



The State Bar of California

OPEN SESSION

AGENDA ITEM

MAY 2021

REGULATION AND DISCIPLINE COMMITTEE III.A

DATE: May 13, 2021

TO: Members, Regulation and Discipline Committee

FROM: Andrew Tuft, Supervising Attorney, Office of Professional Competence

SUBJECT: Formal Advisory Ethics Opinion 2021-206: Request for Approval for Publication

EXECUTIVE SUMMARY

This agenda item seeks Board Committee on Regulation and Discipline (RAD) approval for the publication of proposed Formal Ethics Advisory Opinion 2021-206 developed by the Committee on Professional Responsibility and Conduct (COPRAC), following the close of two public comment periods.

BACKGROUND

COPRAC is charged with developing the State Bar's nonbinding, advisory ethics opinions.¹ Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar policy and procedure,² which provides that once the committee has approved a formal opinion following consideration of public comment, the formal opinion and the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of RAD for decision.

¹ Each published opinion includes the following statement: "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 on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar." Although nonbinding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility (See, e.g., *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 459.)

² See Board Resolutions, July 1979, December 2004, and November 2016.

DISCUSSION

This agenda item requests approval for the publication of proposed Formal Advisory Ethics Opinion 2021-206. Before being finalized for publication, while the opinion was still in development and out for public comment, it was designated as proposed Formal Opinion Interim No. 14-0001.

Proposed Formal Opinion Interim No. 14-0001 was drafted by COPRAC, and at its meeting on July 24, 2020, in accordance with COPRAC's procedures, the committee approved the opinion for an initial 90-day public comment circulation.³ Subsequently, at its meeting on January 8, 2021, COPRAC revised the opinion in response to public comments received and approved an additional 60-day public comment period circulation.

The full text of the proposed opinion is provided as Attachment A. The question addressed in the proposed opinion is: "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 digest states:

This opinion addresses mental impairments that impede a lawyer's fitness to competently and diligently engage in the practice of law in accordance with the rules and 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.

Public Comment

In response to the second public comment period that ended on March 17, 2021, five public comments were received and are provided as Attachment B.

Ana Maria Martinez-Escalona expressed, in sum, that the opinion should state "cases are reviewed and handled on an individual basis taking into consideration the privacy of the professional's mental health and the right to confidentiality in medical records." COPRAC believes that the opinion is not inconsistent with the concerns raised by the commenter. For

³ See Board Resolution, December 2004.

example, the opinion provides that when communicating to the client information reasonably necessary to permit the client to make informed decisions regarding the ongoing representation, the lawyer should maintain the privacy and other legal rights of Impaired lawyer when communicating with client, as required by California Rule of Professional Conduct 1.4(d).⁴ As a result, COPRAC did not make any changes to the proposed opinion.

The California Lawyers Association Ethics Committee stated they support the publication of the opinion and concur with the analysis and conclusions in the opinion. They believe the opinion “is of vital importance for practicing lawyers and for the protection of the public.” They also offered two clarifying edits that COPRAC agreed with and amended the opinion accordingly.

Charles Nishi submitted a comment raising stylistic edits along with some issues that are outside the scope of the opinion. In addition, Mr. Nishi observed that the opinion does not mention the potential for retaliation against the subordinate lawyer for raising concerns about the negative impact on the client resulting from a supervisory attorney’s impairment. Although this comment raises legal issues that are outside the scope of the opinion, COPRAC added footnote 28, which states: “While outside the scope of this opinion, we note that subordinate lawyers may also be protected from retaliation under applicable law. See, e.g., Cal. Labor Code § 1102.5.”⁵

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee submitted a comment stating they “agree with the conclusions in this proposed opinion and support its publication.”

The Los Angeles County Public Defender Office (LAPD) submitted a comment disagreeing with the opinion and stating that it should not be adopted. Specifically, LAPD disagrees with the proposition that “each lawyer of 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 relationship extends to all attorneys in the firm.” The LAPD argues this statement is flawed and not applicable to situations where only a particular “branch” of a law firm or an organization is involved in the representation. COPRAC disagrees and believes the statement is supported by the law.⁶ When read in context, the opinion is clear that this proposition extends to the

⁴ Rule 1.4 addresses a lawyer’s duty to communicate with the client. Rule 1.4(d) states: “A lawyer’s obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.” The opinion also cites to ABA Formal Opn. No. 03-429 (“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.”); and D.C. Ethics Opn. 377 (When a lawyer with a significant impairment leaves the firm, “[m]anagerial and supervisory lawyers should be careful to disclose only necessary and material information to the clients, balancing truthful disclosures with the impaired lawyer’s privacy rights under the substantive law.”).

⁵ Labor Code section 1102.5 offers protection for employees who disclose information to a government or law enforcement agency, a person with authority over the employee, or to another employee with authority to investigate, discover, or correct the violation or noncompliance of a state or federal statute, rule, or regulation.

