

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

**Updated Draft January 18, 2024**

**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 the Rules of Professional Conduct<sup>1</sup> 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 the State Bar Act. A lawyer's impairment does not excuse that lawyer's compliance with the rules and the State Bar Act. An impaired lawyer's conduct can also trigger obligations for the impaired lawyer's subordinates, supervisors, and other colleagues who know of the impaired lawyer's conduct. These ethical obligations may include, but are not limited to, communicating significant developments related to the lawyer's conduct to the client, promptly taking reasonable remedial action to prevent or mitigate any adverse consequences resulting from an impaired lawyer's actions, and reporting the impaired lawyer's conduct to the State Bar or an appropriate tribunal. 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, 8.3, and 8.4 of the Rules of Professional Conduct of the State Bar of California.

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

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

## **STATEMENT OF FACTS**

Impaired Lawyer is a senior partner and successful trial lawyer, who is a rainmaker for the law firm. Impaired Lawyer is the lead counsel on a litigation matter for Impaired Lawyer's longtime client (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, missed client meetings without explanation, failed to promptly respond to Client inquiries, and, when responding to such inquiries, discussed facts and strategies that obviously do not apply to Client's matter. Impaired Lawyer has not recognized 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, and cited facts and law to the court that were not applicable to Client's matter. Recognizing the problem, the court allowed Subordinate Lawyer, who 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 sent by opposing counsel, which stated that since Impaired Lawyer did not respond by the deadline provided, 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 Impaired Lawyer's own impairment, violated the duty to communicate with Client. Subordinate Lawyer expressed concerns 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 personal 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.<sup>2</sup> 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;<sup>3</sup> problematic substance use; or traumatic life events.<sup>4</sup> A mental impairment, standing alone, does not raise ethical issues. "It is not the

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<sup>2</sup> 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 Hazelden Betty Ford Foundation and the ABA Commission on Lawyer Assistance Programs, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys* (2016) *Journal of Addiction Medicine* 10(1), at pp. 46–52; National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practice Recommendations for Positive Change* (August 2017); Anker & Krill, *Stress, drink, leave: An examination of gender-specific risk factors for mental health problems and attrition among licensed attorneys* (2021) *PLoS ONE* 16(5): e0250563.

<sup>3</sup> Hazelden Betty Ford Foundation and the ABA Commission on Lawyer Assistance Programs, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys* (2016) *Journal of Addiction Medicine* 10(1) ["Attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations."]; Pierson, Hamilton, Pepper, & Root, *Stress Hardiness and Lawyers* (2017) 42 *J. Legal Prof.* 1, 11; Anker & Krill, *Stress, drink, leave: An examination of gender-specific risk factors for mental health problems and attrition among licensed attorneys* (2021) *PLoS ONE* 16(5): e0250563.

<sup>4</sup> See ABA Formal Opn. No. 03-429 (2003), fn. 2, for discussion of mental impairments that affect lawyers; ABA Formal Opn. No. 03-431 (2003) at 1; D.C. Bar Ethics Opn. No. 377 (2019) at 1; see also Virginia State Bar Legal Ethics Opn. 1886 (2016) p. 2 and authorities cited at fns. 4–6; *Stress Hardiness and Lawyers*, *supra*, 42 *J. Legal Prof.* at pp. 11–19; ABA/Bloomberg, *Lawyers' Manual of Professional*

impairment that concerns the regulation and disciplinary system but only the effect, if any, on the lawyer's fitness and ability to practice law."<sup>5</sup> 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 opinion is limited to addressing the 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 (2003) p. 2; Virginia State Bar Legal Ethics Opn. No. 1886 (2016) 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 (2003) 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 Bailey, *Impairment, The Profession and Your Law Partner* (1999) 11 No. 1 Prof. Law. 2, 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.<sup>6</sup> (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).<sup>7</sup>) Rule 1.0.1(h) defines "reasonably"

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*Conduct* (2020) Practice Guides, Misconduct and Discipline, Disciplinary Process, Impairment, § 101:3301, p. 1.

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

<sup>6</sup> 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).

<sup>7</sup> ABA Model Rule 1.3, Cmt. [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.

[Note: If [Proposed Formal Opinion Interim No. 20-0002 \(Succession Planning\)](#) which is currently circulating for public comment is approved for publication, the above footnote language will be replaced by the following.] ABA Model Rule 1.3, Cmt. [5], which was not adopted by California, states that attorney competence includes anticipating events or circumstances that may adversely affect

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, disregard, or unduly delay a legal matter entrusted to the lawyer. (Rule 1.3(b).)

