

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 03-429

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Obligations with Respect to Mentally Impaired Lawyer in the Firm

If a lawyer's mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give reasonable assurance that such impairment will not result in breaches of the Model Rules. If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation to the appropriate professional authority. If the firm removes the impaired lawyer in a matter, it may have an obligation to discuss with the client the circumstances surrounding the change of responsibility. If the impaired lawyer resigns or is removed from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer.

This opinion addresses three sets of obligations arising under the Model Rules of Professional Conduct¹ with respect to mentally impaired lawyers.² First, it considers the obligations of partners in a law firm³ or a lawyer super-

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in February 2002 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

2. This opinion deals only with mental impairment, which may be either temporary or permanent. Physical impairments are beyond the scope of this opinion unless they also result in the impairment of mental faculties. In addition to Alzheimer's Disease and other mental conditions that are age-related and can affect anyone, mental impairment can result from alcoholism and substance abuse, which lawyers have been found to suffer from at a rate at least twice as high as the general population. George Edward Bailly, *Impairment, The Profession and Your Law Partner*, 11 No. 1 PROF. LAW. 2 (1999).

3. The term "partners in the firm" includes every partner of a legal partnership and every shareholder of a law firm organized as a professional corporation, not just members of the firm's executive or management committee. Rule 5.1 cmt. 1.

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vising another lawyer to take steps designed to prevent lawyers in the firm who may be impaired from violating the Rules of Professional Conduct. Second, it addresses the duty of a lawyer who knows⁴ that another lawyer in the same firm has, due to mental impairment, failed to represent a client in the manner required by the Model Rules to inform the appropriate professional authority or to communicate knowledge of such violation to clients or prospective clients of the impaired lawyer.⁵ Third, it considers the obligations of lawyers in the firm when an impaired lawyer leaves the firm.⁶

Impaired lawyers have the same obligations under the Model Rules as other lawyers. Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation. Thus, for example, the lawyer who has failed to act with diligence and promptness in representing a client,⁷ or has failed to communicate with the client in an appropriate manner,⁸ has violated the Model Rules even if that failure is the result of mental impairment.⁹ The matter of a lawyer's impairment is most directly addressed under the Model Rules of Professional Conduct under Rule 1.16,

4. "Knows" denotes actual knowledge, which may be inferred from the circumstances. Rule 1.0(f).

5. This opinion does not deal with the issues that could arise for the firm vis-a-vis its responsibilities to accommodate an impaired lawyer under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (2003) (the "ADA"), or a state law equivalent, which protects disabled employees. Such statutes, although generally not applicable to equity partners in law firms, *see, e.g., Simpson v. Ernst & Young*, 100 F.3d 436, 443-44 (6th Cir. 1996), *cert. denied*, 520 U.S. 1248 (1997) (partners not protected as employees under federal antidiscrimination laws), may apply to non-equity partners, associates, in-house counsel, and of counsel. Thus, if a lawyer/employee is able to provide competent representation to a client if the firm provides the lawyer with a reasonable accommodation, the firm may have an obligation to maintain that lawyer's employment. For a discussion of an employer's obligations under the ADA, *see* HENRY H. PERRITT, JR., *Employer Obligations*, in AMERICANS WITH DISABILITIES ACT HANDBOOK § 4 (3rd ed. 1997). A number of documents discussing employers' obligations under the ADA are available on the Equal Employment Opportunity Commission website, <http://www.eeoc.gov/publications.html>.

6. This opinion does not deal with the potential fiduciary obligations or civil liability to clients of a firm with which the impaired lawyer is associated or with the issues that arise under a firm's partnership agreement if a lawyer is impaired. For a discussion of these issues, *see* Bailly, *supra*, note 2.

7. Rule 1.3 states: "A lawyer shall act with reasonable diligence and promptness in representing a client."

8. Rule 1.4, which requires a lawyer to reasonably consult with the client and keep the client reasonably informed about the status of the matter, contains numerous obligations that the impaired lawyer may have difficulty satisfying.

9. Although mental impairment is most likely to cause Rules 1.1, 1.3, and 1.4 to be violated, it also may result in violations of other Model Rules. This opinion assumes that, but for his mental impairment, the lawyer would be able to comply with the requirements of all of the Model Rules.

which specifically prohibits a lawyer from undertaking or continuing to represent a client if the lawyer's mental impairment materially impairs the ability to represent the client.¹⁰ Unfortunately, the lawyer who suffers from an impairment may be unaware of, or in denial of, the fact that the impairment has affected his ability to represent clients.¹¹ When the impaired lawyer is unable or unwilling to deal with the consequences of his impairment, the firm's partners and the impaired lawyer's supervisors have an obligation to take steps to assure the impaired lawyer's compliance with the Model Rules.