⁶ Staff observes this statement is supported by case law and certain rules of professional conduct. See, *Blackmon v. Hale* (1970) 1 Cal.3d 548, 558 [83 Cal.Rptr. 194] [finding that a reasonable client would believe he was being represented by a partnership, rather than an individual partner, where the partners held themselves out to the public and to the client as a partnership]; *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP*

particular duties discussed in the opinion and that those duties are triggered by a lawyer's knowledge of the impaired lawyer's conduct. For example, the conclusion states "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 other lawyers working on the relevant client matters and supervisory or managerial lawyers *who know of the conduct*." (Emphasis added.) However, to address the LAPD's concern, COPRAC added additional language reiterating that the duties discussed in the opinion are limited to attorneys with knowledge of the impairment or misconduct.

The LAPD also believes that the opinion's definition of mental impairment is overbroad and would include an attorney who misses a deadline because of lack of sleep. COPRAC disagrees with that interpretation of the opinion. COPRAC noted that the opinion adopts a functional definition of impairment where the focus is on impairments that "impede a lawyer's fitness to competently and diligently engage in the practice of law in accordance with the rules and State Bar Act." Additionally, in footnote number 2, the opinion clarifies that: "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." As a result, COPRAC did not make any revisions in response to this concern.

At its April 15, 2021 meeting, following consideration of the public comment received, COPRAC approved the opinion for submission to RAD for formal publication. The State Bar Standing Committee on Professional Responsibility and Conduct requests that RAD approves the publication of Formal Ethics Advisory Opinion No. 2021-206.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

(2007) 150 Cal.App.4th 384, 392 [58 Cal.Rptr.3d 516] ["Unless there is an agreement to the contrary, the retention of an attorney in a law firm constitutes the retention of the entire firm."]; *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 445 [98 Cal.Rptr.2d 193] ["[B]y retaining a single attorney, a client establishes an attorney-client relationship with any attorney who is a partner of or is employed by the retained attorney."]; *Redman v. Walters* (1979) 88 Cal.App.3d 448, 453-455 [152 Cal.Rptr. 42] [partner who left partnership one year after client engaged firm and who never had any contact with client was liable for malpractice of his former partners]. See also, Rules of Professional Conduct 1.8.11 [Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9] and 1.10 [Imputation of Conflicts of Interest: General Rule].

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Regulation and Discipline Committee; following publication for public comment and consideration of the comments received, and upon the recommendation of the State Bar Standing Committee on Professional Responsibility and Conduct, approves the publication of Formal Ethics Advisory Opinion 2021-206, attached hereto as Attachment A.

ATTACHMENT(S) LIST

- A.** Formal Ethics Advisory Opinion 2021-206
- B.** Full Text of Public Comments

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2021-206**

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: This opinion addresses mental impairments that impede a lawyer's fitness to competently and diligently engage in the practice of law in accordance with the rules and 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).

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

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.

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 addresses mental impairments that 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 substantive law regarding employment, disability and privacy, among other legal rights. This

² Lawyers are not immune from normal and short-term variations in efficiency, moods, energy, confidence, and decision-making that are common in everyday life. General low points within such normal fluctuations likely do not constitute a form of impairment within the meaning of this opinion, so long as a client's interests are not threatened. See ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation Study (2016); National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practice Recommendations for Positive Change* (August 2017).

³ 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* (2016) ("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 (2019) at 1; see also Virginia State Bar Legal Ethics Opn. 1886 (December 15, 2016) at p. 2 and authorities cited at fns. 4-6; ABA/Bloomberg, *Lawyers' Manual of Professional Conduct* (2020) 101:3301 Practice Guides, *Misconduct and Discipline, Disciplinary Process, Impairment* at p. 1.

⁵ ABA/Bloomberg, *Lawyers Manual of Professional Conduct* (2020) 101:3301 Practice Guides, *Misconduct and Discipline, Disciplinary Process, Impairment* at p. 1.

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 Bailley, *Impairment, The Profession and Your Law Partner* (1999) 11 No. 1 Prof. Law. 2 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 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).

⁶ Specific intent is not required to find a violation of rule 1.1; "[o]nly 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 [276 Cal.Rptr. 176] (decided under former rule); *In the 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.

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. (See rule 1.3(a).) 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.].

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 providing

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] ["[O]ffice 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 "[E]ven 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.

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) and 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, even though 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; [and] the representation is not prohibited by law” Rule 1.7(d)(1)-(2).

An impaired lawyer’s personal interest conflict, if one exists, does not always prohibit the representation of the client by other lawyers of the firm. The personal interest conflict is not imputed to other lawyers of the firm unless the conflict presents a significant risk of materially limiting the representation of the client by the other firm lawyers. Rule 1.10(a)(1).