Here, Impaired Lawyer’s proposed course of conduct involves, at a minimum, reckless, grossly negligent, or repetitive violations of the duties of competence and diligence. (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 personal divorce and a heavy caseload are to blame for any potential issues in Impaired Lawyer’s performance.<sup>8</sup> Whether the lawyer’s performance is due to impairment or personal problems, however, it does not excuse failing to meet obligations to the client.<sup>9</sup>

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client representation. However, this committee has advised that practicing lawyers have an ethical obligation under the duties of competence, diligence, and communication to assess whether their professional responsibility obligations require a succession plan and, if a succession plan is needed to protect the interests of the lawyer’s clients, to engage in succession planning. (Cal. State Bar Formal Opn. No. 2024-XXX.) By planning ahead for the orderly disposition of his or her law practice, an attorney engages in an important client-protective measure.

<sup>8</sup> 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, Cmt. [2] (“A lawyer’s workload must be controlled so that each matter can be handled competently.”).

<sup>9</sup> “[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

## 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 or 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, subdivision (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 copies of significant documents when necessary to keep the client so informed.<sup>10</sup> (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, Cmt. [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 the 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 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, subdivision (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

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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.

<sup>10</sup> 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].

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).)

A 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).)

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 if Client were 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 duties 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).<sup>11</sup>

Other lawyers in Impaired Lawyer's law firm are not necessarily prohibited from representing Client provided 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, Impaired Lawyer's personal interest conflict may be imputed to other lawyers in the firm if their interests in avoiding malpractice liability,<sup>12</sup> a fee dispute with Client, or reputational harm

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

<sup>12</sup> 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).

would prevent them from being able to adequately communicate with Client regarding Impaired Lawyer's prior misconduct, or otherwise present a significant risk of materially limiting their representation of Client. Similarly, imputation may be appropriate where the other lawyers prefer to hide Impaired Lawyer's prior misconduct as a result of their relationship with Impaired Lawyer and their desire to obtain future client referrals and business from 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, 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,<sup>13</sup> as well as the degree of difficulty the lawyer faces in continuing the representation.<sup>14</sup>

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.

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<sup>13</sup> 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 Withdrawal (Termination) by Lawyer.

<sup>14</sup> "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.



## B. Responsibilities of Other Lawyers

When an impaired lawyer is “unable or unwilling to deal with the consequences” of their 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 (2003); see also 19 Law. Man. Prof. Conduct 380 (2003).) The other lawyers owe responsibilities to the affected client, the impaired lawyer, and the firm. Additionally, the other lawyers should evaluate whether they have a duty to report the impaired lawyer’s conduct under rule 8.3.<sup>15</sup> 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.<sup>16</sup> “Every attorney, including an associate . . . , must exercise professional judgment in the best interest of his clients and must take steps which are necessary to assure competent representation for his client[.]” (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.

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<sup>15</sup> Effective August 1, 2023, under rule 8.3, absent an exception, a lawyer must report another lawyer to the State Bar of California or an appropriate tribunal if the lawyer knows of credible evidence that the other lawyer committed a criminal act or engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects. Rule 8.3(a), (c), & (d).

<sup>16</sup> 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 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).

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 unimpaired lawyer who knows of the impaired lawyer's actions and the relevant circumstances.<sup>17</sup> Those obligations are clearest with respect to subordinate and managerial lawyers with knowledge of the impaired lawyer's conduct.

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, Cmt. [6].) Remedial actions may include notifying another lawyer within the firm who has supervisory or managerial responsibilities, confronting the impaired lawyer, notifying the client, ending impaired lawyer's representation of the client, or adjusting the impaired lawyer's responsibilities as appropriate under the rules and the State Bar Act, and referring the client to new counsel to handle the matter. (See rules 1.4, 1.4.1, 1.7, and 1.16; and Business and Professions Code sections 6068(m) and 6103.5.) The details of these forms of remediation are discussed more fully below.

### **1. Responsibilities of Subordinate Lawyer**

Rule 5.2(a) requires a lawyer to comply with the rules and the State Bar Act "notwithstanding that the lawyer acts at the direction of another lawyer or other person." A subordinate lawyer 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, Cmt.; see also *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, Cmt.) 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. (*Ibid.*) "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." (*Ibid.*)

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<sup>17</sup> See D.C. Bar Ethics Opn. No. 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.").

