

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 03-431

August 8, 2003

## Lawyer's Duty to Report

### Rule Violations by Another Lawyer

#### Who May Suffer from Disability or Impairment

*A lawyer who believes that another lawyer's known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16(a)(2), which requires that she withdraw from the representation of clients.*

In this opinion, we examine the obligation of a lawyer who acquires knowledge that another lawyer, not in his firm, suffers from a mental condition that materially impairs the subject lawyer's ability to represent a client.<sup>1</sup> Under Rule 1.16(a)(2) of the Model Rules of Professional Conduct,<sup>2</sup> a lawyer must not undertake or continue representation of a client when that lawyer suffers from a mental condition that "materially impairs the lawyer's ability to represent the client."<sup>3</sup> That requirement reflects the conclusion that allowing persons who do

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1. In ABA Standing Committee on Professional Responsibility Formal Opinion 03-429 (Obligations With Respect to Mentally Impaired Lawyer in the Firm) (June 11, 2003), we addressed the obligations of lawyers within a firm when another lawyer within that firm violates the Model Rules of Professional Conduct due to mental impairment. Like that opinion, 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 affect the entire population, lawyers have been found to suffer from alcoholism and substance abuse at a rate at least twice as high as the general population. See George Edward Bailly, *Impairment, The Profession and Your Law Partner*, 11 No. 1 PROF. LAW. 2 (1999).

2. 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.

3. Rule 1.16(a)(2) states that a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if "the

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not possess the capacity to make the professional judgments and perform the services expected of a lawyer is not only harmful to the interests of clients, but also undermines the integrity of the legal system and the profession.

Under Rule 8.3(a), a lawyer with knowledge<sup>4</sup> that another lawyer's conduct has violated the Model Rules in a way that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" must inform the appropriate professional authority.<sup>5</sup> Although not all violations of the Model Rules are reportable events under Rule 8.3, as they may not raise a substantial question about a lawyer's fitness to practice law, a lawyer's failure to withdraw from representation while suffering from a condition materially impairing her ability to practice, as required by Rule 1.16(a)(2), ordinarily would raise a substantial question requiring reporting under Rule 8.3<sup>6</sup>.

When considering his obligation under Rule 8.3(a), a lawyer should recognize that, in most cases, lack of fitness will evidence itself through a pattern of conduct that makes clear that the lawyer is not meeting her obligations under the Model Rules, for example, Rule 1.1 (Competence) or Rule 1.3 (Diligence). A lawyer suffering from an impairment may, among other things, repeatedly miss court deadlines, fail to make filings required to complete a transaction, fail to perform tasks agreed to be performed, or fail to raise issues that competent counsel would be expected to raise. On occasion, however, a single act by a lawyer may evidence her lack of fitness.<sup>7</sup>

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lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." *See, e.g.*, In re Morris, 541 S.E.2d 844 (S.C. 2001) (lawyer failed to notify clients that he would be unavailable while being treated at in-patient drug and alcohol rehabilitation program); State ex rel. Oklahoma Bar Ass'n v. Southern, 15 P.3d 1 (Okla. 2000) (lawyer had been suffering severe, untreated vitamin B-12 illness that essentially destroyed his short-term memory and exacerbated his depression; lawyer neglected five clients and their cases); In re Francis, 4 P.3d 579 (Kan. 2000) (lawyer's depression resulted in misconduct, including failure to comply with discovery requests, to prosecute civil suit, to return telephone calls, and to withdraw from representing client); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991) (lawyer who neglected, deceived, and abandoned clients due to drugs, alcohol, and depression failed to withdraw); State v. Ledvina, 237 N.W.2d 683 (Wis. 1976) (lawyer with compulsive personality disorder with paranoid trends engaged in hostile and aggressive conduct).

4. "Knows" denotes actual knowledge, which may be inferred from the circumstances. Rule 1.0(f). Thus, the duty to report the violation caused by the mental impairment of another lawyer will likely arise only in very limited situations.

5. Note that the disclosure obligation does not apply to information protected by Rule 1.6 or acquired by the lawyer from his participation in an approved lawyers assistance program. Rule 8.3(c).

6. As noted in Comment [3] to Rule 8.3, the rule "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule."

7. A single act of aberrant behavior may be part of a pattern of conduct affecting the lawyer while under the influence of drugs or alcohol or while displaying the symp-

A lawyer may be impaired by senility or dementia due to age or illness or because of alcoholism, drug addiction,<sup>8</sup> substance abuse, chemical dependency, or mental illness.<sup>9</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.<sup>10</sup> 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).

Each situation, therefore, must be addressed based on the particular facts presented. A lawyer need not act on rumors or conflicting reports about a lawyer. Moreover, knowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not itself enough to trigger a duty to report under Rule 8.3. A lawyer must know that the condition is materially impairing the affected lawyer's representation of clients<sup>11</sup>.

In deciding whether an apparently impaired lawyer's conduct raises a substantial question of her fitness to practice, a lawyer might consider consulting with a psychiatrist, clinical psychologist, or other mental health care professional about the significance of the conduct observed or of information the lawyer has learned from third parties.<sup>12</sup> He might consider contacting an

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toms of a mental illness that manifest themselves only on occasion. As noted in Comment [1] to Rule 8.3, "[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."