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].

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. As discussed above, these issues include violations of several rules of professional conduct, such as the duty to communicate with the client and the duty to render competent and diligent representation. 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 in writing and client consent has not been sought, continued representation is not permissible under rule 1.7(b).¹¹

Other lawyers in the impaired lawyer's law firm are not necessarily prohibited from representing the Client provided the Impaired Lawyer's conflict does not present a significant risk of materially limiting their representation. Rule 1.10(a)(1). While analysis of this issue is fact dependent, the Impaired Lawyer's personal interest conflict may be imputed to other lawyers in the firm if their interests in avoiding malpractice liability,¹² a fee dispute with the Client, or reputational harm would prevent them from being able to adequately communicate with the Client regarding the Impaired Lawyer's prior misconduct, or otherwise present a significant risk of materially limiting their representation of the Client. Similarly, imputation may be appropriate where the other lawyers prefer to hide the Impaired Lawyer's prior misconduct as a result of their relationship with the Impaired Lawyer and their desire to obtain future client referrals and business from the Impaired Lawyer.

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,

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).

¹² See Cal. State Bar Formal Opn. 2019-197 at pp. 3-4 (addressing duty to disclose the material facts potentially giving rise to any legal malpractice claim against the attorney).

the distinction between mandatory and permissive withdrawal is whether the impaired lawyer *will* or is *likely* to violate the rules or the State Bar Act,¹³ as well as the degree of difficulty the lawyer faces in continuing the representation.¹⁴

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 that the impaired lawyer complies 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.¹⁵ "Every attorney, including an associate . . . , must exercise professional

¹³ 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.

¹⁴ "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.

¹⁵ 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] [finding that

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). The duties discussed herein are generally limited to lawyers with knowledge of the impaired lawyer’s misconduct, but managerial lawyers are also responsible for ensuring that the firm has policies and procedures in place giving reasonable assurance that all lawyers in the firm comply with the rules and the State Bar Act. 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.¹⁶ Those obligations are clearest with respect to subordinate and managerial lawyers with knowledge of the impaired lawyer’s conduct.¹⁷

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

a reasonable client would believe he was being represented by a partnership, rather than an individual partner, where the partners held themselves out to the public and to the client as a partnership]; 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].

¹⁶ See D.C. Bar Ethics Opn. 377 (2019) [“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.”].

¹⁷ 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].

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 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.”].¹⁸ 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. See Los Angeles County Bar Assn. Formal Opn. No. 348 (1975) (construing former rule).

¹⁸ See also Tuft et. al, *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2019) Ch. 6-B, § 6:153.2.

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 client any material information about the lawyer's conduct that impacts the client's interest as required by rule 1.4.¹⁹

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, including members of the executive or risk management committees. 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.

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 Big Firm's resolution of the matter is not a reasonable resolution of the underlying ethical issues, Subordinate Lawyer may be obligated to pursue

¹⁹ 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.

further measures, including contacting Client directly. See, for example, rules 5.2(a), 1.1, and 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). Subordinate Lawyer should maintain the privacy and other legal rights of Impaired Lawyer²⁰ when communicating with Client, unless Impaired Lawyer authorizes his private information to be shared. Rule 1.4(d) ("A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law."). 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 should also disclose that Impaired Lawyer was unable to effectively argue before the court on behalf of Client's opposition to the MSJ. In the latter example, even though Subordinate Lawyer was able to step in and successfully argue the MSJ, Impaired Lawyer's conduct during the hearing is a significant development related to the representation or information that is reasonably necessary to permit Client to make informed decisions regarding the ongoing representation under rule 1.4.²¹

²⁰ See 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."); D.C. Ethics Opn. 377 (2019) (When a lawyer with a significant impairment leaves the firm, "[m]anagerial and supervisory lawyers should be careful to disclose only necessary and material information to the clients, balancing truthful disclosures with the impaired lawyer's privacy rights under the substantive law.").

²¹ The inability of the Impaired Lawyer to competently present legal arguments at the summary judgment motion hearing is relevant information that would reasonably cause a client to consider terminating the representation. See ABA Formal Opn. No. 481 at p. 4 (a lawyer must inform a client regarding a "material error" committed by the lawyer in the representation; "[a]n error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.").

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.²²

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,²³ the ethics hotlines of local bar associations where available, or appropriate legal ethics advisors within or outside of a lawyer's firm.²⁴ Subordinate Lawyer may also consider speaking confidentially with an appropriate mental health professional, the State Bar of California's confidential Lawyer Assistance Program ("LAP"),²⁵ or a lawyer mentor for additional insight.

²² *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).

²³ State Bar of California Ethics Hotline: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Hotline>.