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, Cmt.; 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."].)<sup>18</sup> 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].)

In a situation where the only supervisory lawyer is the impaired lawyer and the question of professional judgment as to the lawyer's 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.<sup>19</sup>

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

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<sup>18</sup> See also Tuft et. al, *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2019) Ch. 6-B Elements of Attorney Competence, § 6:153.2.

<sup>19</sup> 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 in that 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.

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, Cmt.) 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 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 the 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.

In this Scenario 2, 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 Lawyer<sup>20</sup> when

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<sup>20</sup> See ABA Formal Opn. No. 03-429 (2003) 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.").

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.<sup>21</sup>

Subordinate Lawyer should further advise Client on how Subordinate Lawyer believes Client’s matter should 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 could 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 who 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.<sup>22</sup>

In Scenarios 1 and 2, Subordinate Lawyer should also evaluate whether Subordinate Lawyer has a duty to report Impaired Lawyer to the State Bar or an appropriate tribunal as required by rule 8.3. Impaired Lawyer has engaged in several possible violations of their ethical obligations,

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<sup>21</sup> 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 (2018) 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.”].

<sup>22</sup> *Heller Ehrman LLP v. Davis Wright Tremaine LLP* (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, Cmt. [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)].

including the possible violations of the duties of competence and diligence (rules 1.1 and 1.3); failure to communicate and failure to communicate a written settlement offer (rules 1.4 and 1.4.1; Bus. & Prof. Code, §§ 6068, subd. (m) & 6103.5, subd. (a)); having a personal conflict of interest with Client (rule 1.7); and failing to withdraw from representation (rule 1.16). However, in both scenarios, there are insufficient facts to indicate that Impaired Lawyer engaged in conduct that must be reported under rule 8.3. Specifically, there is no credible evidence that Impaired Lawyer committed a criminal act or engaged in dishonesty, fraud, deceit, reckless or intentional misrepresentation, or a misappropriation. (Rule 8.3.) Impaired Lawyer's violations of the rules and the State Bar Act are not among the enumerated violations subject to mandatory reporting under rule 8.3. Subordinate Lawyer may report Impaired Lawyer to the State Bar based on the permissive reporting option set forth in rule 8.3(b).

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

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

<sup>24</sup> 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.").

<sup>25</sup> The State Bar of California's LAP does not provide legal advice or treatment, but can discuss the problem and refer the attorney to a limited number of free personal counseling or career counseling sessions. LAP also offers professional monitoring on a voluntary or mandatory basis to satisfy specific monitoring or verification requirements, such as drug or alcohol testing. Additionally, LAP offers attendance at weekly group meetings. 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).)<sup>26</sup> 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, Cmts. [1] & [4].) Such policies and procedures will vary depending on the size of the firm, its structure, and the nature of its practice. (Rule 5.1, Cmt. [2].) Each firm should consider whether compliance with rule 5.1 requires it to have policies and procedures addressing situations where noncompliance 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.<sup>27</sup>

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 the 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 Cmts. [1], [2], & [4]; see also D.C. Bar Ethics Opn. No. 377 (2019).) Anonymous reporting within a law firm and anti-retaliation policies and practices could encourage lawyers, particularly subordinate lawyers, to

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<sup>26</sup> Rule 5.1, Cmt. [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."

<sup>27</sup> D.C. Bar Ethics Opn. No. 377 (2019) 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.").

report any concerns they may have about their superiors and other colleagues without the fear of any backlash.<sup>28</sup>

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.<sup>29</sup> 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 (2003) p. 3.)<sup>30</sup> 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 rules and the State Bar Act 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 (2003) 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 lawyer's work environment or the type of work that the lawyer performs, such steps also

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<sup>28</sup> 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.

<sup>29</sup> "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).

<sup>30</sup> The ABA's Model Rule 1.16(a)(2) differs from California rule 1.16(a)(3) because ABA's rule requires withdrawal if "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.



should be taken.” (North Carolina State Bar Formal Ethics Opn. No. 8 (2013); see also Virginia State Bar Ethics Opn. No. 1886 (2016) 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 (2003).)<sup>31</sup>

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. Finally, for the reasons stated regarding Subordinate Lawyer, other lawyers in Big Firm who know of credible evidence of Impaired Lawyer’s conduct are not required to report Impaired Lawyer under rule 8.3, but may report Impaired Lawyer pursuant to the permissive reporting option set forth in rule 8.3(b).

