneys of a private law firm share responsibilities with their firm for representation of their clients].

judgment in the best interest of his clients and must take steps which are necessary to assure competent representation for his client[.]” Los Angeles County Bar Assn. Formal Opn. No. 383 (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.

Multiple factors may affect the duties of lawyers 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.¹⁵ Those obligations are clearest with respect to subordinate and managerial lawyers with knowledge of the impaired lawyer’s conduct.¹⁶

Reasonable remedial action should be determined on a case-by-case basis, considering the nature and seriousness of the misconduct and the nature and immediacy of its harm. Rule 5.1, Comment [6]. Remedial actions may include notifying another lawyer within the firm who has supervisory or managerial responsibilities, confronting the impaired lawyer, notifying the client, ending impaired lawyer’s representation of the client or adjusting the impaired lawyer’s responsibilities as appropriate under the rules 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 Business and Professions Code sections 6068(m) and 6103.5. The details of these forms of remediation are discussed more fully below.

1. Responsibilities of Subordinate Lawyer

Rule 5.2(a) requires a lawyer to comply with the rules and the State Bar Act “notwithstanding that the lawyer acts at the direction of another lawyer or other person.” A subordinate lawyer

¹⁵ 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.”].

¹⁶ California did not adopt ABA Model Rule 8.3 or any rule which requires a lawyer to report another lawyer to the State Bar of California 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 State Bar of California. San Diego County Bar Assn. Formal Opn. No. 1992-2; Los Angeles County Bar Assn. Formal Opn. No. 440 (1986) [attorney should consider seriousness of other lawyer’s offense and potential impact on public and the profession].

does not, however, violate the rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's "reasonable resolution of an arguable question of professional duty." Rule 5.2(b). Under this rule, a supervisory lawyer and a subordinate lawyer are each independently responsible for fulfilling their own ethical obligations. Rule 5.2, Comment; see *In re Maloney & Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-797 [associate attorney disciplined along with supervising partner for misrepresentations misleading the court and failing to obey a court order]. When an ethical question "can reasonably be answered only one way the duty of both lawyers is clear and both are responsible for performing it." Rule 5.2, Comment. Where the question can reasonably be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable courses to select, and the subordinate may abide by that resolution. *Id.* "If the subordinate lawyer believes that the supervisor's proposed resolution of the question of professional duty would result in a violation of [the rules] 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.

Under these principles, a subordinate lawyer may not follow an order to engage in conduct when there is no reasonable argument that such conduct is ethically permissible. Moreover, if the ethical violation is ongoing, the subordinate has an obligation to take reasonable remedial measures to try to correct the violation and to protect the client from harm. The subordinate lawyer may consider communicating with other supervisory lawyers within the firm about these issues. Depending on the circumstances, such other lawyers may include, among others, in-house ethics counsel, members of the firm's executive committee or risk management committee, a partner in charge of the client matter(s) at issue, or, in smaller or less structured firms, any senior colleague whom the lawyer trusts to take a constructive view of the problem. See rule 5.2, Comment; see also Los Angeles County Bar Assn. Formal Opn. No. 383 (1979) ["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."].¹⁷ Where the subordinate reasonably believes that notifying other lawyers within the firm would be ineffective, or in an emergency situation where consultation is not feasible, a subordinate lawyer should take such action as may be required to preserve the client's rights. Los Angeles County Bar Assn. Formal Opn. No. 348 (June 19, 1975) (construing former rule).

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 rules and the State Bar Act can reasonably be answered in only one way, the subordinate lawyer must take necessary remedial measures to protect the client, which will normally involve communicating to the

¹⁷ See also Tuft et. al, *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2019) Ch. 6-B, § 6:153.2.

client any material information about the lawyer's conduct that impacts the client's interest as required by rule 1.4.¹⁸

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 violations of the rules or the State Bar Act, Subordinate Lawyer may not follow Impaired Lawyer's instruction to take no further action, and must instead act in accord with Subordinate Lawyer's independent duties to Client. If it is reasonable to do so, Subordinate Lawyer may seek to fulfill that obligation by communicating with one or more of the 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 or lawyers under rule 5.1. Subordinate Lawyer should then be able to work with the supervisory or managerial lawyers of Big Firm to investigate the matter and evaluate reasonable remedial measures to avoid further ethical misconduct and protect the client, as discussed more fully below in the next section.

Internally reporting Impaired Lawyer's actions to an unimpaired lawyer with supervisory authority does not fully discharge Subordinate Lawyer's duties. Subordinate Lawyer continues to owe Client an independent set of ethical obligations which requires Subordinate Lawyer to ensure that the ethical concerns have been addressed. If the supervisory lawyer adopts remedial measures which represent a reasonable resolution of the ethical questions that Subordinate Lawyer has raised and reasonably protects Client moving forward, then Subordinate Lawyer has satisfied that obligation to Client. Rule 5.2, Comment. If Subordinate Lawyer concludes, however, that the firm's resolution of the matter is not a reasonable resolution of the underlying ethical issues, Subordinate Lawyer may be obliged to pursue further measures, including contacting client directly.