²⁴ See Cal. State Bar Formal Opn. 2019-197 (addressing lawyer's ethical obligations when lawyers in a law firm consult with outside counsel concerning matters related to the firm's representation of a current client). However, there is no "advice of counsel" defense in State Bar Court matters. Despite facts showing that a lawyer's conduct was consistent with information or counsel received from an ethics hotline or ethics advisor, the State Bar Court can still find that lawyer culpable of ethical misconduct. In an appropriate case, these facts could form a basis for a finding of "good faith" or other mitigating circumstance, but that will not defeat a finding of culpability. See, e.g., *Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 ("It may also be observed that no employee of the State Bar can give an attorney permission to violate the Business and Professions Code or the Rules of Professional Conduct"); see also Rule 5.2(a) ("A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.").

²⁵ 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>.

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).²⁶ 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 steps to be taken in response to the impairment are in place and known by all lawyers of the firm before an issue arises.²⁷

If permitted by applicable law, a firm should consider including in its policies a requirement that conditions continued employment or partnership 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 (2019). Anonymous reporting within a law firm and

²⁶ 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."

²⁷ D.C. Bar Ethics Opn. 377 (2019) 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."].

anti-retaliation policies and practices 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.²⁸

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.²⁹ 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 3.³⁰ 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 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 possible 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, "an impairment may make it impossible for a lawyer to handle a jury trial or hostile takeover competently, but not interfere at all with his performing legal research or drafting transaction documents." *Id.* "If a lawyer's mental impairment can be accommodated by changing the

²⁸ While outside the scope of this opinion, we note that subordinate lawyers may also be protected from retaliation under applicable law. (See, e.g., Cal. Labor Code § 1102.5.)

²⁹ "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).

³⁰ 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.

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 (2016) 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. 03-429.³¹

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 prompt and comprehensive investigation should be conducted to evaluate the reported misconduct, its impact on all client matters and appropriate remedial actions. Absent exigent circumstances requiring that a client be notified immediately, Big Firm should investigate any reports of misconduct to confirm the accuracy of the report and the extent of any misconduct before communicating with Client regarding the misconduct. 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.

After completing a reasonable investigation, 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

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 other lawyers working on the relevant client matters and supervisory or managerial lawyers who know of the conduct. Although it may be possible to reduce or eliminate the impact of an impairment through internal procedures, often

³¹ "The firm's paramount obligation is to take steps to protect the interests 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 represented appropriately notwithstanding the lawyer's impairment. Other steps may 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.

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 lawyers' duties and ethical responsibilities remain the same.

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

Public Comment - Proposed Opinion 14-0001 - 60 days

Commenting on behalf of an organization	No
Name	Ana Maria Martinez Escalona
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Email address	amartinezescalona@outlook.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	see attached PDF
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	California_Bar_letter_03162021.pdf (59k)

March 16, 2021

To: The State Bar of California

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

Dear, Members of the State of California Standing Committee on Professional Responsibility and Conduct (COPRAC)-

Discussion/Proposal: 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?

When addressing mental health issues or impairment we must understand that we do not come into this world with behavioral patterns but are acquired through a person's lifespan. What psychology considers nature versus nurture. In other words a baby is not born a criminal but the nature v. nurture of society shapes a person's life. For example, in the case of serial killers, studies have shown that there's a genetic component or pre-disposition to becoming one later in life. However, a good home environment can make all the difference in the world. A dysfunctional childhood full of abuse with the genetic pre-disposition, society, violence, substance abuse all have a domino effect and then we see the individual become part of the criminal justice system. By the time we get to the first appearance in court (arraignment), the "how does your client plea?", the psychiatric evaluation, clearance, fitness for trial, etc., all makes sense, a broken individual from years of "society."

Based on my career experience, mental health issues such as impairment (temporary or long term) should be addressed on an individual basis with the support of a medical team. Others in a law firm don't have to pay for the acts or conducts of an individual that had choices but made the wrong one (s) based on impairment which wasn't treated or dealt with. The question is: what is the underlying condition for impairment? Is it abuse? Is it a traumatized veteran? Is it a 911 victim? In the case of post traumatic stress disorder (PTSD) which is acquired in life and not a condition that a person is born with, it is treatable such as anxiety, depression, substance abuse to name a few. Treatment options include psychotherapy, re-exposure to a trauma setting in which the brain snaps out of it if done correctly, medication management or a combination¹.

When it comes to impairment, drugs and addiction take control over a person's mind and body, the brain structure changes, it is hard for family members and colleagues to see a dear person consumed by the effects of illicit or prescription drugs (i.e. opioids or narcotics). Many fear the

¹ Virtual reality exposure therapy for World Trade Center Post-traumatic Stress Disorder, National Library of Medicine, National Center for Biotechnology Information

effects of withdrawal and won't give up substance abuse, once again we have to understand that the substance has taken over the person's mind and professional help is necessary to overcome it. Further, it takes a lot of support, medical care, counseling to overcome an addiction, most importantly preventing a relapse and entering a vicious cycle. Once an individual is able to identify, treat, overcome mental health issues such as impairment, the person is able to function better as a professional and other aspects of life.