## **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

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<sup>31</sup> “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 (2003).

reduce or eliminate the impact of an impairment through internal procedures, often communication to the client may be required and representation by the impaired lawyer may need to end, resulting in the firm's re-staffing or withdrawal from the representation. Additionally, lawyers who know of credible evidence of the impaired lawyers conduct may have an obligation to report such conduct to the State Bar or an appropriate tribunal. 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.

**TOTAL = 9   S = 2  
SM = 1  
O = 6**

**Draft Opinion 2021-206– Colleague Impairment  
Synopsis of Public Comments**

<b>No.</b>	<b>Commenter/Signatory</b>	<b>Comment on Behalf of Group?</b>	<b>Position</b>	<b>Comment</b>	<b>COPRAC Response</b>
1	Anonymous (18616262)	N	O	<p>It's funny that you keep adding new ethics obligations after obligation in response to the Girardi fiasco. You - the bar - and all of the corrupt people who worked there that helped him are responsible for what occurred. None of these proposed rules would have had any impact on what occurred. Instead of piling more on us in an effort to deflect the real blame, leadership at the bar should resign and you need to implement a whole new set of checks and balances on your own staff and new leaders.</p> <p>Enough already - you are at fault. Trying to turn everyone's attention to other attorneys is just vile.</p>	
2	Huber, Jonathan (18627699)	N	O		
3	Langevin, Floyd (18618981)	N	O	<p>The reporting mandates are too nebulous for attys to interpret or otherwise be in compliance. If the 'impairment ' is severe and undisputed, like Girardi, then it's easy. But what about forgetfulness, errors in legal advice according to another atty, a colleague that can't master computer technology and an infinite number of other situations where co employees'</p>	

**TOTAL = 9   S = 2  
SM = 1  
O = 6**

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<b>No.</b>	<b>Commenter/Signatory</b>	<b>Comment on Behalf of Group?</b>	<b>Position</b>	<b>Comment</b>	<b>COPRAC Response</b>
				<p>question another atty's legal skills?</p> <p>My entire staff is resentful of the state Bar placing this burden on them as a result of the state bar failing to take action for which they were responsible and after multiple complaints on Girardii.</p> <p>Let's see what kind of compliance you get on this ill thought out rule. As stated... severe cases are easy. However the potential for mischief is so great that we will need to see violations as they occur to give us guidance. In the real world, attys often state that they stay as far away from state bar as possible. Even expressing this opinion is done so with mistrust.</p>	
4	Le, Helen (18640147)	N	O	Misdirected complaint/not applicable Comment letter attached	
5	Lee, Eva	N	Does not state	<p>Regarding the duty to report impaired colleagues, it risks putting the first chair in conflict with the second chair if the second chair doesn't like what the first chair is doing. I say this without having fully read the document, but I still feel it needs to be said.</p> <p>Also, the "appears frazzled" That is a pretty broad approach to alleging impairment. I went through a contentious divorce and I was frazzled</p>	

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SM = 1  
O = 6**

**Draft Opinion 2021-206– Colleague Impairment  
Synopsis of Public Comments**

<b>No.</b>	<b>Commenter/Signatory</b>	<b>Comment on Behalf of Group?</b>	<b>Position</b>	<b>Comment</b>	<b>COPRAC Response</b>
				for years. I was accused of cognitive impairment and even had memory testing and both a medical and legal psych evaluation. Both resulted in the same diagnosis "ADHD." I think some people are just not as smooth as others, and I feel like it takes a risk that "differently abled" persons for whatever reason, deserve the respect and consideration that what can appear as an impairment is just an innate personality trait. Perhaps, more needs to be looked at in terms of supporting attorneys who appear "frazzled," like a diversion scenario. There can always be more help for a friend in need.	
6	Schneidereit, Adele (18616250)	N	O		
7	Sandoval, Jessica (18853050)	N	S		
8	Dominguez, Maria (18901391)	N	S		
9	CLA Ethics Committee (Spencer)	Y	SM	On behalf of the California Lawyers Association Ethics Committee, we appreciate the opportunity to comment on the proposed updates to current Formal Opinion 2021-206. We agree that with the Supreme Court's approval of rule 8.3, effective August 1,	