An impaired lawyer's mental condition may fluctuate over time. Certain dementias or psychoses may impair a lawyer's performance on "bad days," but not on "good days" during which the lawyer behaves normally. Substance abusers may be able to provide competent and diligent representation during sober or clean interludes, but may be unable to do so during short or extended periods in which the abuse recurs. 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.

It also is important to understand that some disorders that may appear to be mental impairment (for example, Tourette's Syndrome), while causing overt conduct that appears highly erratic, may not interfere with competent, diligent legal representation such that they "materially impair" a lawyer's ability to represent his clients.

When considering what must be done when confronted with evidence of a lawyer's apparent mental disorder or substance abuse, it may be helpful for partners or supervising lawyers to consult with an experienced psychiatrist, psychologist, or other appropriately trained mental health professional.¹²

I. Obligations to Adopt Measures to Prevent Impaired Lawyers in the Firm from Violating the Model Rules

Although there is no explicit requirement under the Model Rules that a lawyer prevent another lawyer who is impaired from violating the Model Rules, Rule 5.1(a) requires that all partners in the firm and lawyers with comparable managerial authority in professional corporations, legal departments, and other organizations deemed to be a law firm¹³ make "reasonable efforts" to establish internal policies and procedures¹⁴ designed to provide "reasonable assurance" that all lawyers in the firm, not just lawyers known to be impaired, fulfill the requirements of the Model Rules. The measures required depend

10. Rule 1.16(a)(2).

11. Bailly, *supra* note 2 at 12.

12. The extent to which information concerning the impaired lawyer may be communicated without his consent may be limited by the Americans with Disabilities Act, *supra* note 5.

13. Rule 1.0(c)

14. Rule 5.1, cmt. 2.

on the firm's size and structure and the nature of its practice.¹⁵

In addition to the requirement that the firm establish appropriate preventive policies and procedures, Rule 5.1(b) requires a lawyer having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the supervised lawyer conforms to the Model Rules. When a supervising lawyer knows that a supervised lawyer is impaired, close scrutiny is warranted because of the risk that the impairment will result in violations.

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.¹⁶

Some impairments may be accommodated. A lawyer who, because of his mental impairment is unable to perform tasks under strict deadlines or other pressures, might be able to function in compliance with the Model Rules if he can work in an unpressured environment. In addition, the type of work involved, as opposed to the circumstances under which the work occurs, might need to be examined when considering the effect that an impairment might have on a lawyer's performance. 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. Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) 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 clients of the firm.

If reasonable efforts have been made to institute procedures designed to assure compliance with the Model Rules, neither the partners in the firm nor the lawyer with direct supervisory authority are responsible for the impaired lawyer's violation of the rules unless they knew of the conduct at a time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action.¹⁷

15. The black letter of Rule 5.1(a) does not identify what constitutes a reasonable effort or reasonable assurance, but some examples of appropriate measures appear in Comment [3] of the Rule.

16. Rule 1.16(a)(2).

17. Rule 5.1(c). Failure to intervene to prevent avoidable consequences of a violation also may violate Rule 8.4(a), which provides that it is professional misconduct for a lawyer to knowingly assist another to violate the Model Rules.

II. Obligations When an Impaired Lawyer in the Firm has Violated the Model Rules

The partners in the firm or supervising lawyer may have an obligation under Rule 8.3(a) to report violations of the ethics rules by an impaired lawyer to the appropriate professional authority.¹⁸ Only violations of the Model Rules that raise a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer must be reported.¹⁹ If the mental condition that caused the violation has ended, no report is required. Thus, if partners in the firm and the supervising lawyer reasonably believe that the previously impaired lawyer has resolved a short-term psychiatric problem that made the lawyer unable to represent clients competently and diligently, there is nothing to report.²⁰ Similarly, if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the Model Rules through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation.²¹ If, on the other hand, a lawyer's mental impairment renders the lawyer unable to represent clients competently, diligently, and otherwise as required by the Model Rules and he nevertheless continues to practice, partners in the firm or the supervising lawyer must report that violation.

If the matter in which the impaired lawyer violated his duty to act competently or with reasonable diligence and promptness still is pending, the firm may not simply remove the impaired lawyer and select a new lawyer to handle the matter. Under Rule 1.4(b), there may be a responsibility to discuss with the client the circumstances surrounding the change of responsibility. In

18. Rule 8.3(a) requires a lawyer who knows that another lawyer has committed a violation of the Model Rules that raises a substantial question as to that lawyer's fitness as a lawyer to inform the appropriate professional authority. Although a lawyer may satisfy her obligation under Rule 8.3 by disclosing the violation without identifying the impairment that caused the violation, in most cases, disclosure of the impairment will be appropriate. However, in doing so, the lawyer must be careful to avoid potential violations of the Americans With Disabilities Act.