The brain is an organ like any other. If someone has chest pain, the person seeks a cardiac evaluation and treatment. There's times in which a person might be emotionally and mentally burned out from family life, work, clients, debt, right now we are dealing with a pandemic which has caused death, business loss and interruptions, loss of revenue, people are most likely to use substances, alcohol, etc., all contributing to impairment².

In sum, it is my recommendation that cases are reviewed and handled on an individual basis taking into consideration the privacy of the professional's mental health and the right to confidentiality in medical records (Health Insurance Portability and Accountability Act of 1996-HIPAA). We come from different backgrounds, cultures, religions, people are more open for example in Europe about mental health issues discussions than the stigma we face in the United States of America. As we continue to evolve as a society, let's listen more to people, get to know them, understand what led to a situation before reaching a conclusion. The public we serve needs to understand that we are human beings as well, educated, trained to provide a service, we are held to a higher standard from a professional standpoint but life happens and to error is human.

Sincerely,

Ana Maria Martinez-Escalona J.D. Candidate, MSHL, LHCRM
Northwestern California University School of Law

² Preventing a Parallel Pandemic- A National Strategy to Protect Clinicians' Well-Being, The New England Journal of Medicine, 2020.

March 16, 2021

Committee on Professional Responsibility and Conduct (COPRAC)
State Bar of California
180 Howard Street
San Francisco, CA 94105

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

Dear COPRAC members

On behalf of the California Lawyers Association Ethics Committee (CLAEC) and in response to the State Bar of California's request for public comment, we respectfully submit this letter in support of Proposed Opinion 14-0001. CLAEC appreciates the opportunity to comment on Proposed Opinion 14-0001.

Proposed Opinion 14-0001 addresses a very important issue that many lawyers will encounter in the course of their careers, namely what ethical obligations the lawyer has if the lawyer, or a colleague of the lawyer, develops a mental impairment that might affect such person's ability to competently and ethically perform legal services as required under the Rules of Professional Conduct and the State Bar Act.

Proposed Opinion 14-0001 provides a reasoned analysis of the ethical violations of the impaired lawyer. This is of vital importance for practicing lawyers and for the protection of the public.

CLAEC appreciates COPRAC's changes for clarity under Section A.3 (the personal interest conflict section). Section A.3. of the Discussion partially addresses CLAEC's concerns that the prior draft did not clearly reflect that the personal interest conflict of Impaired Lawyer is imputed to the other lawyers of the firm under Rule 1.10(a)(1). To make the conclusion clearer, CLAEC suggests adding the phrase "in the impaired lawyer's law firm" after the opening phrase "Other lawyers" in the fourth paragraph so that it would read "Other lawyers in the impaired lawyer's law firm...." We agree that the errors already committed by the impaired lawyer may mean there is a significant risk that the representation of Client by other lawyers at the firm may be materially limited by the interests of those other lawyers in protecting the firm against such claims. Other lawyers and staff members may be inclined to hide Impaired Lawyer's conflict of interest because of the other lawyers' and staff members' "personal, economic, and reputational interests." It may be in the interests of other

lawyers in the firm to retain Client as well. Further, it may be in the interests of other lawyers in the firm to hide or minimize the fact of Impaired Lawyer's impairment from Client as that may affect the economic and reputational interests of such other lawyers and of the firm itself. As a result, whether or not the conflict of Impaired Lawyer is imputed to other lawyers in the firm, other lawyers in the firm may have their own conflict under Rule 1.7(b).

CLAEC would also note that on pg. 13, in the first sentence of first full paragraph, it reads: "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,[Fn.23]". It would be prudent to note that there is no "advice of counsel" defense in State Bar Court matters. While the ethics hotlines of the State Bar and local bar associations, or appropriate legal ethics advisors within or outside of a lawyer's firm, could provide caselaw references or advice and recommendations to an attorney in the situation described in Proposed Opinion 14-0001, every attorney will be held responsible for their conduct, especially in the context of a state bar investigation and prosecution. Despite facts showing that the attorney's conduct was consistent with information or counsel received from an ethics hotline or ethics advisor, the State Bar Court can still find that attorney culpable of ethical misconduct. Of course, in an appropriate case, such facts could form a basis for a finding of "good faith" or other mitigating circumstance, but that will not defeat a finding of culpability. See, e.g., *Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 ("It may also be observed that no employee of the State Bar can give an attorney permission to violate the Business and Professions Code or the Rules of Professional Conduct"); see also Rule 5.2(a) ("A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.").