TOTAL = 9   S = 2  
SM = 1  
O = 6

**Draft Opinion 2021-206– Colleague Impairment  
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position	Comment	COPRAC Response
				<p>2023, a revision to the opinion is warranted to address the potential responsibilities of other firm lawyers to report their impaired colleague. We have several comments on the revisions to the opinion. First, on page 9, first paragraph, penultimate sentence, the opinion states that the other lawyers in Impaired Lawyer’s firm “<i>should</i> evaluate whether they have a duty to report the Impaired Lawyer’s conduct under rule 8.3.” (Emphasis added) We believe that the other lawyers have a mandatory duty to “evaluate” Impaired Lawyer’s conduct to determine whether Impaired Lawyer might have engaged in reportable conduct. Although we agree that some of Impaired Lawyer’s actions do not appear to be the kinds of conduct (“dishonesty, fraud, deceit,” etc.) explicitly identified in rule 8.3, the other lawyers in the firm at least have a duty to evaluate whether Impaired Lawyer’s conduct is reportable. We recommend substituting “must” or “needs to” for “should.” Second, on page 9, first paragraph, last sentence, a citation to “Id. at p. 4” is included. However, there are two authorities to which that citation might refer, the ABA formal opinion or the article in the</p>	

TOTAL = 9   S = 2  
SM = 1  
O = 6

**Draft Opinion 2021-206– Colleague Impairment  
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position	Comment	COPRAC Response
				<p>Lawyers Manual of Professional Conduct. Please clarify which of the two authorities is intended. Third, on page 14, carryover paragraph, the opinion states: “Impaired Lawyer’s violations of the rules and the State Bar Act are not among the enumerated violations subject to mandatory reporting under rule 8.3.” By “enumerated violations,” we assume COPRAC is referring to the “conduct involving dishonesty, fraud,*deceit, or reckless or intentional misrepresentation or misappropriation,” etc. referenced in the previous sentence, which strike us as broadly-identified kinds of conduct that might constitute a reportable violation under the rule. In any event, they are not “enumerated” in the rule. We recommend deleting the word “enumerated.” Fourth, although not specifically in reference to rule 8.3, we note that on page 6, second paragraph, the last sentence states: “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, Cmt. [1].)” Although we do not disagree that these are factors that might be</p>	

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**SM = 1**  
**O = 6**

**Draft Opinion 2021-206– Colleague Impairment  
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position	Comment	COPRAC Response
				<p>considered in determining whether a “significant event” has occurred, that is not what rule 1.4, comment [1] provides. That comment simply states that “Whether a particular development is significant will generally depend on the surrounding facts and circumstances.” We recommend that the sentence be changed to more accurately reflect the language of Comment [1]. Alternatively, the reference to Comment [1] should be removed and the sentence be presented as the committee’s conclusion as to how to determine whether a “significant development” has occurred. Thank you for the opportunity to comment on updated formal opinion 2021-206.</p>	



## Public Comment - Proposed Revised Opinion 2021-206

Name	Anonymous
City	Los Angeles
State	California
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>It's funny that you keep adding new ethics obligations after obligation in response to the Girardi fiasco. You - the bar - and all of the corrupt people who worked there that helped him are responsible for what occurred. None of these proposed rules would have had any impact on what occurred. Instead of piling more on us in an effort to deflect the real blame, leadership at the bar should resign and you need to implement a whole new set of checks and balances on your own staff and new leaders.</p> <p>Enough already - you are at fault. Trying to turn everyone's attention to other attorneys is just vile.</p>

June 7, 2024

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

Re: Proposed Revised Formal Opinion No. 2021-206 (Colleague Impairment)

Dear COPRAC members:

On behalf of the California Lawyers Association Ethics Committee, we appreciate the opportunity to comment on the proposed updates to current Formal Opinion 2021-206. We agree that with the Supreme Court's approval of rule 8.3, effective August 1, 2023, a revision to the opinion is warranted to address the potential responsibilities of other firm lawyers to report their impaired colleague. We have several comments on the revisions to the opinion.

First, on page 9, first paragraph, penultimate sentence, the opinion states that the other lawyers in Impaired Lawyer's firm "*should* evaluate whether they have a duty to report the Impaired Lawyer's conduct under rule 8.3." (Emphasis added) We believe that the other lawyers have a mandatory duty to "evaluate" Impaired Lawyer's conduct to determine whether Impaired Lawyer might have engaged in reportable conduct. Although we agree that some of Impaired Lawyer's actions do not appear to be the kinds of conduct ("dishonesty, fraud, deceit," etc.) explicitly identified in rule 8.3, the other lawyers in the firm at least have a duty to evaluate whether Impaired Lawyer's conduct is reportable. We recommend substituting "must" or "needs to" for "should."