19. Not every violation must be reported. Only those violations "that a self-regulatory profession must vigorously endeavor to prevent" must be reported, and judgment must be exercised in deciding whether prior violations fall into this category. Rule 8.3, cmt. 3.

20. N.Y.C. Opinion 1995-5 (April 5, 1995), *in* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 1001:6404 (ABA/BNA 1998).

21. If such supervision exceeds that which would be required in the case of a lawyer who is not impaired, it would not be proper for the firm to charge the client for the additional level of supervision. Although it is appropriate to charge a client for normal supervisory activities related to the quality of the client work product, fees for additional steps taken by the supervising lawyer because of the firm's fear that an impaired lawyer's work would not be competent would not be reasonable under Rule 1.5(a) unless the necessity for supervision and the fact that the client would be charged for it is communicated to, and agreed to by, the client. Rule 1.5(b).

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. Even if the matter in which the impaired lawyer violated the Model Rules no longer is pending, partners and lawyers in the firm with comparable managerial authority and lawyers with direct supervisory authority over the impaired lawyer may have obligations to mitigate any adverse consequences of the violation.²²

III. Obligations When an Impaired Lawyer No Longer is in the Firm

The responsibility of the firm to the client does not end with the resignation from the firm, or the firm's termination of, the impaired lawyer. If the impaired lawyer resigns or is removed from the firm, clients of the firm may be faced with the decision whether to continue to use the firm or shift their relationship to the departed lawyer. Rule 1.4 requires the firm to advise existing clients of the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel. In doing so, the firm must be careful to limit any statements made to ones for which there is a reasonable factual foundation.²³

The firm has no obligation under the Model Rules to inform former clients who already have shifted their relationship to the departed lawyer that it believes the departed lawyer is impaired and consequently is unable to personally handle their matters competently.²⁴ However, the firm should avoid any communication with former clients who have transferred their representation to the departed lawyer that can be interpreted as an endorsement of the ability of the departed lawyer to handle the matter. For example, a joint letter from the firm and the departed lawyer regarding the transition could be seen as an implicit endorsement by the firm of the departed lawyer's competence.

In addition to considering what the firm may or must communicate to clients who are considering whether to take their representation to the departed lawyer, the firm must consider whether it has an obligation to report the

22. Rule 5.1(c)(2).

23. If such a communication also is designed to convince the client to remain with the firm rather than follow the impaired lawyer who continues to practice, it must be drafted in such a manner that it does not violate either the prohibition of false and misleading communications about the firm's services under Rule 7.1 or the prohibition of deceit or misrepresentation under Rule 8.4(c). In addition, the potential for claims of tortious interference with contractual relationships and unfair competition should be considered.

24. See Philadelphia Bar Ass'n Prof. Guidance Committee Op. 00-12, 2000 WL 33173008 (Dec. 2000).

25. The "appropriate professional authority" need not be the state disciplinary authority. If available in the jurisdiction, a peer review agency may be more appropriate under the circumstances. Rule 8.3, cmt. 3.

impaired lawyer's condition to the appropriate disciplinary authority.²⁵

No obligation to report exists under Rule 8.3(a) if the impairment has not resulted in a violation of the Model Rules. Thus, if the firm reasonably believes that it has succeeded in preventing the lawyer's impairment from causing a violation of a duty to the client by supplying the necessary support and supervision,²⁶ there would be no duty to report under Rule 8.3(a).²⁷

Subject to the prohibition against disclosure of information protected by Rule 1.6, however, partners in the firm may voluntarily report to the appropriate authority its concern that the withdrawing lawyer will not be able to function without the ongoing supervision and support the firm has been providing.²⁸

26. An obligation exists under Rule 5.1 to take reasonable efforts to prevent violations of the Model Rules by the impaired lawyer if firm management or a direct supervisor of the impaired lawyer is aware of the risk of violation posed by the impairment.

27. As noted in Bailly, *supra*, note 2 at 15: "It would be the ultimate irony if a partner were suspended for not reporting his impaired partner, while the impaired partner was able to use mitigating circumstances in any disciplinary hearing against him."

28. Pennsylvania Bar Ass'n Committee on Legal Eth. Op. 98-124, 1998 WL 988111 (Dec. 7, 1988).