Aside from the above comments, we concur with the analysis and conclusion in Proposed Opinion 14-0001 and applaud COPRAC's efforts on this important issue.

Sincerely,



Neil J Wertlieb
Co-Chair
California Lawyers Association Ethics
Committee

From: noreply@fs16.formsite.com on behalf of [Formsite](#)
To: [Tuft, Andrew](#)
Subject: 14-0001 (60-day) - Public Comment Form Result #13735019
Date: Wednesday, March 17, 2021 5:57:08 PM

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No

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City Novato

State California

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I am giving my opinion from a neutral client position with numerous similar attorney issues that parallel the proposed format.

- 1) Brackets should ne used where (Impaired Attorney) or similar uses are written.
- 2) Adding what repercussions and penalties the (Impaired Attorney) could result.
- 3) The proposed format is vague because of the (Subordinate Attorneys) whistle-blower status.
- 4) The proposed format is vague because it does not address future problems the (Subordinate Attorney) faces due to the biasedness of the profession to be "black-balled" e.g. that (Subordinate Attorney) might not get that promotion or be supported trying to move into public office.
- 5) Other issues are not addressed in the proposed format e.g. what if the client complains but enforcement is lacking, vague as to how, who and what benefits from the enforcement and removal of an attorney.

6) The proposed format is vague because it doesn't describe what treatment the (Impaired Attorney) must undergo to continue as a competent attorney or lawyer.

My own personal experiences include an attorney admitting guilt on my behalf preventing myself from testifying in my own defense with the court allowing the (Impaired Attorney) to go on vacatiin in the middle of a trial. Another experience a judge didn't repirt to the state bar about a prosecutor violating PC141(b) whom allowed a police officer to violate PC 141(c) because they failed a court enforced discovery. These are just a fee. The proposed format literally describes all but three attorney/lawyer's that were retained by myself and that's quite a few attorneys.

This email was sent to andrew.tuft@calbar.ca.gov as a result of a form being completed.

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March 17, 2021

Dena M. Roche, Esq.
Chair, Standing Committee on
Professional Responsibility and Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Request for Public Comment on Proposed Formal Opinion Interim No.
14-0001 (Colleague Impairment)
Deadline for Comments: March 17, 2021

Dear Ms. Roche and Members of the Committee:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association appreciates the opportunity to communicate our support of Proposed Formal Opinion Interim 14-0001 (Duty to Prospective Client). We previously submitted comments to the prior version of this proposed opinion, and we thank COPRAC for its consideration of those comments. We agree with the conclusions in this proposed opinion and support its publication.

Respectfully submitted,



Elizabeth L. Bradley
Chair
Professional Responsibility and Ethics Committee
Los Angeles County Bar Association



RICARDO D. GARCÍA
PUBLIC DEFENDER

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ALBERT J. MENASTER
Head Deputy Public Defender

March 18, 2021

Andrew Tuft
Staff Counsel
The State Bar of California
Committee on Professional Responsibility and Conduct
180 Howard Street
San Francisco, CA 94105

Re: Proposed formal opinion 14-0001

We oppose the adoption of Proposed Formal Opinion 14-0001 (hereafter "Prop. Opn."). We believe that the Proposed Opinion is fatally flawed and should not be adopted at all. Imposition of a duty on every member of every firm to address perceived flaws in the representation of clients by conveying the claimed flaws to the client is unwarranted, unsupported by any authority or logic, and could have an adverse impact on the client. We do not quarrel with the recommendations in the Proposed Opinion directing lawyers aware of potential ethical or competency breaches to bring these to the attention of the impaired lawyer and any supervising or managing lawyers.

Moreover, if this opinion is adopted with such a duty, we strongly urge that the opinion make it clear that no such duty applies to indigent criminal defense governmental law offices such as ours, where we represent all our clients by appointment of the court, since those clients by definition cannot retain alternative counsel. A policy such as the one proposed has the potential to impair the attorney-client relationship if reports of impairment are incorrect, and indigent defense governmental law offices already have reporting procedures in place which protect the client who is harmed by an impaired lawyer.

It appears that the Proposed Opinion is attempting to address a high-profile case of a mentally incompetent lawyer who headed a small firm. The attempt to draft a solution to that specific problem and make that solution applicable to all firms simply does not work. There are too many kinds of law firms for a one-size-fits-all approach. Our governmental firms have clients who did not hire us and who cannot replace us by hiring other counsel. District Attorney Offices have no individual clients; their clients are the People of the State of California. To whom would a lawyer in such an office notify about a mentally impaired lawyer? We agree that there should be a solution to mental impairment of a lawyer in a firm; but this is not it.

The very definition of “mental impairment” is overly broad and essentially describes everyone: “[m]ental 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; problematic substance use; or traumatic life events.” (Prop. Opn., p. 3; fn. omitted.) A lawyer who engages in unethical or incompetent representation almost always has one or more of these conditions. For example, a lawyer who misses a deadline because of lack of sleep qualifies within this definition. Notably, the scope of this Proposed Opinion is so broad that it covers all unethical or incompetent conduct, although it purports to only address the problem of mental impairment of a lawyer.

The Proposed Opinion has a critical flaw when discussing the scope of the duties of lawyers in firms who believe that a lawyer in that firm representing a client has engaged in unethical or incompetent conduct. The Proposed Opinion says that *every* member of a law firm hired by a client represents that client and has an ethical duty to protect that client: “[e]ach 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.” (Prop. Opn., p. 8; fn. omitted.)

It is doubtful this is true even in the context of civil firms. For example, assume that a client hires a major law firm to represent him in a criminal case, a case handled by the criminal branch of that firm. That branch of the firm might be only one lawyer; or only a few. Does the wills and trusts branch of that firm also represent that criminal client? Does the wills and trusts branch of that firm in San Diego represent the criminal client retaining the criminal branch in Los Angeles? The footnote to the quotation in the Proposed Opinion cites two State Bar opinions and an appellate case. All three of these sources simply state that all members of a firm *have* responsibilities to clients of the firm. Obviously, if it comes to the attention of a branch of a firm that another branch has breached their ethical duties to any client of the firm, that branch should take remedial action. But this cannot mean that *every* member of a firm has the *same* ethical duties to every client of the firm. Yet that is what this rule provides.

The flaw in this position is illustrated by examining the authorities the Proposed Opinion cites. The Proposed Opinion cites Cal. State Bar Formal Opn. No. 1981-64, and describes that Opinion as, “opining that all attorneys employed by a legal services program owe identical professional responsibilities to clients of the program.” (Prop. Opn., p. 9, fn. 15; parens omitted.) However, the Formal Opinion actually says, “[o]ur discussion here is limited to the situation where the individual client intends to engage the legal services program, rather than one of its employed attorneys, to provide legal representation.” (Cal. State Bar Formal Opn. No. 1981-64, p. 2.) A client hiring a civil firm’s criminal branch may well engage the legal services of one of the firm’s attorneys, *not* the entire firm. Although a client may hire an entire firm and not an individual lawyer, this practice surely varies among firms.

The other State Bar opinion cited in the Proposed Opinion is also inapplicable: “[s]ee 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.]” (Prop. Opn., p. 8, fn. 15.) Formal Opinion No. 2014-190 is exclusively about dissolution of a law firm, and

concludes, “[p]artner A, Associate, and Partner B – and, indeed, all attorneys at Old Firm – each owe a duty to Client to take reasonable steps to avoid reasonably foreseeable prejudice during the dissolution process.” (State Bar Formal Opn. No. 2014-190, p. 6.) Obviously, when a law firm is being dissolved, every member of that firm has a duty to prevent prejudice to all clients of the firm. The duties applicable to the dissolution of a law firm are surely not identical to the duties every member of a law firm has to every client of that firm. Finally, the Proposed Opinion merely cites to *Blackmon v. Hale* (1970) 1 Cal.3d 548, 558. (Prop. Opn., p. 9, fn. 15.) Nothing in that case discusses what duties the members of a firm have to every client of the firm. The case simply says that absent any contrary evidence, it is reasonable to treat a law firm representing itself as a partnership, as being a partnership.

In addition, the position that every member of a firm has the same ethical duties to every client of that firm is untrue in the context of indigent criminal defense governmental agencies such as ours. The Public Defender of Los Angeles County is Ricardo Garcia. The Alternate Public Defender of Los Angeles County is Erika Anzoategui. When a court appoints either office, the court is appointing Mr. Garcia or Ms. Anzoategui. Neither Department Head represents individual clients. Each designates a lawyer (on some occasions, two lawyers) to individually represent that client. There is a chain of command above that lawyer, running all the way up to the Department Head. More on this below. But it is simply not true that a client who has the Public Defender or Alternate Public Defender appointed as his or her counsel is literally represented by every member of either Office.

Although we agree with the recommendations in the Proposed Opinion directing lawyers aware of potential ethical or competency breaches to bring these to the attention of the impaired lawyer and any supervising or managing lawyers, as explained below, both Offices already have such systems in place. However, the Proposed Opinion imposes an ethical duty on a lawyer who believes that there is a breach to convey this to the client if, in the judgment of that individual lawyer, all else fails. “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.” (Prop. Opn., p. 12.) Of course, this duty applies not only to lawyers who are literally “subordinate.” Since the Proposed Opinion has already stated that all members of a firm owe the same duties of ethical and competent practice to every client, the articulated duty applies to all lawyers of every firm.

In its conclusion, the Proposed Opinion appears to attempt to narrow the scope of this duty by saying, “[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 other lawyers working on the relevant client matters and supervisory or managerial lawyers who know of the conduct.” (Prop. Opn., p. 16.) Someone only reading that conclusion might conclude that the duty at issue applies only to lawyers actually working on the client’s case and managing and supervising lawyers. But because the Proposed Opinion has already stated that *every* member of a firm owes the same duty of ethical and competent conduct to *every* client of the firm, there is in fact no such limitation. This inconsistency must be corrected and should narrow the scope rather than widen it.

We believe that imposing an ethical duty on a lawyer to inform the client of that lawyer's concern about the "mental impairment" of another lawyer representing the client is unsupported and wrong. The other procedures described in the Proposed Opinion (going to the supposedly impaired lawyer; going to managers or supervisors of the impaired lawyer, etc.) will routinely address the problem. We suspect that in many if not most cases the complaining lawyer simply is not fully informed about the strategic reasons for various actions or inactions of other counsel. If a mistake has been made, it behooves the firm to correct or remediate it.

Imposing a duty on a lawyer to tell the client about a claimed error is likely to result in the client firing the first firm and hiring the lawyer telling the client about the error. The Proposed Opinion itself anticipates this result and discusses it. (Prop. Opn., pp. 12-13.) This would undoubtedly result in multiple lawsuits and State Bar referrals. It is difficult to see how this chaos results in a system that protects the client, which appears to be the goal of the Proposed Opinion.

The Proposed Opinion would be problematic for criminal defense firms, particularly ones appointed to represent indigent clients, which have unique characteristics. One such characteristic is that there is a process whereby a client who believes that he or she is not receiving adequate or competent or ethical representation can make what is called a *Marsden* motion to bring this to the judge's attention. "We additionally hold that, at any time during criminal proceedings, if a defendant requests substitute counsel, the trial court is obligated, pursuant to our holding in *Marsden*, to give the defendant an opportunity to state any grounds for dissatisfaction with the current appointed attorney. In turn, if the defendant makes a showing during a *Marsden* hearing that his right to counsel has been 'substantially impaired,' substitute counsel must be appointed as attorney of record for all purposes." (*People v. Sanchez* (2011) 53 Cal.4th 80, 90, referring to *People v. Marsden* (1970) 2 Cal.3d 118; citations omitted.)

This procedure is unique to appointed criminal defense firms; there is no comparable procedure for civil firms or even privately retained criminal defense firms. This procedure ensures that when a client believes that a lawyer is "mentally impaired" as the Proposed Opinion defines that term and is acting in a manner prejudicial to a client, he or she will have a hearing in court before a judge to explore that issue. No additional duties are required of counsel. The lawyers in our Offices typically explain the *Marsden* procedure to their clients when the client expresses dissatisfaction with their representation.

In addition, our Offices have in place procedures for the review of "mentally impaired" lawyers identified by any party: client, family member, colleague, justice stakeholder or supervisor. Every line lawyer in both Offices has a direct manager. That manager has a manager, and so on. Effectively every lawyer representing actual clients has at least four levels of supervision. Each level is tasked with ensuring competent representation. When anyone brings a concern about a lawyer's competence or mental status to a manager, that manager is tasked with investigating and, if necessary, correcting or remediating any damage done to a client. All concerns are investigated and appropriate action is taken.


Another key difference between civil firms and private criminal defense firms, as opposed to governmental criminal defense firms, is that the sitting Public Defender in each

County stays in office at the discretion of a Board of Supervisors (with the exception of San Francisco, which elects its Public Defender). Thus, unlike any civil firm, there is an external review of lawyers' conduct in Public Defender Offices to ensure competent representation by lawyers.


Imposing a duty on every member of a firm to convey concerns to a client if, in the opinion of that individual lawyer, the problem was not adequately resolved is unwarranted and will surely result in chaos, which will not benefit clients. Unlike the paying clients of a civil firm, Public Defender clients are indigent, did not retain our Offices, and cannot simply hire another lawyer. Bringing concerns to the client will merely result in a *Marsden* motion, a procedure already in place for these issues. It would also likely cause additional strains on what can sometimes be a difficult attorney-client relationship, causing unnecessary anxiety for our clients, eroding trust between our staff and our clients, and negatively affecting the outcome of the clients' cases.

In the alternative, if the Proposed Opinion is adopted with the requirement of conveying supposed flaws in representation to the firm's client, the Proposed Opinion should be modified to make it clear that such a duty is inapplicable to governmental criminal defense firms representing indigent clients. There are already procedures in place to protect such clients. Requiring this additional duty will not provide more or better protection to clients beyond what is already in place.

Date: 3/18/21

Signature: 
ALBERT J. MENASTER
Head Deputy, Appellate Branch
Public Defender

Date: 3/18/21

Signature: 
FELICIA GRANT
Head Deputy, Appellate Branch
Alternate Public Defender