Second, on page 9, first paragraph, last sentence, a citation to "Id. at p. 4" is included. However, there are two authorities to which that citation might refer, the ABA formal opinion or the article in the Lawyers Manual of Professional Conduct. Please clarify which of the two authorities is intended.

Third, on page 14, carryover paragraph, the opinion states: "Impaired Lawyer's violations of the rules and the State Bar Act are not among the enumerated violations subject to mandatory reporting under rule 8.3." By "enumerated violations," we assume COPRAC is referring to the "conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation or misappropriation," etc. referenced in the previous

sentence, which strike us as broadly-identified kinds of conduct that might constitute a reportable violation under the rule. In any event, they are not “enumerated” in the rule. We recommend deleting the word “enumerated.”

Fourth, although not specifically in reference to rule 8.3, we note that on page 6, second paragraph, the last sentence states: “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, Cmt. [1].)” Although we do not disagree that these are factors that might be considered in determining whether a “significant event” has occurred, that is not what rule 1.4, comment [1] provides. That comment simply states that “Whether a particular development is significant will generally depend on the surrounding facts and circumstances.” We recommend that the sentence be changed to more accurately reflect the language of Comment [1]. Alternatively, the reference to Comment [1] should be removed and the sentence be presented as the committee’s conclusion as to how to determine whether a “significant development” has occurred.

Thank you for the opportunity to comment on updated formal opinion 2021-206.

Sincerely,

A handwritten signature in dark ink, appearing to read "Suzanne", with a stylized, flowing script.

Suzanne Burke Spencer, Chair  
California Lawyers Association Ethics  
Committee

## Public Comment - Proposed Revised Opinion 2021-206

Commenting on behalf of an organization	No
Name	Jonathan Huber
City	Elk Grove
State	California
Email address	<a href="mailto:jhuber@huberfox.com">jhuber@huberfox.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

## Public Comment - Proposed Revised Opinion 2021-206

Commenting on behalf of an organization	No
Name	Floyd Skeren Manukian Langevin
City	Westlake Village
State	California
Email address	<a href="mailto:john.floyd@floydskerenlaw.com">john.floyd@floydskerenlaw.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>The reporting mandates are too nebulous for attys to interpret or otherwise be in compliance. If the 'impairment ' is severe and undisputed, like Girardi, then it's easy. But what about forgetfulness, errors in legal advice according to another atty, a colleague that can't master computer technology and an infinite number of other situations where co employees' question another atty's legal skills?</p> <p>My entire staff is resentful of the state Bar placing this burden on them as a result of the state bar failing to take action for which they were responsible and after multiple complaints on Girardii.</p> <p>Let's see what kind of compliance you get on this ill thought out rule. As stated... severe cases are easy. However the potential for mischief is so great that we will need to see violations as they occur to give us guidance. In the real world, attys often state that they stay as far away from state bar as possible. Even expressing this opinion is done so with mistrust.</p>

Public Comment - Proposed Revised Opinion 2021-206

Commenting on behalf of an organization	No
Name	HELEN LE prose
City	Pleasant Hill
State	California
Email address	<a href="mailto:tuyetngatuyetle@outlook.com">tuyetngatuyetle@outlook.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>ALL attorney at CALIFORNIA also at USA to be not my attorney and they are not right charge fee also they no right Violate all my human right /Civil right before all COURT at CALIFORNIA as State BAR COURT OF CALIFORNIA</p> <p>I none sign for any attorney /lawyer (1-100) at USA But my voice and my face were block from A to Z at all COURT in CALIFORNIA as th state BAR court also DIRECTOR STATE BAR OF CALIFORNIA to be not my attorney before any COURT at CALIFORNIA too</p> <p>Follow law attorney their fee 1/3 in my award from CONGRESS grant BUILD BACK BETTER for me , But now AWARD that were all attorney and director at state bar unite Violate when all to be not my attorney and I am PROSE before all COURT at CALIFORNIA , but my voice , my face still be block from 2016 to now , I am not talk complaint before prosecutor also all JUDGE and teacher DEAN</p> <p>ORDER STATE BAR OF CALIFORNIA COMPENSATION FOR ME \$2 BILLION REASON DISCRIMINATE/MISCONDUCT / VIOLATE</p> <p>Please CONTACT DIRECT FBI about my date</p>

11/2/2023 I was report act Violate by attorney , It was camera FEDERAL BUILDING and room hearing record act violate by attorney . date 11/29/2023 all attorney unite Violate again and at this time attorney set up for MARSHAL US at SAN FRANCISCO FEDERAL BUILDING 450 GOLDING GATE , they expel me out of FEDERAL BUILDIN G when I was grant hearing by CLERK OFFICE NORTHERN DISTRICT CALIFORNIA . If I am not grant hearing date by CLERK OFFICE COURT how can I to know that date my hearing ? and why did attorney expel me went of room when they are not my attorney and MARSHAL US FEDERAL BUILDING at SAN FRANCISCO

...