¹⁸ See also Los Angeles County Bar Assn. Formal Opn. No. 383 (1979) ["[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 Los Angeles County Bar Association opinion to the extent it states the disagreement between the associate and the firm must be disclosed to the client, to the extent that they are material, the lawyer's misconduct, the consequences, and proposed remedial actions, must be discussed with the client to allow the client to make an informed decision regarding continued representation. Rule 1.4.

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. Impaired Lawyer has denied there is any problem, has refused to communicate necessary information to Client, and has refused to consider stepping away from Client's 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 to Client the significant developments and other information reasonably necessary to permit Client to make informed decisions regarding the ongoing representation. Rule 1.4(a)(2)-(3) and (b). When it is possible to do so, 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). 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 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 and able 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, must be discussed with Client, and Client's decision will be controlling.²⁰

¹⁹ ABA Formal Opn. No. 03-429 at p. 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* (2018) 4 Cal.5th 467, 479 [229 Cal.Rptr.3d 371] (citing *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790[100 Cal.Rptr. 385]; Code of Civil Procedure 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 Ethics Hotline at the State Bar of California,²¹ the ethics 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.

2. Responsibilities of Lawyers 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 rules and the State Bar Act. Rule 5.1 (a)-(b). A lawyer who possesses managerial authority within a law firm where the impaired lawyer practices or who has direct supervisory authority over that lawyer is responsible for the other lawyer's violations of the rules and the 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. *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 368-369; *In the Matter of Phillips* (Review 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 rules and the State Bar Act. Rule 5.1, Comments [1] and [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]. Each firm should consider whether compliance with rule 5.1 requires it to have policies and procedures addressing situations where non-compliance could result from a lawyer's mental impairment, so that the

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

²² The State Bar of 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. 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."

steps to be taken in response to the impairment are in place and known by all lawyers of the firm before an issue arises.²⁴

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

Lawyers cannot diagnose the cause or extent of a colleague's mental impairment, but when alerted to a specific instance of unethical conduct stemming from an impairment, reasonable remedial action must be taken to eliminate any ongoing violation and to avoid or mitigate any consequences that affect a client's interests.²⁵ In order to evaluate what is "reasonable remedial action" under rule 5.1(c)(2), a lawyer would likely need to investigate the colleague's perceived impairment to evaluate the accuracy of the report(s); the severity and duration of the impaired lawyer's unethical conduct; whether the lawyer's conduct can be resolved or improved; and whether the lawyer's condition renders it difficult or unreasonably difficult for the impaired lawyer to carry out legal representation effectively. ABA Formal Opn. No. 03-429 at 3.²⁶ The law firm may also need to closely supervise the conduct of the impaired lawyer and assess whether the other client matters being handled by the impaired lawyer have been affected by the colleague's impairment. See rules 5.1(b)-(c) and 8.4(a). This may entail

²⁴ D.C. Bar Ethics Opn. 377 at p. 2 [A written policy regarding impairment is not required in order to comply with Rule 5.1; however, "even if a written policy is reasonably determined to be unnecessary, firms and agencies may want to have a written policy to provide consistency in the guidance available to lawyers and other firm or agency personnel."].

²⁵ "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. No. 03-431 (2003).

²⁶ The ABA's Model Rule 1.16(a)(2) differs from 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.

identifying and auditing the other client's files where the impaired lawyer is involved to ensure no violations of the ethics rules have occurred and to avoid or mitigate any consequences of the impaired lawyer's conduct. *Id.* The investigating lawyers should be careful to not reveal the impaired lawyer's private information or impair any other legal rights when speaking with the other lawyers or staff within the firm as necessary to investigate the lawyer's condition and resulting impact.

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 rules and the State Bar Act. See ABA Formal Opn. No. 03-429 at p. 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.* "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." North Carolina State Bar Formal Ethics Opn. 8 (2013); see also Virginia State Bar Ethics Opn. 1886 at p. 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. No. 03-429.²⁷

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

²⁷ "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. No. 03-429.

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 ethically provide legal services as required under the rules and the State Bar Act triggers ethical obligations not just for the impaired lawyer, but also for lawyers who know of the conduct. Although it may be possible to reduce or eliminate the impact of an impairment through internal procedures, often communication to the client may be required and representation by the impaired lawyer may need to end, resulting in the firm's re-staffing or withdrawal from the representation. The available resources and options to remedy this type of situation may differ from firm to firm and will depend on the particular facts and circumstances, but the duties and ethical responsibilities owed by the lawyers who have knowledge of the impairment remain.

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