8. In certain cases, the conduct of the lawyer may involve violation of applicable criminal law. In such cases, Rule 8.4(b) is implicated. That rule provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

9. *See* ABA Formal Opinion 03-429 for discussion of mental impairments that affect a lawyer only on occasion.

10. There is a wealth of information about impairments available for the general reader. For an initial overview, *see* such sources as David R. Goldmann, *AMERICAN COLLEGE OF PHYSICIANS COMPLETE HOME MEDICAL GUIDE WITH INTERACTIVE HUMAN ANATOMY CD-ROM* (DK Publishing 1999); Charles R. Clayman, *THE AMERICAN MEDICAL ASSOCIATION FAMILY MEDICAL GUIDE* (3rd ed. Random House 1994); and Anthony L. Komaroff, *THE HARVARD MEDICAL SCHOOL FAMILY HEALTH GUIDE* (Simon & Schuster 1999). Websites for various organizations also can be a good starting point for information. The American Medical Association's website at <http://www.ama-assn.org> has links to various sites, as does the website of the National Institutes of Health, <http://www.nih.gov>. For Alzheimer's disease and related conditions, *see* the websites of the Alzheimer's Disease Education and Referral Center, <http://www.alzheimers.org>, and the American Association of Geriatric Psychiatry, <http://www.aagppa.org>.

11. *See* Rule 1.16(a)(2).

12. The reporting lawyer may become aware of the impaired lawyer's conduct either from personal observation or from a third party, such as a client of the lawyer who complains of the impaired lawyer's conduct.

established lawyer assistance program.<sup>13</sup> In addition, the lawyer also might consider speaking to the affected lawyer herself about his concerns. In some circumstances, that may help a lawyer understand the conduct and why it occurred, either confirming or alleviating his concerns. In such a situation, however, the affected lawyer may deny that any problem exists or maintain that although it did exist, it no longer does. This places the lawyer in the position of assessing the affected lawyer's response, rather than the affected lawyer's conduct itself. Care must be taken when acting on the affected lawyer's denials or assertions that the problem has been resolved. It is the knowledge of the impaired conduct that provides the basis for the lawyer's obligations under Rule 8.3; the affected lawyer's denials alone do not make the lawyer's knowledge non-reportable under Rule 8.3.

If the affected lawyer is practicing within a firm, the lawyer should consider speaking with the firm's partners or supervising lawyers.<sup>14</sup> If the affected lawyer's partners or supervising lawyers take steps to assure that the affected lawyer is not representing clients while materially impaired, there is no obligation to report the affected lawyer's past failure to withdraw from representing clients. If, on the other hand, the affected lawyer's firm is not responsive to the concerns brought to their attention, the lawyer must make a report under Rule 8.3. We note that there is no affirmative obligation to speak with either the affected lawyer or her firm about her conduct or condition before reporting to the appropriate authority.

If a lawyer concludes there is material impairment that raises a substantial question about another lawyer's fitness to practice, his obligation ordinarily is to report to the appropriate professional authority.<sup>15</sup> As we said in ABA Formal Opinion 03-429, however, if information relating to the representation of one's own client would be disclosed in the course of making the report to the appropriate authority, that client's informed consent to the disclosure is required. In the usual case, information gained by a lawyer about another lawyer is unlikely to be information protected by Rule 1.6, for example, observation of or information about the affected lawyer's conduct in litigation or in the completion of transactions. Given the breadth of information protected by Rule 1.6,<sup>16</sup> however, the reporting lawyer should obtain the client's

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13. In most states, lawyer assistance programs are operated through the state or major metropolitan bar associations. Information about these systems is available from the staff of the ABA Commission on Lawyer Assistance Programs. See <http://www.abanet.org/legalservices/colap/home.html>.

14. Such contact is solely discretionary. Although partners and supervising lawyers have a responsibility to ensure that lawyers in their own firms comply with the rules of professional conduct, *see* ABA Formal Opinion 03-429, no lawyer is obligated under the Model Rules to take any action to ensure compliance with the rules by lawyers in other firms.

15. Rule 8.3 cmt. 3. There is no duty to report information learned from participation in an approved lawyers assistance program.

16. Rule 1.6 cmts. 3 and 4.

informed consent to the disclosure in cases involving information learned in the course of representation through interaction with the affected lawyer.

Whether the lawyer is obligated under Model Rule 8.3 to make a report or not, he may report the conduct in question to an approved lawyers assistance program, which may be able to provide the impaired lawyer with confidential education, referrals, and other assistance. Indeed, that may well be in the best interests of the affected lawyer, her family, her clients, and the profession. Nevertheless, such a report is not a substitute for reporting to a disciplinary authority with responsibility for assessing the fitness of lawyers licensed to practice in the jurisdiction.

In conclusion, a lawyer should review the situation and determine his responsibilities under Rule 8.3 when he has information that another lawyer has failed to meet her obligation to withdraw from the representation of client when suffering from a mental condition materially impairing her ability to represent her clients.