...

CITING

Why did I am not appear before state BAR court OF CALIFORNIA ?

Attach

Document from State BAR OF CALIFORNIA sent to me

**ATTACHMENTS**You 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.

[23-O-22649\\_R-Ramsey\\_CW-Le\\_ClsLtr.pdf \(248 KB\)](#)



The State Bar  
*of California*

OFFICE OF CHIEF TRIAL COUNSEL

180 Howard Street, San Francisco, CA 94105

415-538-2193

Jason.Kwan@calbar.ca.gov

November 16, 2023

**Delivered by Email**

Helen Le  
300 Longbrook Way 215  
Pleasant Hill, CA 94523  
lele12331@yahoo.com

RE: Case Number: 23-O-22649  
Respondent: Ismail J. Ramsey

Dear Helen Le:

The State Bar's Office of Chief Trial Counsel has reviewed your complaint against Ismail J. Ramsey to determine whether there are sufficient grounds to prosecute a possible violation of the State Bar Act and/or Rules of Professional Conduct.

You filed a complaint against Mr. Ramsey, the U.S. Attorney for the Northern District of California. You allege Mr. Ramsey violated your human rights, closed or dismissed all of your cases, violated your right to trial, and violated your right to appeal. You allege you were denied access to the federal courthouse.

You explain that you were the plaintiff/appellant/petitioner in your cases regarding the deaths of your son, older brother, and parents. You state you are deaf and blind, but it is not clear whether those disabilities are related to your complaints. You also claim you were denied a default judgment on July 27, 2023.

You cite the following United States District Court, Northern District of California case numbers: 3:22-cv-08872, 4:22-cv-04375, and 4:21-cv-00566. You also cite the following Ninth Circuit Court of Appeal case numbers: 23-15295, 23-15485, and 21-15533. In your complaints, you filed against the United States Postal Office, the President of the United States, and the Director Administrative U.S. Court, claiming they are all responsible for the deaths of your family members.



According to the court's dockets, your cases were dismissed because: 1) the court deemed them frivolous, 2) the court found that your filings had numerous and various deficiencies, and 3) the entities you filed your complaints against have qualified immunity. Mr. Ramsey was not listed as an attorney-of-record in any of your cases.

You request the State Bar Court to open a hearing room to allow you appear before a judge to hear your complaints. You give no further explanation as to how Mr. Ramsey is related to any of your cases or related to the deaths of your family members.

Based on our evaluation of the information provided, we are closing your complaint. In order to investigate allegations of attorney misconduct, the State Bar needs specific facts which, if proved, would establish a violation of the attorney's ethical duties. Conclusions based on speculation and not supported by facts are insufficient to warrant investigation. We have determined that your complaint does not present sufficient facts to support an investigation of Mr. Ramsey.

The Office of Chief Trial Counsel ("OCTC") cannot act as your attorney or otherwise help you in legal matters connected with your complaint. For example, OCTC cannot give you legal advice or perform legal service for you (such as pursuing damages or other legal action against the attorney(s) involved in your complaint). You may have legal remedies available to you, but OCTC cannot advise you on your rights in a given situation or what you should do. The State Bar is not a court that can provide civil remedies to you.

As a result, you may wish to consult with an attorney to determine what options may be available to you. Our closing of your complaint is not a determination of the validity of any legal dispute you may have, but only that the allegations you have made do not support a finding that Mr. Ramsey violated the State Bar Act or the Rules of Professional Conduct.

For these reasons, the State Bar is closing this matter.

If you have new facts and circumstances that you believe may change our determination to close your complaint, you may submit a written statement with the new information to the Intake Unit for review. If you have any questions about this process, you (or your authorized designee) may call Trial Counsel Jason J. Kwan at 415-538-2193, or send the additional information by mail, or by email to [Jason.Kwan@calbar.ca.gov](mailto:Jason.Kwan@calbar.ca.gov). If you leave a voice message, be sure to clearly identify the lawyer complained of, the case number assigned, and your

telephone number including the area code. We should return your call within two business days.

If you have presented all of the information that you wish to have considered, and you disagree with the decision to close your complaint, you may request that the State Bar's Complaint Review Unit review your complaint. The Complaint Review Unit will recommend that your complaint be reopened if it determines that further investigation is warranted. To request review by the Complaint Review Unit, you must submit your request in writing, either:

- 1) Via email: Within 90 days of the date of this letter, by email to: [CRU@calbar.ca.gov](mailto:CRU@calbar.ca.gov); or
- 2) Via United States Mail: Post-marked within 90 days of the date of this letter, by United States Mail to:

The State Bar of California  
Complaint Review Unit  
Office of General Counsel  
180 Howard Street  
San Francisco, CA 94105-1617

If you decide to send new information or documents to this office, the 90-day period will continue to run during the time that this office considers the new material. You may wish to consult with legal counsel for advice regarding any other available remedies. You may contact your local or county bar association to obtain the names of attorneys to assist you in this matter.

The State Bar cannot give you legal advice. If you wish to consult an attorney about any other remedies available to you, a certified lawyer referral service can provide the names of attorneys who may be able to assist you. In order to find a certified lawyer referral service, you may call our automated Lawyer Referral Services Directory at 1-866-442-2529 (toll free in California) or 415-538-2250 (from outside California) or access the State Bar's website at [www.calbar.ca.gov](http://www.calbar.ca.gov) and look for information on lawyer referral services.

We would appreciate if you would complete a short, anonymous survey about your experience with filing your complaint. While your responses to the survey will not change the outcome of the complaint you filed against the attorney, the State Bar will use your answers to help

Helen Le  
November 16, 2023  
Page 4

improve the services we provide to the public. The survey can be found at  
<https://www.calbar.org/octc/intake>.

Thank you for bringing your concerns to the attention of the State Bar.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jason J. Kwan", with a horizontal line extending from the top of the signature.

Jason J. Kwan  
Trial Counsel

**From:** [Eva Lee](#)  
**To:** [COPRAC](#)  
**Subject:** Today's Ethic's Committee Meeting in progress  
**Date:** Friday, January 12, 2024 11:28:38 AM

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**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Regarding the duty to report impaired colleagues, it risks putting the first chair in conflict with the second chair if the second chair doesn't like what the first chair is doing. I say this without having fully read the document, but I still feel it needs to be said.

Also, the "appears frazzled" That is a pretty broad approach to alleging impairment. I went through a contentious divorce and I was frazzled for years. I was accused of cognitive impairment and even had memory testing and both a medical and legal psych evaluation. Both resulted in the same diagnosis "ADHD." I think some people are just not as smooth as others, and I feel like it takes a risk that "differently abled" persons for whatever reason, deserve the respect and consideration that what can appear as an impairment is just an innate personality trait. Perhaps, more needs to be looked at in terms of supporting attorneys who appear "frazzled," like a diversion scenario. There can always be more help for a friend in need.

Eva Lee  
CA Bar 191152

Also, I couldn't find the "free course" referenced in today's meeting regarding an online course offered by the Bar for 8.3 training. I would appreciate a link to it.

Thank you so much!

## Public Comment - Proposed Revised Opinion 2021-206

Commenting on behalf of an organization	Yes
Professional Affiliation	Wealth bancorp investments
Name	US bank N.A SEP IRA CUSTODIAN FOR JESSICA SANDOVAL
Email address	<a href="mailto:sandovaljessica997@gmail.com">sandovaljessica997@gmail.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
<p><b>ATTACHMENTS</b>You 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.</p>	
Last Update	2024-05-12 16:23:03
Start Time	2024-05-12 16:10:42
Finish Time	2024-05-12 16:23:03

## Public Comment - Proposed Revised Opinion 2021-206

Commenting on behalf of an organization	No
Name	María D. Domínguez
City	Concord
State	California
Email address	<a href="mailto:mdominguezesq@gmail.com">mdominguezesq@gmail.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support

## Public Comment - Proposed Revised Opinion 2021-206

Commenting on behalf of an organization	No
Name	Adele Schneidereit
City	Atascadero
State	California
Email address	<a href="mailto:adele@amslawoffices.com">adele@amslawoffices.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose