The Ethics of Lawyers Needing Assistance

John M. Barkett
Shook, Hardy & Bacon L.L.P.
Miami, Florida

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INTRODUCTION

> *WHEREAS, in 2016, the American Bar Association (ABA) Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation published a study of currently practicing lawyers that found between 21 and 36 percent of lawyers qualify as problem drinkers, and that approximately 28 percent struggle with some level of depression, 19 percent suffer from anxiety, and 23 percent are dealing with stress symptoms; and*
>
> *WHEREAS, a similar survey of Law Student Well-Being published in 2016 showed 25 percent of those students were at risk for alcoholism, 17 percent experienced some level of depression, 14 percent experienced severe anxiety, 23 percent had mild or moderate anxiety, and 6 percent reported serious suicidal thoughts in the past year; . . .*

This text comes from a resolution of the Conference of Chief Justices of our state supreme courts.

Let me put the numbers into a slightly different perspective. According to the American Bar Association, in 2016, there were 1,335,963 "active resident attorneys" in the United States.[1] This number suggests that between 288,000 and 488,000 lawyers "qualify as problem drinkers." And either a subset of this number or independent of this number there are about 379,000 lawyers suffering from depression, 257,000 from anxiety, and 312,000 from stress symptoms. It is no wonder why State Bars have established Legal Assistance Programs.

The ABA also reported that in 2016, there were 110,951 Juris Doctor candidates in law schools in America.[2] This number suggests that about 28,000 law students are at risk of alcoholism. And either a subset of this number or independent of this number there are about 19,000 law students who have experienced some level of depression, 15,500 who have experienced severe anxiety, 26,000 who have had mild or moderate anxiety, and nearly 7,000 who before even entering the profession have had suicidal thoughts.

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[1] https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals/.

[2] https://www.americanbar.org/groups/legal_education/resources/statistics/ (2016 JD/non-JD Enrollment Data).

I believe I can safely say that most lawyers have encountered other lawyers who fall into one of the above categories. Personally, I have faced the tragic news of lawyer suicides twice. In one case, a Yale Law School classmate shot himself in his law office. Some speculated the financial pressures of "big law" played a role. In another, one of the finest trial lawyers in America who was very successful hung himself from a tree in the back yard of his home.

So the resolution of the Chief Justices has a personal resonance and should resonate among all lawyers. This was the conclusion of the resolution:

> *NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports the goals of reducing impairment and addictive behavior, and improving the well-being of lawyers, and recommends that each jurisdiction considers the recommendations of the Report of the National Task Force on Lawyer Well-Being.*

The Report of the National Task Force on Lawyer Well-Being was issued on August 14, 2017. The Task Force was "conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL). It is a collection of entities within and outside the ABA that was created in August 2016."[3] The Report contains 44 recommendations addressed to all stakeholders—judges, bar regulators, legal employers, law schools, bar associations, professional liability insurance carriers, and lawyer assistance programs.

In 2018, the ABA House of Delegates passed Resolution 105 in which it resolved to support the goals of improving lawyer well-being and to promote the recommendation of the Task Force:

> *RESOLVED, That the American Bar Association supports the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, judges and law students; and*
>
> *FURTHER RESOLVED, That the American Bar Association urges all federal, state, local, territorial, and tribal courts, bar associations, lawyer regulatory entities, institutions of legal education, lawyer assistance programs, professional liability carriers, law firms, and other entities employing lawyers to consider the recommendations set out in the report,* The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, *by the National Task Force on Lawyer Well-Being.*[4]

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[3] https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf. "Its participating entities currently include the following: ABA CoLAP; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Wellbeing Committee; The National Organization of Bar Counsel; Association of Professional Responsibility Lawyers; National Conference of Chief Justices; and National Conference of Bar Examiners. Additionally, CoLAP was a co-sponsor of the 2016 ABA CoLAP and Hazelden Betty Ford Foundation's study of mental health and substance use disorders among lawyers and of the 2016 Survey of Law Student Well-Being."

[4] https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_2018_hod_midyear_105.pdf.

In response, the Virginia Supreme Court has already amended Va. Rule of Professional Conduct (RPC) 1.1 on November 1, 2018, to add a comment about a lawyer's well-being.[5] Comment [7] to Va. RPC 1.1 provides:

> *[7] A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).*[6]

I expect other states will follow Virginia's lead.

Having stated the problems, identified the source of possible responses to the problem, and the response of at least one state supreme court, I turn to the obligations of lawyers under the Model Rules of Professional Conduct[7]—those in need of assistance and those with whom they work or encounter. I will also address ABA and state bar ethics opinions that inform the obligations contained in the Model Rules or State RPC. Finally, I examine some reported decisions to further explore the contours of lawyers' obligations under the RPC discussed below.

This is not an in-depth review; view this paper as a checklist. Nonetheless, I hope it contributes to the improvement of lawyer well-being.

MODEL RULES FOR CONSIDERATION WHEN LAWYERS HAVE A NEED FOR ASSISTANCE

Preamble and Scope

The Preamble to the Model Rules speaks aspiringly about lawyers as public citizens who have a special responsibility "for the quality of justice." "In all professional functions," the Preamble continues, "a lawyer should be competent, prompt and diligent." The Preamble notes that the legal profession is "largely self-governing." That relative autonomy "carries with it special responsibilities of self-government." "Every lawyer," we are told in the Preamble, "is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."

The "Scope" section of the Model Rules elaborates on these principles. Compliance with the Model Rules, "depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through

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[5] http://www.vsb.org/site/news/item/scova_approves_amendments.

[6] I discuss Model Rule 1.16(a)(2) below. The Virginia rule is identical.

[7] I discuss the Model Rules of Professional Conduct in this paper. They can be found at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/. However, states have adopted variations of some of the Model Rules. Hence, readers should always look to the state bar Rules of Professional Conduct (RPC) to compare them to the Model Rules discussed in this paper.

disciplinary proceedings." In addition, while violation of a Model Rule "should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached," the Model Rules "do establish standards of conduct by lawyers." Thus, "a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."

As any reader can see, there is no particular reference in the Preamble to, or Scope of, the Model Rules to lawyers suffering from a dependency on alcohol or drugs or from a mental or emotional state that may impair the lawyer's judgment or ability to act. Instead, the emphasis is on lawyers policing themselves or other lawyers, and the imposition of disciplinary sanctions when lawyers fail to honor their professional obligations. However, while recognizing that lawyer omissions or errors must have consequences, lawyers who have a dependency or other impairing condition still deserve compassion, understanding, and assistance. The Preamble does not yet say this, but one day, perhaps it will.[8]

What are the obligations of lawyers who suffer from a well-being impairment or those that supervise or have managerial responsibility for them? That is the subject to which I now turn.

Model Rule 1.16(a): Declining or Terminating Representation

Model Rule 1.16(a)(2) provides:

> *(a) Except as stated in paragraph (c),[9] a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:*
>
> . . .
>
> *(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. . . .*

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[8] That is not to say that the Model Rules are unaware of "diminished capacity." In Rule 1.14, the Model Rules do recognize that *clients* may suffer from a diminished capacity to make decisions. Model Rule 1.14 provides:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

When the client is impaired, the lawyer is supposed to maintain "as far as reasonably possible" a normal client-lawyer relationship. And when that is not possible, the lawyer is to take protective action and may even reveal information protected by Rule 1.6 to the extent necessary to protect the client's interests.

[9] Paragraph (c) addresses compliance with applicable law requiring notice or permission to withdraw from a matter. It provides in full: "(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

What is a material impairment? The Comments to Rule 1.16 do not answer this question. Indeed, they make no direct reference to this part of the Rule. Rather, the Comments address a client with diminished capacity, referring back to Model Rule 1.14:

> *[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.*

Comment [1] does provide, generally, that, "A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."[10] So presumably, a "material impairment" is one related to competence and diligence, two subjects to which I now turn.

Model Rule 1.1: Competence

Model Rule 1.1 provides:

> *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

Comment [1] to Model Rule 1.1 identifies relevant factors in determining whether a lawyer has the requisite knowledge and skill to handle a particular matter. They include,

> *the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.*[11]

Comment [8] adds this observation on maintaining the requisite knowledge and skill:

> *To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.*

Assuming a lawyer otherwise satisfies Rule 1, if that lawyer suffers from a dependency on alcohol or drugs or another impairment that compromises the lawyer's well-being, such conditions would not necessarily result in the loss of the knowledge and skill that made the lawyer competent in the first

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[10] There is no reference in this Comment to withdrawal, but the same conclusion would apply.

[11] Comment [5] to Model Rule 1.1 adds that handling a matter competently "includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence."

instance. If they do, then, of course, the lawyer faces a Rule 1.1 violation and supervisory or managerial lawyers face a Rule 5.1, and possibly a Rule 8.4, violation.[12]

However, such conditions may affect the thoroughness and preparation reasonably necessary for the representation and both the lawyer and those that supervise or have managerial responsibility for the lawyer must understand that competence may be compromised in violation of Rule 1.1 in such an event.

Prudent lawyers will act before something goes wrong. If the impaired lawyer recognizes the potential failure to act competently, that lawyer must seek assistance not only to try to eliminate the impairment but also because of the obligations to the client under Rule 1.1 and the other Rules discussed in this paper that relate to the lawyer's obligations to, and interactions with, the client. Apart from trying to help the lawyer personally, managerial and supervisory lawyers must also have a mechanism in place to identify lawyers in need of assistance and act to protect the client from "incompetent" representation within the framework of Rule 1.1.

Model Rule 1.3: Diligent Representation

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

Comment [2] elaborates: "[2] A lawyer's work load must be controlled so that each matter can be handled competently."

Comment [3] addresses the danger of procrastination:

> *[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.*

And Comment [5] address the issue of a lawyer's disability with special attention to a sole practitioner's disability:

> *[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer*

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[12] There may also be a separate state bar requirement to refrain from practice in the event of an impairment. For example, Rule 3-7.13 of the Rules Regulating the Florida Bar is entitled "Incapacity Not Related to Misconduct." Subparagraph (a) provides: "Whenever an attorney who has not been adjudged incompetent is incapable of practicing law because of physical or mental illness, incapacity, or other infirmity, the attorney may be classified as an inactive member and shall refrain from the practice of law even though no misconduct is alleged or proved."

to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).[13]

Can a lawyer with a dependency or other condition that compromises the lawyer's well-being act diligently within the terms of Model Rule 1.3 and these Comments? Perhaps. That lawyer has the professional obligation to evaluate the lawyer's compliance with Model Rule 1.3, and those that supervise or have managerial responsibility for the lawyer must do so as well.

Model Rules 5.1 and 5.2 and the Responsibilities of Partners and Subordinate Lawyers

Lawyers are required to be competent and diligent, communicate with clients, and maintain client confidentiality. If a lawyer in a law firm is unable to satisfy any of these obligations because of "diminished capacity"—whatever the cause—Rules 5.1 and 5.2 come into play.

Model Rule 5.1 provides:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.[14]

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model Rule 5.2 provides in full:

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[13] See the Appendix regarding one bar association's effort to give meaning to what is also Comment [5] to Pennsylvania's RPC 1.3.

[14] Comment [1] to Rule 1.14 elaborates on the requirements in Paragraphs (a) and (b): "[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm."

> *(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.*
>
> *(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.*

The message of these rules is not complicated. Lawyers must reasonably ensure that those whom they oversee are competent under Model Rule 1.1 and are in compliance with other applicable rules of professional conduct.

Similarly, lawyers who are overseen by others are still bound by the RPC even if they are taking direction from another lawyer. The subordinate lawyer must speak up if the RPC are not being followed by the supervisory lawyer.

Under Model Rule 5.1, there is an "knowledge" requirement to hold a supervisory lawyer responsible for the failure of a supervised lawyer to comply with the RPC. However, lawyers must be aware of differences between Model Rule 5.1 and the Rule as it has been adopted in a particular jurisdiction. Illustratively, the District of Columbia has a "knew or should have known" requirement. D.C. Rule 5.1(c)(2) provides in pertinent part that a lawyer "shall be responsible for another lawyer's violation of the Rules of Professional Conduct if":

> *The lawyer has direct supervisory authority over the other lawyer or is a partner or has comparable managerial authority in the law firm or government agency in which the other lawyer practices, and knows <u>or reasonably should know</u> of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.*

In Re Cohen, 847 A.2d 1162 (D.C. 2004) illustrates the importance of this difference. An associate in a law firm withdrew a trademark application for a client, Dr. Schleicher, telling the Patent and Trademark Office that the client had "expressly abandoned its above-referenced trademark application." *Id.* at 1166. The statement was false. The client was not aware of the filing and had not endorsed it. The PTO accepted the abandonment of the application. The associate was supervised by Cohen. Disciplinary proceedings were instituted against Cohen. The D.C. Board of Professional Responsibility found Cohen to be in violation of, among others, D.C. Rule 5.1(c)(2). Cohen conceded that "there was no system in place to impart rudimentary ethics training to lawyers in the firm," and there was no "review mechanism which allowed an associate's work to be reviewed and guided by a supervisory attorney." But he argued that he should not be punished for professional misconduct where he had no actual knowledge of the associate's misrepresentation. *Id.* The D.C. Court of Appeals rejected the plea.

> *Rule 5.1(c)(2) in this jurisdiction represents a judgment that attorneys supervising other lawyers must take reasonable steps to become knowledgeable about the actions of those attorneys in representing clients of the firm. As the Board explained, the "reasonably know" provision was carefully crafted to encourage — indeed to require — supervising attorneys to reasonably monitor the course of a representation such as respondent's firm had undertaken on behalf of Dr. Schleicher, denying them the ostrich-like excuse of saying, in effect, "I didn't know and didn't want to know."*
>
> *…*

> *In reaching this conclusion, the Board took into account a number of factors including the discreet nature of the case, the extended length of the representation, the small size of the firm, and of course, the degree of supervision or lack thereof. The Board stated:*
>
> *"Therefore, in the particular circumstances of this case, we conclude that Bar Counsel has established a violation of Rule 5.1(c)(2) because respondent reasonably should have known of the withdrawal application and should have been able to take reasonable remedial action to avoid its consequences. We believe a lawyer of reasonable prudence and competence would have made the inquiry necessary to determine the status of the application proceeding."*
>
> *We adopt this conclusion given the circumstances of this case.*

Id. at 1166-67. This case illustrates the importance to supervisory lawyers not only of knowing your jurisdiction's counterpart to Model Rule 5.1, but also what supervised lawyers are doing or failing to do.

Note that persons in a managerial capacity in a law firm are also responsible for ensuring that all lawyers in the firm, and not just subordinate lawyers, satisfy their professional obligations. Prudent managing partners will have a policy in place[15] to identify and help lawyers in need of assistance without compromising the law firm's duties to its clients.

Comment [3] to Rule 5.1 recognizes that the supervisory responsibilities articulated in Rule 5.1(a) may be fulfilled in different ways depending on the type of firm:

> *[3] . . . In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.*

Comment [8] to Rule 5.1 emphasizes that all lawyers remain responsible for their own conduct: "[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a)."However, a lawyer who is suffering from a well-being impairment may not be able to focus on this mandate.

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[15] Comment [2] to Rule 5.1 emphasizes the importance of internal policies and procedures and proper supervision: "[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

Supervisory or managing lawyers need to recognize that potential in evaluating their responsibilities or policies.

Comments [4] and [7] to Rule 5.1 speak to the issue of personal responsibility for the acts of another lawyer. Comment [4] provides that, "Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a)." Comment [7] adds that, "Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules." Model Rule 8.4(a) provides that it is "professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another. Taken together, it is small comfort that civil or criminal liability for the conduct of another lawyer is beyond the scope of the Rules. If there is such a risk, the managing or supervisory lawyer is going to take her responsibilities quite seriously for reasons other than legal ethics. However, within the ethics arena, proper supervision and appropriate managerial policies are required under Rule 5.1 and that means identifying lawyers with well-being impairments and determining the appropriate response consistent with the obligations of the rules of professional conduct.

At least one state has "upped" the responsibility of supervisory and managerial lawyers. In 2015, South Carolina amended its Rule 5.1 to add a new subparagraph (d) requiring partners and managerial lawyers to confront a lawyer who "may be" suffering from a "significant impairment" of that lawyer's cognitive function:

> *(d) Partners and lawyers with comparable managerial authority who reasonably believe that a lawyer in the law firm may be suffering from a significant impairment of that lawyer's cognitive function shall take action to address the concern with the lawyer and may seek assistance by reporting the circumstances of concern pursuant to Rule 428, SCACR.*[16]

It might seem obvious, but supervisory or managerial lawyers need to be particularly vigilant if an impaired lawyer serves as a signatory on a trust or other account of the Firm or has some other fiduciary role over funds that would permit misappropriation to occur. The impaired lawyer may need to be removed from that role, or there may be a need for additional signing authority before funds can be released.

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[16] Rule 428 of the South Carolina Court Rules, adopted in 2015, provides: (a) The Executive Director of the South Carolina Bar, upon receipt of a written report or referral pursuant to Rule 5.1, RPC, Rule 407, SCACR; pursuant to Canon 3, CJC, Rule 501, SCACR; or from a member of the South Carolina Bar expressing concern about cognitive impairment of another lawyer shall take such actions as he or she deems advisable. Upon the Executive Director's recommendation, the President of the Bar may appoint one or more Attorneys to Intervene. The Attorneys to Intervene shall attempt to meet with the lawyer alleged to be impaired and, if in the best interest of both the lawyer and the public, propose a course of conduct to be followed.

(b) The Attorneys to Intervene shall promptly report to the Executive Director whether any actions were recommended to the lawyer, whether the lawyer agreed to any recommendations, and whether further action is recommended. Further action may include action under Rule 28, RLDE, Rule 413, SCACR. In the event a referral to the Commission on Lawyer Conduct is recommended by the Attorneys to Intervene, that referral shall be made by them promptly.

(c) The Attorneys to Intervene, the Executive Director of the South Carolina Bar, and the President of the Bar shall be immune from civil action for their actions taken in good faith under this rule. Information received by those Attorneys shall not be forwarded to the Office of Disciplinary Counsel in the event that a referral is not recommended under paragraph (b).

Model Rule 1.4 and Communications with Clients

Model Rule 1.4 is entitled "Communication" and contains these requirements:

> *(a) A lawyer shall:*
>
> *(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;*
>
> *(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;*
>
> *(3) keep the client reasonably informed about the status of the matter;*
>
> *(4) promptly comply with reasonable requests for information; and*
>
> *(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.*
>
> *(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

While not aiming to be repetitive, the ethical reality is that the lawyer suffering from a well-being impairment again must evaluate his or her compliance with Rule 1.4 and so must those that supervise or have managerial responsibility for the lawyer.

I highlight two comments to Rule 1.4. Comment [4] provides:

> *[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.*

Comment [7] states in pertinent part:

> *[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person.*

These comments emphasize the importance of prompt and regular communications with clients. They also present the "boomerang" question: should the lawyer disclose a well-being impairment to the

client? Model Rule 1.4(b) might apply in this context: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[17]

"Wait," you might say. "The client will discharge the lawyer immediately." Maybe. The client's decision may depend on the lawyer's condition, the nature of the representation, and the history and strength of the relationship between the lawyer and client. I assume, however, that a lawyer making an impairment-related disclosure would also be seeking assistance or undergoing appropriate treatment to allow the lawyer to go about his or her professional activities in an ethically consistent manner. A client might not leave the lawyer under such circumstances.

And assuming compliance with Model Rules 1.1, 1.3, 5.1, and 5.2 by the impaired lawyer or those that supervise or have managerial responsibility for the lawyer, dealing with Rule 1.4's requirements should be ethically manageable.[18]

Model Rule 5.3 and Responsibilities Regarding Nonlawyer Assistants

Model Rule 5.3 addresses supervision over nonlawyers. It provides:

> *With respect to a nonlawyer employed or retained by or associated with a lawyer:*
>
> *(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;*
>
> *(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and*
>
> *(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:*
>
> *(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or*

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[17] In other contexts, the Standing Committee on Ethics and Professional Responsibility has interpreted Rule 1.4(b) to require disclosure to a client. See, e.g., ABA Formal Ethics Opinion 483 (October 17, 2018) ("When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules"); ABA Formal Ethics Opinion 481 (April 17, 2018) ("Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an 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.")

[18] Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Secretary of the Department of Health and Human Services (HHS) has issued regulations governing the privacy of health information. Referred to as the "Privacy Rule," these regulations, as explained at the HHS website on the rule, https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html, "address the use and disclosure of individuals' health information—called 'protected health information' by organizations subject to the Privacy Rule." If a disclosure is going to be made by other than the impaired lawyer, the Privacy Rule should be reviewed to ensure that HIPAAA requirements either are not applicable or have been satisfied.

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

A lawyer with a well-being impairment may not be able to carry out Rule 5.3 responsibilities. A lawyer supervising a nonlawyer who has a well-being impairment has to ensure that nonlawyer does not place in jeopardy the lawyer's compliance with the rules of professional conduct. Rule 1.6 confidentiality concerns, for example, could become an issue if a nonlawyer is holding client information. Similarly, if a nonlawyer has access to client funds or property, there must be mechanisms in place to ensure that misappropriation does not occur.

Model Rule 1.6 and the Duty of Confidentiality

Lawyers have a duty to protect the confidences of their clients. Model Rule 1.6 contains the basic "confidentiality" obligations of lawyers. Rule 1.6(a) provides that a lawyer "shall not" reveal information "relating to representation of a client unless the client gives informed consent,"[19] the disclosure is "impliedly authorized in order to carry out the representation,"[20] or the disclosure is permitted by Rule 1.6(b).[21]

Comment [16] of Model Rule 1.6 succinctly provides:

A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

I do not assume that failing to protect confidentiality by a lawyer suffering from a well-being impairment is a substantial risk, but in some circumstances it could be. And I refer here not necessarily to what a lawyer might say under, for example, the influence of alcohol, but also to a lawyer's failure to safeguard electronic devices or papers that may contain client information because of some diminished capacity.

Once again, supervisory lawyers or lawyers with managerial responsibility have to be alert to Rule 1.6 risks. Sole practitioners will not have the supervisory or managerial check-and-balance that a law

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[19] Informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rule 1.0(e).

[20] To illustrate this second exception, comment [5] to Rule 1.6 explains that a lawyer is impliedly authorized to admit a fact that cannot be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may also disclose information to each other relating to a client in the firm "unless the client has instructed that particular information be confined to particular lawyers."

[21] Rule 1.6(b) is not applicable in this context.

firm might provide. Staff in such a practice or good lawyer-friends might be the good Samaritans upon which solo practitioners have to rely to help them deal with a well-being impairment.[22]

Model Rules 1.15 and 1.16 and Safeguarding Property

Model Rule 1.15(a) creates a fiduciary obligation on lawyers to safeguard client property, which includes client documents. It provides:

> *A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.*

Model Rule 1.16(d) addresses termination but also discusses handling of client documents. It provides:

> *Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.*

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[22] Solo practitioners have been the topic of several ethics opinions on the topic of contingency planning. For example, see Philadelphia L.E.O 2014-100 (December 2015), http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2014-100_21.pdf, The authors determined that the Pennsylvania RPC do not mandate a succession plan in the event of death or disability, but other rules, like those relating to confidentiality or safeguarding client property, weigh "heavily in favor of lawyers taking steps to anticipate the closure of their practices due to death or disability even if that closure is not imminent. The authors urged the appointment of an "assisting attorney" as a "backup" to deal with the transition. The opinion contains a discussion of issues associated with identifying and assisting an attorney as well as best practices for dealing with succession planning. They are attached as an Appendix to this paper. Some jurisdictions require the designation of "transition counsel," Arizona Supreme Court Rule 41(i), https://govt.westlaw.com/azrules/Document/NAD032AF0661311DC84EA9CBE9F8E38DB?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default), ("The duties and obligations of members shall be: . . . (i) To protect the interests of current and former clients by planning for the lawyer's termination of or inability to continue a law practice, either temporarily or permanently") and Comment [2] ("Lawyers must plan for the possibility that they will be unable or unwilling to discharge their duties to current and former clients or to protect, transfer and dispose of client files, property or other client-related materials. As part of their succession plan, solo practitioners should arrange for one or more responsible transition counsel agreeable to assuming these responsibilities. Lawyers in multi-lawyer firms and lawyers who are not in private practice, such as those employed by government or corporate entities, should have a similar plan reasonable for their practice setting."). See also Florida Bar Rule 1-3.8, https://www-media.floridabar.org/uploads/2018/12/Ch-1-Dec-14-2018-RRTFB.pdf, which addresses appointment of an "inventory attorney" by a circuit court in the event that an attorney, among others, suffers an involuntary leave of absence due to, among others, illness, and no partner or other person is known to exist to conduct the attorney's affairs. The Rule makes no reference to alcohol or substance abuse but addiction to either likely would be regarded as an "illness" under the Rule.

Lawyers today often carry their client documents with them. Among mobile telephone, tablet computers, and notebook computers, lawyers have enormous amounts of client information in their possession wherever they might travel. Lawyers with a well-being impairment may be, under certain circumstances, at greater risk of losing one of these devices or leaving them somewhere where they may not be recovered.

If a client's funds are at risk of being commingled or lost in the context of this discussion, the lawyer with the well-being impairment and those that supervise or have managerial responsibility for the lawyer, may face consequences beyond ethical ones. However, whether in a solo practice or a law firm, establishing proper procedures to protect against the failure to safeguard client funds by a lawyer is a prudent step to take at the outset of any law practice or as part of good law firm management. Accountants can play a helpful role here particularly with respect to solo practitioners if they are given authority to develop internal accounting procedures and proper checks and balances on the handling of client funds.[23]

Model Rule 8.3: Reporting Professional Misconduct

Model Rule 8.3 requires disclosure of a certain RPC violations by another lawyer except where knowledge of the violation was gained by the reporting lawyer (or judge) while participating in an "approved" lawyers assistance program. Model Rule 8.3 provides:

> *(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.*
>
> *(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.*
>
> *(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.*

The comments to Rule 8.3 echo the text of the Rule. The comments refer to "misconduct" and "victims." Again, Rule 8.4(a) defines "misconduct" as including a violation of the Rules of Professional Conduct. If a client is prejudiced by the violation, the client then becomes a "victim." Here are relevant portions of the comments:

- "Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct." Comment [1].

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[23] Without accounting safeguards in place, an impaired lawyer who needs funds to feed a gambling, alcohol, or other addiction may succumb to the temptation to misappropriate client funds or property at the end of an engagement without the client realizing it. Where the client made an advanced payment of fees or costs, or where funds belonging to the client otherwise remain in a law firm account at the end of an engagement, there must be procedures in place to protect against misappropriation.

- "Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover." *Id*.
- "Reporting a violation is especially important where the victim is unlikely to discover the offense." *Id*.
- "If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense." Comment [3].
- "This 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." *Id*.
- "The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." *Id*.
- "A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct." *Id.*

Let me translate this text into practical points. First, the potential "reporting" lawyer must "know" of the RPC violation. "Knowledge" under the Model Rules requires "actual knowledge." Model Rule 1.0(f) provides that the word "knows" "denotes actual knowledge of the fact in question," although it adds the caveat that a person's knowledge "may be inferred from circumstances." So hearsay or innuendo does not trigger a reporting obligation.

Second, the violation has to raise a "substantial question" as to that lawyer's "fitness as a lawyer in other respects."[24] In the context of a lawyer suffering from a well-being impairment, one must evaluate what RPC the lawyer has violated; how serious the offense is (does it rise to the level that a self-regulating profession "must vigorously endeavor to prevent"?); and is the lawyer's fitness "in other respects" at risk? If the violation results from the well-being impairment and the impairment is not being addressed, presumably this part of Rule 8.3(a) would be satisfied because the lawyer may repeat the violation or violate a different RPC and thus the lawyer's "fitness in other respects" is a genuine concern; i.e., the "substantial question" requirement has been satisfied.

I have to believe that lawyers faced with a reporting dilemma because of another lawyer's well-being impairment will evaluate if they can assist the impaired lawyer by encouraging the lawyer to seek whatever help is appropriate to address the impairment. That may mean reaching out to a supervisory lawyer or a lawyer with managerial responsibility for the impaired lawyer. Or it may mean seeking assistance from a Lawyer's Assistance Program, which may be able to start an intervention or advise the lawyer on appropriate steps to take based on the circumstances presented.

If the impaired lawyer is in a solo practice, lawyer-friends or staff, hopefully, will recognize the need for assistance and help the impaired lawyer find a way to obtaining that assistance. Even a lawyer within a law firm may, in effect, operate as a solo practitioner. For example, the nature of the practice may be such that only one lawyer handles a particular type of matter, or client demands limit staffing a matter to a single lawyer. Again, others lawyers within the firm and staff play an important role in

[24] I will assume that only fitness, and not honesty or trustworthiness, is not implicated here.

detecting signs of an impairment as well as preventing conduct that could adversely affect the interests of clients.[25]

Comment [5] elaborates on Rule 8.3(c), which protects a lawyer in an assistance program from having to report on another lawyer in that program. The rule makes good sense. A self-regulating profession wants to encourage lawyers to get help. Punishing them for getting help would discourage participation in assistance programs. Comment [5] provides:

> *[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.*

The first half of Rule 8.3(c) is echoed in Comment [2]: "A report about misconduct is not required where it would involve violation of Rule 1.6." But Comment [2] adds, "[A] lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests." In the context of lawyer well-being, the potential reporting lawyer might also seek client consent if that is the catalyst required for the impaired lawyer to seek assistance.

If you are counsel to the lawyer accused of misconduct, Rule 8.3 is not applicable. Comment [4] provides: "The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship."

Model Rule 8.4 - Misconduct

While I have referenced Rule 8.4 already above, let me set forth the first four subparagraphs of the rule:

> *It is professional misconduct for a lawyer to:*
>
> *(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;*
>
> *(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;*
>
> *(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;*

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[25] I discuss elsewhere in this paper protocols that solo practitioners or law firms should have in place to address assistance to an impaired lawyer as well as prevention of adverse impacts on a client because of the impairment.

(d) engage in conduct that is prejudicial to the administration of justice; . . .

Rule 8.4(a) sets forth the basic rule: a violation of the RPC is "misconduct." Whether it rises to the level of a Rule 8.3(a) reporting obligation will be the issue for lawyers faced with the dilemma of how to deal with misconduct by a lawyer suffering from a well-being impairment.

If a violation of subparagraphs (b) or (c) is implicated by a lawyer suffering from a well-being impairment, "professional misconduct" exists but the lawyer may face consequences beyond those associated with a bar disciplinary action.

Subparagraph (d) may capture conduct not captured by subparagraphs (a) through (c), but it would be an unusual case where conduct occurs that does not violate (a) through (c) and subparagraph (d) has to be relied upon to establish misconduct.

Model Rules 4.1, 4.4, and 8.2: Truthfulness and Civility

Model Rule 4.1(a) addresses the truthfulness of statements made by lawyers. It provides in pertinent part: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." Model Rule 4.4(a) addresses the obligation imposed on lawyers to refrain from conduct that will embarrass a person. It provides in pertinent part: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, . . ." Model Rule 8.2(a) governs statements made by lawyers about judges. It provides in pertinent part: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

A lawyer suffering from some types of impairment may engage in outbursts against others that violate these rules. Lawyers with managerial or supervisory authority need to be attuned to this risk if a lawyer in a law firm is making statements or sending emails or other communications that violate these rules. Solo practitioners may need help in policing their own verbal or written outbursts. In addition, lawyers or judges who are at the receiving end of improper communications or who witness improper conduct under these rules need to evaluate carefully their obligations under Rule 8.3(a), particularly where the behavior is repetitive.

FORMAL ETHICS OPINIONS OF THE ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

There are two pertinent Formal Ethics Opinions (F.E.O.) issued by the Standing Committee on Ethics and Professional Responsibility (SCEPR) that address some of the Rules set out above in a lawyer-impairment context.

ABA F.E.O. 03-429 (June 11, 2003): Duties of lawyers in the same law firm as a lawyer suffering an impairment

The SCEPR issued Formal Ethics Opinion (F.E.O.) 03-429 on June 11, 2003[26] to address the responsibilities of lawyers within a law firm who must confront another lawyer's impairment.

The opinion begins with a number of preliminary observations.

The first is that lawyers remain responsible for their actions: "[M]ental impairment does not lessen a lawyer's obligation to provide clients with competent representation" or to withdraw under Rule 1.16(a)(2) if there is a material impairment. If the lawyer is unaware of the impairment, or denies that it is affecting the lawyer's work, "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."

The opinion also recognizes at the outset that a lawyer's mental condition may fluctuate:

> *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.*

The Committee also cautioned that lawyers should not jump to conclusions. There may be disorders "that may appear to be mental impairment (for example, Tourette's Syndrome), while causing overt conduct that appears highly erratic," but does not "interfere with competent, diligent legal representation such that they 'materially impair' a lawyer's ability to represent his clients."

And one way to evaluate how to proceed is to consult a health professional: "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."

Against this backdrop, the opinion first addressed the supervisory obligations under Model Rule 5.1(a). As noted above, 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 firm make 'reasonable efforts' to establish internal policies and procedures 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." And 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."

The SCEPR then applies these rules with the following guidance:

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[26] https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/clientpro_migrated/03_429.pdf. In quotations from this and other ethics opinions in this paper, I omit all footnotes, even though I may fail to so note that in the text.

- The measures required under Rule 5.1(a) "depend on the firm's size and structure and the nature of its practice."
- 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."
- 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."
    - "[T]he 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.[27]
- "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."

Reasonable efforts will insulate the other lawyers in the law firm subject to Rule 5.1(c):

> *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 [as provided in Rule 5.1(c)].*[28]

What if the impaired lawyer has violated the Rules of Professional Conduct? Is there a reporting obligation? F.E.O. 03-429 tackles this question as well with this guidance:

- "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."
- 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."

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[27] The SCEPR gave this example: "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:"

[28] In a footnote, the SCEPR also admonished lawyers: "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."

- 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."
- If "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."

Of course, the next question is one of disclosure to the client. The SCEPR concluded that under Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"), "there may be a responsibility to discuss with the client the circumstances surrounding the change of responsibility."[29] If such discussions occur, "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."[30]

And what if the impaired lawyer has left the law firm? It should be no surprise that there remain responsibilities to the client, who may have to choose whether to follow the departed 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.*

And what if the client had already decided to shift the work to the departed lawyer? The firm has no duty to warn, the SCEPR determined, and may want to avoid even using a joint letter regarding the transition since that might represent an endorsement of the departed lawyer's competence:

> *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. 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.*

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[29] As noted earlier, if the HIPAA Privacy Rule is applicable, disclosures must be compliant with that Rule.

[30] The SCEPR issued another admonition citing to Rule 5.1(c)(2), *supra*: "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."

The firm also has to consider whether it has a reporting obligation under Rule 8.3(a). If there is no obligation because the firm's procedures resulted in support to prevent one, there still may be a need to follow up: "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."

ABA F.E.O. 03-431 (August 7, 2003): Duties of lawyers not in the same law firm as a lawyer suffering an impairment

Building upon F.E.O 03-429 (June 11, 2003), the SCEPR issued Formal Ethics Opinion 03-431 (August 8, 2003) to address the obligation of a lawyer who learns that another lawyer, *"not in his firm,"* suffers "from a mental condition that materially impairs" the other lawyer's ability to represent a client. By framing the question as involving a "material impairment," the answer should be obvious:

> *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.*

Referring to the requirement to withdraw under Rule 1.16(a)(2), the SCEPR observed:

> *That requirement reflects the conclusion that allowing persons who do 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,*

The SCEPR provides some guidance to the potential reporting lawyer using examples that fall into the "obvious" category:

> *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.*

However, the SCEPR also recognized that a single act may evidence a lack of fitness:

> *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 symptoms 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."*

In response to the concern some lawyers may have (remember this opinion addresses lawyers who are not in the same firm) about their inability to judge the condition of another, the SCEPR wrote that lawyers may not shut their eyes to conduct that reflects "generally recognized symptoms of impairment."

> *A lawyer may be impaired by senility or dementia due to age or illness or because of alcoholism, drug addiction, substance abuse, chemical dependency, or mental illness. 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).*

(Footnotes omitted.)[31]

F.E.O. 03-431 contains other helpful tips:

- Each situation "must be addressed based on the particular facts presented."
- "A lawyer need not act on rumors or conflicting reports about a lawyer."
- 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."
- "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."
- "He might consider contacting an established lawyer assistance program."
- While there is no obligation to do so, "if the affected lawyer is practicing within a firm, the lawyer should consider speaking with the firm's partners or supervising lawyers."
- "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."

What of the direct approach? Speaking to the affected lawyer "about his concerns"? The SCEPR says that may be a good idea in "some" (undefined) circumstances but care must be taken to ensure that the focus remains on the lawyer's conduct:

> *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,*

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[31] One of the footnotes in this passage reminds lawyers that criminal conduct might be involved, triggering a reporting obligation for an additional reason: "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.'"

> *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.*

The SCEPR is also quick to point out, however, that there is no obligation to speak to the affected lawyer or an associated law firm: "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."

Echoing F.E.O, 03-429, the Committee reminded readers that "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."[32]

Finally, the SCEPR offered an additional route the reporting lawyer may take. Contact a lawyers' assistance program:

> *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.*

STATE BAR ETHICS OPINIONS

State bar ethics committees have addressed reporting obligations and the roles of supervisory and managerial employees as well as the obligations of the impaired lawyer. Those that post-date ABA F.E.O. 03-429 and 03-431 rely heavily on both opinions. I set forth below a representative sample of state bar ethics opinions.

West Virginia Legal Ethics Opinion 92-04

In L.E.O 92-04,[33] the West Virginia Committee on Legal Ethics addressed this hypothetical:

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[32] The SCEPR added: "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, however, the reporting lawyer should obtain the client's informed consent to the disclosure in cases involving information learned in the course of representation through interaction with the affected lawyer."

[33] http://www.wvodc.org/pdf/lei/Chronologic/LEI-92-04.pdf.

> *Attorney #1 discovered that attorney #2, who is an active alcoholic, had "misappropriated client funds." Attorney #1 contact the Lawyer Impairment Committee for attorney #2's alcoholism and contracted the Lawyer Assistance Committee with respect to the misappropriations. Members of the Lawyer Assistance Committee worked with attorney #2 to repay the money.*

The question presented was, as you may have guessed: Has attorney #1 discharged his obligation to report unethical conduct under Rule 8.3(a)? Framed in terms of Rule 8.3(a), where the Rule states that the reporting lawyer "shall inform the appropriate professional authority," did attorney #1 do that by reporting to the Lawyer Assistance Committee instead of the Committee on Legal Ethics?

As you may have also guessed, the Committee disagreed with attorney #1 and determined that misappropriation of funds represents professional misconduct and the Committee is the "appropriate professional authority" to receive reports of professional misconduct.

Utah Legal Ethics Opinion 98-12 (December 4, 1998)

In Utah L.E.O. 98-12,[34] the question presented related to knowledge of another lawyer's use or possession of controlled substances: "When a lawyer becomes aware that another lawyer has illegally used or possessed controlled substances, under what circumstances must the first lawyer report such conduct to the Utah State Bar?"

The answer to this question has particular resonance today with so many states having approved the use of marijuana under medical or recreational circumstances. The answer was as one might expect—if there is actual knowledge and the requirements of Rule 8.3(a) are satisfied, a report must be made:

> *A lawyer is required to report to the Utah State Bar any unlawful possession or use of controlled substances by another lawyer if two conditions are satisfied: (1) the lawyer has actual knowledge of the illegal use or possession, and (2) the lawyer has a reasonable, good-faith belief that the illegal use or possession raises a substantial question as to the offending lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. A lawyer is excused from this reporting requirement only if (i) the lawyer learns of such use or possession through a bona fide attorney-client relationship with the offending lawyer, or (ii) the lawyer becomes aware of the unlawful use or possession through providing services to the offending lawyer under the auspices of the Lawyers Helping Lawyers program of the Bar.*

Philadelphia Bar Association Opinion 2000-12 (2000)

In Philadelphia Bar Association L.E.O. 2000-12 (2000),[35] the ethics committee addressed this situation: A two-person law firm is dissolving. One of the lawyers (W) had a reading disability and some memory impairment due to several strokes but did not intend, in the lawyers' joint solicitation to clients, to tell them of his condition. What must, or may, the other partner do?

The committee concluded:

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[34] http://www.utahbar.org/wp-content/uploads/2017/12/1998-12.pdf.

[35] http://www.philadelphiabar.org/page/EthicsOpinion2000-12?appNum=1.

- "the inquirer may have a Rule 8.3(a) duty to inform the Disciplinary Board of the Pennsylvania Supreme Court of W's proposed conduct";.
- the inquirer "should also consider a direct approach to W urging that W not go forward with a solicitation of the firm's clients which includes an indication that W would handle their cases in any substantive way";
- "there does not . . . appear to be an obligation under the Rules to inform the clients to be solicited of W's disability and his consequent inability to personally handle their matters";
- "Rule 1.1 may permit such disclosure to the clients, as may Rules 1.3 and 1.4(a) and (b), but none of the just-cited Rules appear to contemplate the situation posited by inquirer, and inquirer would be risking action against him by W on various legal theories if inquirer engaged in the proposed disclosure to the firm's clients."

The Committee acknowledged that under Pennsylvania RPC 5.1(c)(2), the "inquirer may have some responsibility for violation by W of the Rules, but under the facts as stated, that responsibility could be discharged by urging that W desist from misrepresenting his ability to serve the firm's clients, and informing the Disciplinary Board if W fails to comply with Inquirer's request."

But then the committee came up with a solution for the inquirer to inform the clients:

> *If, in the process of remonstrating with W, and proceeding with the Disciplinary Board, inquirer observes that W's violation of the Rules persist, a direct approach to clients, carefully worded to reflect demonstrable facts and to avoid discouraging the clients from selecting a firm capable of handling their matters which might employ or have a relationship with W, may be permitted under the Rules.*

South Carolina Legal Ethics Opinion 02-13 (2002)

In Opinion 02-13,[36] the South Carolina Bar ethics committee addressed reporting obligations associated with this hypothetical: "Attorney A has knowledge that Attorney B, to whom he has referred clients, has developed a medical condition which renders him unable to practice law with any material degree of competence."

As to a report to the Bar, the committee followed Rule 8.3(a)'s text in concluding:

> *If Attorney A has knowledge that Attorney B has violated Rules 1.1 and 1.16 (a) (2) due to a medical condition materially impairing the attorney's ability to represent a client or clients, and the violations raise a substantial question as to Attorney B's fitness as a lawyer, Attorney A shall inform the appropriate professional authority, unless the reporting would disclose information protected by Rule 1.6.*

What about reporting to Attorney A's clients that had been referred to Attorney B? The committee explained that reporting was required:

> *Since the referrals have evolved out of Attorney A's representation of his or her clients, Attorney A is obligated to advise clients concerning changes in his or her opinion, especially if Attorney A's reservations concerning the attorneys fitness have*

[36] https://www.scbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-02-13/

reached a level where Attorney A is contemplating reporting a violation, which could lead to disciplinary action regarding Attorney B's fitness or transfer to incapacity inactive status.

New York State Bar Association Opinion 822 (June 27, 2008)

Writing under the Code of Professional Responsibility, in Opinion 822,[37] the New York State Bar Committee on Professional Ethics addressed a single question: to whom does a lawyer report knowledge of professional misconduct when the professional misconduct is associated with a condition that can be treated through a lawyer assistance program? The Committee determined that the report must be made to a tribunal or other authority empowered to investigate or act upon such violation, including the "appropriate Grievance Committee." Reporting to a Lawyer Assistance Program does not satisfy the reporting obligation. "In our opinion, while lawyers are to be encouraged to refer to an LAP lawyers who are abusing alcohol or other substances or who face mental health issues, such a referral would not satisfy the ethical reporting requirement."[38]

Kentucky Legal Ethics Opinion E-430 (January 16, 2010)

In L.E.O. E-430,[39] the Bar ethics committee covered a host of questions.

Under what circumstances does Rule 8.3 impose a duty to report professional misconduct of others? The committee quoted Kentucky RPC Rule 8.3,[40] which is similar to but broader than Model

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[37] https://www.nysba.org/CustomTemplates/Content.aspx?id=5218.

[38] See also NYSBA L.E.O. 854 (March 11, 2011). It did not involve a lawyer impairment but did address reporting suspicions. Here is the digest: "Lawyer who was employed by another lawyer must report knowledge of former employer's violation of the Rules of Professional Conduct if the violation raises a substantial question about the employer's honesty, trustworthiness, or fitness as a lawyer and if the report does not disclose confidential information. If the former employee lacks knowledge, he may report a good faith belief or suspicion of the former employer's professional misconduct to an appropriate authority if the report does not disclose confidential information, but may not communicate that belief or suspicion to the employer's clients." http://www.nysba.org/CustomTemplates/Content.aspx?id=5182.

[39] https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)_/kba_e-430.pdf.

[40] Kentucky RPC 8.3 provides:

Rule 8.3. It then set forth the specific conditions that must be met for there to be a reporting obligation:

- The reporting lawyer must "know" of the violation.
- In the case of a lawyer, the violation of the Rules of Professional Conduct must raise "a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."
- In the case of a judge, the violation of the Rules of Judicial Conduct must raise "a substantial question as to the judge's fitness for office."
- The information that serves as the basis of "knowledge" must not be "protected by Rule 1.6 or other law" nor have been "receive(d) in the course of participating in the Kentucky Lawyer Assistance Program or the Ethics Hotline."
- If the above conditions are met, and no exceptions (discussed below) applies, then the lawyer with "knowledge" must report.
- If the misconduct raises a substantial question as to a lawyer's honesty, trustworthiness or fitness, or if the lawyer is self-reporting, or a prosecutor is reporting the conviction of another lawyer, the report must be made to KBA Bar Counsel.
- If the misconduct raises a substantial question as to a judge's fitness for office, the report must be made to the Judicial Conduct Commission.
- The duty to report to Bar Counsel or the Judicial Conduct Commission is independent of any other reporting obligations, such as a lawyer's obligation to report perjury to a tribunal under [Kentucky Supreme Court Rule (SCR)] 3.130 (3.3(a)(3)).
- Lawyers cannot satisfy their obligations under Rule 8.3 by advising the tribunal of misconduct or by making a referral to KYLAP.
- The duty to report is an individual duty. It is not satisfied because a report has been made to another person or by another lawyer.

When does a lawyer "know" a violation has occurred? Citing to the definition of "know" (actually knowledge where knowledge can be inferred from the circumstances), the committee explained that the standard is an objective one. Absolute certainty "is not required." "Mere suspicion" is

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"(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Association's Bar Counsel (emphasis added).
(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such violation to the Judicial Conduct Commission (emphasis added).
(c) A lawyer is not required to report information that is protected by Rule 1.6 or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received in the course of participating in the Kentucky Lawyer Assistance Program or Ethics Hotline.
(d) A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).
(e) As provided in SCR 3.435, a lawyer who is disciplined as a result of a lawyer disciplinary action brought before any authority other than the Association shall report that fact to Bar Counsel (emphasis added).
(f) As provided in SCR 3.166(2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, should immediately notify the Director of such event."

insufficient. There is no duty to investigate, the committee pointed out, but there may be circumstances that require a lawyer to investigate. Illustratively, a managerial or supervisory lawyer may have such a duty under Kentucky's RPC. If there is doubt about a duty to report, "any reasonable doubt should be resolved in favor or reporting."

What constitutes a "substantial question" within the meaning of Rule 8.3? After quoting the text of the rule, the committee explained that the reporting obligation is focused on "serious violations." If the conduct would result in disbarment or suspension, then "clearly" it must be reported, the committee wrote. The committee also noted that "chronic neglect" may trigger a reporting obligation. Then focusing on impairments, the committee contoured the reporting obligation:

> *Misconduct, particularly neglect of duty, often arises when a lawyer is suffering from some kind of impairment. Impairment may arise as a consequence of senility, dementia, alcoholism, drug addiction, substance abuse, chemical dependency or mental illness. While not all impairments must be reported, any impairment that materially affects the fitness of the lawyer or the judge must be reported, unless one of the exceptions described below applies.*

Does a lawyer have a duty to report conduct unrelated to the practice of law or to judicial duties? The answer is yes if the conduct "raises a substantial question about the lawyer's honesty, trustworthiness, or fitness as a lawyer, or the judge's fitness for office."

Does a lawyer have a duty to report information protected by SCR 3.130 (1.6) or other law, or information received in the course of participation in the Kentucky Lawyer Assistance Program (KYLAP) or the Ethics Hotline? The committee highlighted the text of Rule 8.3 prohibiting without client consent a report of another's misconduct if knowledge of the misconduct is based on information protected by RPC 1.6. The committee added two points: (1)"lawyers are encouraged to discuss possible waiver and reporting with their clients, especially where the public faces a serious risk of harm," and (2) "although a lawyer cannot report information protected by Rule 1.6, the lawyer does have a duty to report information from an independent source unrelated to the representation, if it raises a substantial question as to the lawyer's honesty, trustworthiness or fitness."

And information learned in the court of participation in a LAP does not, by rule, have to be reported. Similarly, information conveyed in the course of a Kentucky Ethics Hotline inquiry is also confidential.

Does a lawyer have a duty to self-report his or her own misconduct or that of an associate? Rule 8.3 does not address self-reporting, the committee explained, while adding, "[t]his is not to say that a lawyer should not self-report and in some circumstances it may be the best course of action."[41] As to the conduct of others, the committee seemed a bit sheepish in explaining that Rule 8.3 applies:

> *A lawyer's obligation under Rule 8.3 may require a lawyer to report a partner or associate. This may have consequences for the reporting lawyer, but there is nothing*

[41] Discipline from other jurisdictions must be self-reported in Kentucky: "[S]elf-reporting is required under SCR 3.453, which provides that lawyers must report discipline from other jurisdictions, including federal court. In addition, SCR 3.166 requires a lawyer who has pleaded 'guilty to a felony, including a no contest plea or a plea in which the member allows conviction but does not admit the commission of a crime, or is convicted by a judge or jury of a felony, in this state or in any other jurisdiction' to self-report."

in the rule to suggest that the duty to report does not extend to one with whom the reporting lawyer is or was associated. For example, if a lawyer knows that another lawyer in the firm falsified material documents for trial, the lawyer is obligated to report that misconduct unless one of the exceptions applied.

Does a lawyer have a duty to report a suspended or disbarred lawyer? A suspended lawyer is subject to the RPC. Thus if a reportable offense occurs, a report must be made by a lawyer with knowledge of the misconduct. Disbarred lawyers are no longer subject to the RPC. Absent conduct representing the unauthorized practice of law, there is no reporting obligation.

Does a prosecutor have additional responsibilities under Rule 8.3? Kentucky Rule 8.3 (f) provides: "As provided in SCR 3.166 (2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, should immediately notify the Director of such event." The committee explained that this report is mandatory under Kentucky Supreme Court Rule 3.166(2):

Although 8.3 (f) says a prosecutor "should" report, SCR 3.166 (2) makes it clear that the obligation to report is mandatory. It provides: "The attorney prosecuting the case to a plea of guilty, conviction by judge or jury or entry of judgment, whichever occurs first, shall immediately notify the Director of the Kentucky Bar Association and the Clerk of the Supreme Court that such plea, finding or entry of judgment has been made."

Is the reporting lawyer immune from civil or criminal liability? In Kentucky, "A lawyer who makes a report in good faith is immune from civil or criminal liability or disciplinary action by the bar, except for conduct prohibited by SCR 3.130 (3.4(f)). Rule 3.4 prohibits a lawyer from filing or threatening to file a disciplinary charge 'solely' to gain an advantage in a civil or criminal matter."

What are the procedures for reporting a violation and when must the report be made? The committee explained that report of lawyer misconduct is made to the Association's Bar Counsel, while reports of judicial misconduct are made to the Kentucky Judicial Conduct Commission. The reporting lawyer should report the facts. There is no prohibition on discussing the matter initially by telephone with either Bar Counsel or the Commission. But if a report is going to be made, under SCR 4.170, it must be made in writing if against a judge, and "good practice" dictates that all reports be made in writing. An "anonymous report does not comply with the rule and affords no protection to the reporting lawyer."

As to when the report must be made, the committee suggested that, "under most circumstances the report should be made within a reasonable time after discovery." However, the committee did have these cautionary words when the report may have a detrimental impact on a client:

To the extent that the client's interests are not protected by the Rule l.6 exception, it is the view of the Committee that where an immediate report would have a detrimental impact on the client, the lawyer may delay reporting to protect the client's interests. The lawyer would be well served to document any discussions with the client and the reasons for delaying the reporting.

Kansas Bar Association Legal Ethics Opinion No. 14-01 (June 11, 2014)

In Kansas L.E.O. 14-01,[42] the Kansas ethics committee determined that a lawyer is not required to report another lawyer who was suffering from memory lapses to the Disciplinary Administrator of the Bar in the absence of evidence of misconduct. However, the committee recommended that a report be made to the Kansas Lawyers Assistance Program.

The facts were straightforward. A law firm had a partner with "possible cognitive degeneration." The partner had memory lapses manifested "by an inability to dial in to a conference call, a client reporting that the lawyer required a re-orientation to the facts of the representation, and multiple staff members reporting the lawyer's failure to recall prior discussions." There were no reported violations of the Kansas RPC. However, the inquiring law firm believed that the lawyer's memory lapses "could impact clients." The lawyer left the firm but continued to practice. What does Kansas Rule 8.3 require under these circumstances?

The Kansas reporting rule differs from Model Rule 8.3. Kansas RPC 8.3 provides:

> *(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.*

The Committee explained the differences:

> *This Rule contrasts strikingly with the Model Rule adopted in most of the other states. The Model version of Rule 8.3(a) provides:*
>
> *(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.*
>
> *The Model Rule applies only to conduct by "another lawyer," (i.e. not to the reporting lawyer himself). Moreover, the duty to report under the Model Rule does not apply to all Rule violations, but only to those violations which raise "a substantial question" as to that other lawyer's "honesty, trustworthiness or fitness as a lawyer." Those limitations were all removed from the Kansas version of the Rule in 1999. In Kansas, lawyers have a duty to report themselves, and they have a duty to report even KRPC violations that do not implicate the lawyer's honesty, trustworthiness or fitness. The Comment to Rule 8.3 explains the justification of the duty to report on the basis of the bar as a self-policing profession.*

In the absence of a violation of the Kansas RPC, however, the committee determined, there is not duty to report:

> *[T]the duty to report only extends to a situation in which the reporting lawyer has "knowledge" of acts or omissions which constitute a violation of the KRPC. In the present situation, the inquiring law firm does not identify any violations of the KRPC by the subject lawyer. Thus, no duty to report would arise.*

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[42] https://cdn.ymaws.com/www.ksbar.org/resource/resmgr/files/898595_1.pdf

The committee did recommend that the law firm consider referring the lawyer to the Kansas Lawyers Assistance Program (KALAP). The committee explained:

> *However, should there be candid concerns in this regard, even coupled with an actual KRPC violation, consideration is commended to the resources and facilities provided by the Kansas Lawyers Assistance Program ("KALAP").*
>
> *(a) KALAP Purpose. The Kansas Lawyers Assistance Program (KALAP) is established to provide immediate and continuing assistance to any lawyer needing help with issues, including physical or mental disabilities that result from disease, addiction, disorder, trauma, or age and who may be experiencing difficulties performing the lawyer's professional duties. KALAP will have the following purposes:*
>
> *(1) to protect citizens from potential harm that may be caused by lawyers in need of assistance;*
>
> *(2) to provide assistance to lawyers in need; and*
>
> *(3) to educate the bench and bar about the causes of and services available for lawyers needing assistance.*

North Carolina Legal Ethics Opinion 2013-8 (July 25, 2014)

In L.E.O. 2013-8,[43] the North Carolina ethics committee address the response to the "mental impairment" of a "firm lawyer." The committee introduced the topic with this statement:

> *As the lawyers from the "Baby Boomer" generation advance in years, there will be more instances of lawyers who suffer from mental impairment or diminished capacity due to age. In addition, lawyers suffer from depression and substance abuse at approximately twice the rate of the general population. This opinion examines the obligations of lawyers in a firm who learn that another firm lawyer suffers from a mental condition that impairs the lawyer's ability to practice law or has resulted in a violation of a Rule of Professional Conduct.*

(Footnote omitted.) Then relying on ABA F.E.O 03-429, the committee set forth the following inquiries and opinions:

1. Attorney X has been practicing law successfully for over 40 years and is a prominent lawyer in his community. In recent years, his ability to remember has diminished and he has become confused on occasion. The other lawyers in his firm are concerned that he may be suffering from the early stages of Alzheimer's disease or dementia.

What are the professional responsibilities[2] of the other lawyers in the firm?

The committee restated the applicable rules. "The partners in the firm must make reasonable efforts to ensure that Attorney X does not violate the Rules of Professional Conduct." "Mental impairment may

[43] https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-8/.

lead to inability to competently represent a client as required by Rule 1.1." It might lead to an "inability to complete tasks in a diligent manner as required by Rule 1.3." It might render the lawyer unable "to communicate with clients about their representation as required by Rule 1.4." Whatever the cause, each of these represents a violation of RPC, and under Rule 1.16(a)(2), "a lawyer is prohibited from representing a client and, where representation has commenced, required to withdraw if 'the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."

Rules 5.1(a) and 5.1(b) "require a managerial or supervisory lawyer who suspects or knows that a lawyer is impaired to closely supervise[5]the conduct of the impaired lawyer because of the risk that the impairment will result in violations of the Rules."

Partners and supervising lawyers "may wish to consult a mental health professional for advice about identifying mental impairment and assistance for the impaired lawyer."

"If the lawyer's mental impairment can be accommodated by changing the lawyer's work environment or the type of work that the lawyer performs, such steps also should be taken."

"Making a confidential report to the State Bar's Lawyer Assistance Program (LAP) (or to another lawyers assistance program approved by the State Bar[7]) would also be an appropriate step. The LAP can provide the impaired lawyer with confidential advice, referrals, and other assistance."

2. Attorney X's mental capacity continues to diminish. Apparently as a consequence of mental impairment, Attorney X failed to deliver client funds to the office manager for deposit in the trust account. It is believed that he converted the funds to his own use. In addition, Attorney X failed to complete discovery for a number of clients although he declined assistance from the other lawyers in the firm. Some clients may face court sanctions as a consequence. Although Attorney X is engaging and articulate when he meets with clients, he no longer seems able to prepare for litigation and, on more than one occasion, Attorney X's presentation in court was muddled, meandering, and confused.

What are the professional responsibilities of the other lawyers in the firm?

The committee concluded, of course, that Attorney X violated Rule 1.15 by failing to place entrusted funds in the firm trust account. He has also violated Rule 1.1 and Rule 1.3 by providing incompetent representation and by failing to act with reasonable promptness in completing discovery.

Steps "may have to be taken to provide additional ongoing supervision for Attorney X or to change the circumstances or type of work that he performs to avoid additional violations of his professional duties."

"The other lawyers in the firm must also take steps to mitigate the adverse consequences of Attorney X's past conduct including replacing client funds."

X's RPC violations may have to be reported to the State Bar or to the court. Under Rule 8.3(a), if an impaired lawyer's misconduct "is isolated and unlikely to recur because the mental impairment has ended or is controlled by medication or treatment, no report of incompetent or delinquent representation may be required."

"If the firm is able to eliminate the risk of future violations of the duties of competence and diligence through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation." (Citation omitted.)

Reporting is required "if the misconduct is serious, such as the violation of the trust accounting rules described in this inquiry, or the lawyer insists upon continuing to practice although his mental impairment has rendered him unable to represent clients as required by the Rules of Professional Conduct."

A report of misconduct "may not be made if it would require the disclosure of confidential client information in violation of Rule 1.6, and the client does not consent to disclosure. See Rule 8.3(c)."

Under Rule 1.4(b), if the managing lawyers "determine that the impaired lawyer cannot provide competent and diligent representation and should be removed from a client's case, the situation must be explained to the client so that the client can decide whether to agree to be represented by another lawyer in the firm or to seek other legal counsel."

Under Rule 5.1(c), even if the impaired lawyer is removed from a representation, "the firm lawyers must make every effort to mitigate any adverse consequences of the impaired lawyer's prior representation of the client."

3. If the firm partners determine that Attorney X has violated the Rules and there is a duty to report under Rule 8.3, may they fulfill the duty by reporting Attorney X to the State Bar's Lawyer Assistance Program (LAP)?

The committee answered this question bluntly, "No." It cited to North Carolina 2003 Formal Ethics Opinion 2 which determined, in the context of reporting opposing counsel, that the report should be made to the Grievance Committee of the State Bar so that the lawyer may be held professionally accountable. The committee added: "Making a report to the State Bar, as required under Rule 8.3(a), does not diminish the appropriateness of also making a confidential report to LAP. The Bar's disciplinary program and LAP often deal with the same lawyer and are not mutually exclusive. The discipline program addresses conduct; LAP addresses the underlying illness that may have caused the conduct. Both programs, in the long run, protect the public interest."

4. Attorney X announces his intent to leave the firm to set up his own solo practice and to take all of his client files with him. The other lawyers in the firm are concerned that, absent any supervision or assistance, Attorney X will be unable to competently represent clients because of his mental impairment.

What are the duties of the remaining lawyers in the firm if Attorney X leaves and sets up his own practice?

Beyond a potential duty to report, the committee explained that, "the remaining lawyers may have a duty to any current client of Attorney X to ensure that the client has sufficient information to make an informed decision about continuing to be represented by Attorney X." Referring again to Rule 1.4(b), the remaining lawyers may have to explain the matter to the clients so that they can make an informed decision about representation. "The clients of an impaired lawyer who leaves a firm must decide whether to follow the departed lawyer to his new law practice."

"To make an informed decision, the clients must be informed 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.' ABA Formal Op. 03-429."

There is no comparable duty to former clients of the impaired lawyer "as long as the firm avoids any action that might be interpreted as an endorsement of the services of the departed, impaired lawyer, including sending a joint letter regarding the lawyer's departure from the firm."

"The remaining lawyers in the firm may conclude that, while under their supervision and support, the impaired lawyer did not violate the Rules and, therefore, there is no duty to report to the State Bar under Rule 8.3. Nevertheless, subject to the duty of confidentiality to clients under Rule 1.6, voluntarily reporting the impaired lawyer to LAP (or another lawyer assistance program approved by the State Bar) would be appropriate. The impaired lawyer will receive assistance and support from LAP and this may help to prevent harm to the interests of the impaired lawyer's clients."

Associate lawyers and staff members are often the first to observe behavior indicating that a lawyer has a mental impairment. If an associate lawyer or a staff member reports behavior by Attorney X that indicates that Attorney X is impaired and may be unable to represent clients competently and diligently, what is a partner's or supervising lawyer's duty upon receiving such a report?

"If a partner or supervising lawyer receives a report of impairment from an associate lawyer or a staff member, regardless of whether the lawyer suspected of impairment is a senior partner or an associate, the partner or supervising lawyer must investigate and, if it appears that the report is meritorious, take appropriate measures to ensure that the impaired lawyer's conduct conforms to the Rules of Professional Conduct. *See* Opinion #1 and Rule 5.1(a). It is never appropriate to protect the impaired lawyer by refusing to act upon or ignoring a report of impairment or by attempting to cover up the lawyer's impairment."

6. If an associate lawyer in the firm observes behavior by Attorney X that indicates that Attorney X is not competent to represent clients, what should the associate lawyer do?

"The associate lawyer must report his or her observations to a supervising lawyer or the senior management of the firm as necessary to bring the situation to the attention of lawyers in the firm who can take action."

7. An associate lawyer in the firm reports to his supervising lawyer that he suspects that Attorney X is mentally impaired. He also describes to the supervising lawyer conduct by Attorney X that violated Rules 1.1 and 1.3. The supervising lawyer tells the associate to ignore the situation and to not say anything to anyone about his observations including clients, other lawyers in the firm, or staff members. The associate concludes that no action will be taken to investigate or address Attorney X's behavior. Does the associate lawyer have any further obligation?

"A subordinate lawyer is bound by the Rules of Professional Conduct notwithstanding that the subordinate lawyer acts at the direction of another lawyer in the firm. Rule 5.2(a). If the associate lawyer believes that the duty to report professional misconduct under Rule 8.3 may be triggered by the conduct of Attorney X, the associate lawyer should discuss this concern with his supervising lawyer. If the supervising lawyer declines to address the situation, the associate lawyer should seek guidance as to his professional responsibilities from the lawyers at the State Bar who provide informal ethics advice."

8. Assume that Attorney X is the sole principal in the firm and there is one associate lawyer. Attorney X displays behavior that may indicate that he is in the early stages of Alzheimer's disease or dementia. There is no senior management to whom the associate lawyer can report. What should the associate lawyer do?

"If the associate lawyer believes that the duty to report professional misconduct under Rule 8.3 may be triggered by the conduct of Attorney X, the associate lawyer should seek guidance as to his professional responsibilities from the lawyers at the State Bar who provide informal ethics advice. See Opinion #7. Regardless of whether Attorney X's conduct triggers the duty to report, the associate lawyer may seek advice and assistance from the LAP or from another approved lawyer assistance program, or may contact a trusted, more experienced lawyer in another firm to serve as a mentor or advisor on how to address the situation."

9. Assume Attorney X is a sole practitioner and the lawyers in his community observe behavior that may indicate that he is in the early stages of Alzheimer's disease or dementia. What is the responsibility of the lawyers in the community?

"The Rules of Professional Conduct impose no specific duty on other members of the bar to take action relative to a potentially impaired fellow lawyer except the duty to report to the State Bar if the other lawyer's conduct raises a substantial question about his honesty, trustworthiness, or fitness to practice law and the information about the lawyer is not confidential client information. See Opinion #7. Nevertheless, as a matter of professional responsibility, attendant to the duties to seek to improve the legal profession and to protect the interests of the public that are articulated in the Preamble to the Rules of Professional Conduct, the lawyers in the community are encouraged to assist the potentially impaired lawyer to find treatment or to transition from the practice of law. A mental health professional, the LAP, or another lawyer assistance program can be consulted for advice and assistance."

10. Do the responses to any of the inquiries above change if the lawyer's impairment is due to some other reason such as substance abuse or mental illness?

"No."[44]

Virginia Legal Ethics Opinion 1886 (December 15, 2016)

In Opinion 1886,[45] the Virginia ethics committee analyzed "the ethical duties of partners and supervisory lawyers in a law firm to take remedial measures when they reasonably believe another lawyer in the firm may be suffering from a significant impairment that poses a risk to clients or the general public." Relying on the ABA's Formal Opinion 03-429, the Virginia Bar committee focused on "precautionary measures *before* a lawyer's impairment has resulted in serious misconduct or a material risk to clients or the public." (Emphasis in original.)

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[44] See also North Carolina L.E.O. 2001-5 (July 27, 2001) which determined that a lawyer participating in a Lawyer Assistance Program did not have to report the conduct of another lawyer in the group if the other lawyer discloses conduct that would otherwise be reportable under Rule 8.3(a). https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2001-formal-ethics-opinion-5/,

[45] https://www.vacle.org/opinions/1886.htm.

After describing the problem,[46] the committee provided two hypotheticals. In the first, a junior associates informs the managing partner, James, that Bill, a senior associate, has a serious cocaine and alcohol problem. James confronts Bill, who has made some mistakes recently, and denies the charge:

> *James practices in a mid-sized law firm in a large metropolitan area. One day, a junior associate informs James that Bill, a senior associate, has a serious cocaine and alcohol problem. The information is credible, detailed, and alarming; it also points to the potential for trust fund violations or other misconduct associated with substance use. James has also received calls from several clients complaining that Bill has missed appointments, appeared in court late, disheveled and smelling like alcohol, and has failed to return phone calls. Another client complains that Bill missed a filing deadline and placed the client in default. James has observed that Bill has problems remembering instructions, has difficulty completing familiar tasks, is challenged in problem solving at meetings, and experiences changes in mood and personality. When James confronts Bill about these issues, Bill denies having any substance abuse problems, attributes his work performance to stress caused by marital discord, and promises to improve.*

In the second hypothetical, an older partner in a two-person law firm may be showing signs of dementia creating concerns for his long-time law partner about how to proceed:

> *George is a sixty-year old partner in a small, two lawyer firm. He has been honored many times for his lifelong dedication to family law and his expertise in domestic violence protective order cases. He has suffered a number of medical issues in the past several years and has been advised by his doctor to slow down, but George loves the pressure and excitement of being in the courtroom regularly. Recently, Rachelle, his long-time law partner, has noticed some lapses of memory and confusion that are not at all typical for George. He has started to forget her name, calling her Mary (his ex-wife's name), and mixing up details of the many cases he is currently handling. Rachelle is on very friendly terms with the J&DR court clerk, and has heard that George's behavior in court is increasingly erratic and sometimes just plain odd. Rachelle sees some other signs of what she thinks might be dementia in George, but hesitates to "diagnose" him and ruin his reputation as an extraordinarily dedicated attorney. Maybe he will decide to retire before things get any worse, she hopes.*

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[46] "Studies report that lawyers experience depression, alcohol and other substance abuse at a rate much higher than other populations and 2 to 3 times the general population. The incidence of alcohol abuse is higher among lawyers aged 30 or less. Besides the potential lawyer impairment caused by substance abuse, the aging of the legal profession presents an increased incidence of cognitive impairment among lawyers. As of 2016, Virginia State Bar membership records revealed that of the 23,849 active members located in the Commonwealth, 8,366 or 35% are ages 55 or older. Fifteen percent of these attorneys or 3,584 members are 65 or over. These numbers reflect that Virginia's lawyers, like lawyers nationally, are moving into an older demographic profile, and they continue to practice as they age. Moreover, in the years ahead, the number of lawyers that will continue to practice law beyond the traditional retirement age will increase dramatically. The substantial percentage of aging lawyers presents both opportunities and challenges for the state bars, and the scope and nature of the challenges and the best way to manage the challenges have been examined by bars around the country." (Footnotes omitted.)

The Virginia ethics committee offered some general guidance on dealing with an impaired lawyer:

- The law firm "may be able to work around or accommodate some impairment situations."
- The firm "might be able to reduce the impaired lawyer's workload, require supervision or monitoring, or remove the lawyer from time-sensitive projects."[47]
- "Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, the firm may have an obligation to supervise the work performed by the impaired lawyer or may have a duty to prevent the lawyer from rendering legal services to clients of the firm, until the lawyer has recovered from the impairment."
- "The impaired lawyer's role might be restricted solely to giving advice to and assistance, counseling, therapy, or treatment as a condition of continued employment with the firm."
- "The firm could recommend, encourage or direct that the impaired lawyer contact Lawyers Helping Lawyers[48] for an evaluation and assessment of his or her condition and referral to appropriate medical or mental health care professionals for treatment and therapy."
- "Alternatively, making a confidential report to Lawyers Helping Lawyers may be an appropriate step for the firm."
- "The firm or its managing lawyers might instead find it necessary or appropriate to consult with a professional medical or health care provider for advice on how to deal with and manage an impaired lawyer, including considering options for an 'intervention' or other means of encouraging the lawyer to seek treatment or therapy."

The committee then analyzed the two hypotheticals.

The first hypothetical is not a difficult one. James is the managing partner. His Rule 5.1 obligations and those of any supervisory attorneys are clear: they must "promptly make reasonable efforts to ensure that the impaired senior associate does not engage in any further conduct that breaches ethical duties owed to his clients." The committee then continued on how to deal with the potential for a reporting obligation:

> *While the senior associate's past conduct might be considered violations of the Rules of Professional Conduct, only violations that raise a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer must be reported. Rule 8.3(a). If James and any other supervising attorney have taken appropriate action to prevent the senior associate from engaging in further conduct that may violate the Rules of Professional Conduct, and the senior associate is in recovery from his impairment, i.e., the condition that caused the violations has ended, there is nothing to report to the bar. If, for example, the firm is able to eliminate the risk of future*

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[47] The committee wrote that the impaired lawyer "may not be capable of handling a jury trial but could serve in a supporting role performing research and drafting documents."

[48] "Lawyers Helping Lawyers ('LHL') is an independent, non-disciplinary and non-profit organization that has been assisting legal professionals and their families since 1985 deal with depression, addiction and cognitive impairment. LHL can assist law firms dealing with an impaired lawyer through a confidential environment by planning and implementing intervention, providing a free clinical evaluation, referral to appropriate medical and mental health care providers, peer support and group counseling, establishing contracts to monitor and report recovery and rehabilitation and assist and identify financial resources for treatment. LHL is not affiliated with the Virginia State Bar and does not share information with anyone except and unless the participating lawyer expressly consents in writing to share information with third parties"

> *violations of the duties of competence and diligence under the Rules of Professional Conduct through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation. On the other hand, if the past conduct of the impaired lawyer involves dishonesty, i.e., embezzlement of client funds, or stealing firm funds or assets, James and any other lawyer in the firm that knows of such misconduct must report it to the bar under Rule 8.3(a). This would be required even if the violating lawyer was participating with Lawyers Helping Lawyers and in recovery. The reporting duty under Rule 8.3(a), however, does not diminish the importance of making a confidential report to a lawyer assistance program such as Lawyers Helping Lawyers. Both reports fulfill important objectives. The report to the lawyer disciplinary agency is necessary to address the misconduct and protect the public. The report to the lawyer assistance program is necessary to address the underlying illness that may have caused the misconduct. In the end, both reports protect and serve the public interest.*

If the impairment raises a substantial question about James' ability to comply with the RPC, more drastic measures may need to be taken:

> *If, on the other hand, the impaired lawyer's condition raises a substantial question about his ability to comply with the Rules of Professional Conduct, James and any lawyer with supervisory authority must make reasonable efforts to ensure that the clients' interests are protected. This could require removal of the senior associate from their cases, or restricting his role and placing him under close supervision.*[49]

As for the second hypothetical, it was not obvious that George had committed a violation of the RPC. Thus, no reporting obligation exists. The committee then counseled:

> *Yet his mental condition, as observed by his partner, Rachelle, would require that Rachelle make reasonable efforts to ensure that George does not violate his ethical obligations to his clients or violate any Rules of Professional Conduct. This would include, as an initial step, Rachelle or someone else having confidential and candid conversation with George about his condition and persuading him to seek evaluation and treatment.*

Virginia Legal Ethics Opinion 1887 (August 30, 2017)

Eight months after approving Opinion 1886, the Virginia Supreme Court approved of Opinion 1887[50] to address the obligations of a lawyer not in the same law firm of another lawyer who may be impaired.

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[49] Then in recognition of Rule 5.1(c), the committee explained: "Further, if reasonable measures or precautions have been taken by James and any other lawyers in the firm to ensure that the impaired lawyer complies with the Rules of Professional Conduct, neither the partners or supervisory lawyers in the firm are ethically responsible for the impaired lawyer's professional misconduct, 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. Rule 5.1(c)."

[50] https://www.vacle.org/opinions/1887.htm.

Again, there were two hypotheticals. In the first, a solo practitioner in the criminal defense field has recently seemed scattered and disorganized to judges, prosecutors, and other defense lawyers, although "he is still able to manage a court proceeding appropriately." He just did not seem to living up to standards that others came to expect of him after his decades of practice in the community.

The second scenario involves a solo practitioner who becomes moody and forgetful after a car accident:

> *[Attorrney is] the sole owner and managing partner of a law firm that employs associates and nonlawyer assistants. After a car accident, she becomes increasingly moody and forgetful, sometimes lashing out at the other employees of the firm or opposing counsel when they have to correct her or remind her of something. The associates are aware of a number of near-misses where the partner would have missed a significant deadline if someone else in the firm had not intervened to remind her, and they have also noticed that she overlooks important, and obvious, issues in conversations with clients and with members of the firm. Based on their interactions with her, the associates believe the managing partner is not able to competently and diligently represent clients on her own. She is also not receptive to any help or input from the associates, and no one in the firm has any authority to require her to accept oversight or assistance since she is the sole partner.*

After reciting Virginia RPC 1.16(a)(2) and 8.3(a), which are identical to the Model Rule versions of these rules, the committee noted that other than managerial and supervisory lawyers, lawyers do not have a duty to "proactively" address a lawyer's impairment. Reporting is required under 8.3(a), the committee said, when the lawyer has "reliable information" that the impaired lawyer has violated the RPC in a manner that raises a substantial question as the lawyer's honesty, trustworthiness, or fitness to practice law.

As to the first hypothetical, the Virginia committee determined that no reporting obligation existed:

> *In a specific instance where other lawyers believe that a lawyer is impaired, there might not be specific misconduct that the lawyers know about and that is subject to Rule 8.3(a). This scenario is presented by the first hypothetical, above, where other lawyers believe that the solo lawyer's cognitive abilities are visibly declining but have not seen any evidence of any specific misconduct by the lawyer.*
>
> *…*
>
> *[I]n a situation like the first hypothetical in this opinion, there may be cases where a lawyer believes it is clear that another lawyer is mildly impaired, and that clients are at risk in the future if no action is taken, although there is no evidence that the lawyer's ability to represent clients is* currently *compromised. In these situations, the lawyers have no* duty *to take any action to address the solo lawyer's impairment.*

(Emphasis in original.)

In the second hypothetical, however, action needed to be taken. The associates had "reliable information" that the impaired lawyer "is currently materially impaired in her ability to represent clients, and is continuing to represent those clients in violation of Rule 1.16(a)(2)." Thus, "Rule 8.3(a) requires them to report the impaired lawyer's conduct to the Bar." As to confidentiality, the committee

also cautioned: "The duty to report is subject to the associates' duty of confidentiality to clients of the firm under Rule 8.3(d), but in many cases a report may be accomplished without disclosing information that would be embarrassing or detrimental to the firm's clients."[51]

Oregon Legal Ethics Opinion 2005-129 (Revised November 2018)

In Oregon L.E.O. 2005-129, as revised in 2018,[52] the focus was on a sole practitioner with no partners, associates, or employees where the lawyer's files contained information relating to client representation.

Two obvious questions were asked:

> *1. Must Lawyer take steps to safeguard the interests of Lawyer's clients, and the information relating to their representations, if Lawyer dies or is disabled?*
>
> *2. If Lawyer makes arrangements for a successor lawyer to disburse his or her files if Lawyer dies or becomes disabled, what steps must or may the successor lawyer undertake?*

If the lawyer becomes impaired in a manner that there could be "a significant lapse of time after the lawyer's . . . disability during which the lawyer's telephone would go unanswered, mail would be unopened, deadlines would not be met, and the like," Oregon's RPC 1.1 requires "at a minimum, making sure that someone will step in to avoid client prejudice."

> *The person may, but need not, be a lawyer. Depending on the circumstances, it may be sufficient to instruct the person that if the lawyer dies or becomes disabled, the person should contact the presiding judge of the county circuit court so that the procedure set forth in ORS 9.705 to 9.755 can be commenced. The person also should be instructed, however, about the lawyer's duties to protect information relating to the representation of a client pursuant to Oregon RPC 1.6.*[53]

The Oregon opinion writers add that a lawyer may go beyond this obligation and designate another lawyer to disburse the lawyer's files if the nature of the disability requires such action. That "voluntary lawyer" also has to be "mindful" of Rule 1.6's requirements. In addition, "the voluntary lawyer must promptly inform the clients of the sole practitioner that the voluntary lawyer has possession of the client's files and must inquire what the clients wish the voluntary lawyer to do with

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[51] The committee also suggested that the associates reached out to Lawyers Helping Lawyers: "The associates may also choose to seek guidance from Lawyers Helping Lawyers or another lawyer assistance program to try to convince the impaired partner to seek treatment to manage her impairment or transition out of the practice of law without awaiting the conclusion of the disciplinary process. As LEO 1886 emphasized, reporting a lawyer's impairment to both the Bar and to LHL is important, and each report serves different purposes. Neither report removes the need for the other; together they can address both the misconduct that has already occurred and the underlying situation that contributed to the misconduct." (Footnote omitted.)

[52] https://www.osbar.org/_docs/ethics/2005-129.pdf.

[53] The opinion writers explained that ORS 9.705-9.755 "set forth a statutory scheme pursuant to which a nonperforming lawyer's law practice may be placed under the jurisdiction of the court and steps taken to protect the interests of the nonperforming lawyer's clients."

the files."[54] Assuming no conflicts and competency, the voluntary lawyer may also "offer to take over the work of the lawyer's clients, if the voluntary lawyer complies with Oregon RPC 7.3 on solicitation of clients."

I do not know how many sole practitioners there are with no employees, but I can imagine a lawyer, retired perhaps from a law firm, who keeps up her or his bar license, works from home, and is single, perhaps with no children or children that do not check in with the lawyer daily. Along with the Appendix, this opinion provides a roadmap to succession planning that makes both common and ethical sense.[55]

JUDICIAL DECISIONS

I highlight below a number of decisions that address a variety of circumstances that have involved lawyers with an impairment.

In re Marshall, 762 A.2d 530 (D.C. 2000): Cocaine Addiction Results in Disbarment and Americans with Disabilities Act is not Applicable

In re Marshall, 762 A.2d 530 (D.C. 2000) resulted in the disbarment of a lawyer who sought a lesser sanction because his misappropriation of client funds and fabrication of documents submitted to D.C. Bar Counsel resulted from an addiction to cocaine. Marshall had relied on *In re Kersey*, 520 A.2d 321 (D.C.1987) in which the court held that "under some circumstances, alcoholism may be a mitigating factor to be considered in determining the appropriate discipline to be meted out against an attorney who has violated the Rules of Professional Conduct. 520 A.2d at 326." *Id.* at 532. The court recognized the case law in which it had applied *Kersey*, but concluded that Marshall's case was different because his conduct was criminal:

> *[W]e have extended the mitigation principles enunciated in that case to an attorney who was addicted to lawfully obtained prescription drugs,* see In re Temple, *596 A.2d 585, 586 (D.C.1991); to a lawyer who was suffering from clinical depression,* see In re Peek, *565 A.2d 627, 631-32 (D.C.1989); and to a practitioner afflicted with bipolar disorder,* see In re Larsen, *589 A.2d 400, 400-01 (D.C.1991); but* see In re

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[54] The Oregon ethics committee added this footnote to describe what the voluntary lawyer might also have to do: "There may be circumstances, however, in which the lawyer must do more. This would be true if, for example, a client were to request that particular steps be taken. It would also be true if the lawyer learns in advance that he or she would be able to continue practicing law for only a limited additional time. In this event, the lawyer should begin the process of notifying the lawyer's clients as soon as possible to inquire how each client wishes to have his or her files handled."

[55] It bears repeating that readers should always consult state bar rules on the issue of succession planning. As an example, the Florida Bar requires most Florida Bar members to designate an "inventory attorney." See https://www.floridabar.org/member/inv-atty/, The Florida Bar explains the purpose of this rule: "The purpose of the amendment is to provide for a means to protect the interests of clients if their originally retained counsel cannot or will not do so." The Bar adds: "Inventory attorneys take possession of the files of a member who dies, disappears, is disbarred or suspended, becomes delinquent, or suffers involuntary leave of absence due to military service and no other responsible party capable of conducting the member's affairs is known. The inventory attorney has the responsibility of identifying clients in need of services and getting notice to the clients of such needs. The inventory attorney may give the file to a client for finding substitute counsel; may make referrals to substitute counsel with the agreement of the client; or may accept representation of the client, but is not required to do so."

> Appler, *669 A.2d 731, 741 (D.C.1995) (refusing to apply* Kersey *in disciplinary proceeding against attorney with bipolar disorder who stole more than a million dollars). These cases differ from Marshall's, however, in that the attorney's disability in each of them did not result from criminal conduct on his part. Marshall's addiction, on the other hand, stems from his unlawful possession, use, and abuse of cocaine over a period of several years.*
>
> *…*
>
> *[W]e hold that, at least where an attorney's misconduct warrants disbarment, addiction to cocaine attributable to the intentional use of that drug does not warrant the imposition of a lesser sanction.*

Id. at 536-37, 539 (footnote omitted).

The court also rejected Marshall's argument under the Americans with Disabilities Act (ADA) and cited to a number of other cases where the defense was rejected:

> *To avail himself of the protections of the ADA, Marshall must show that he is a "qualified individual with a disability." 42 U.S.C. § 12132. This term is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices ... or the provisions of auxiliary aids and services, meets the essential eligibility requirements for ... participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). "The Bar is a noble calling," see* In re Shillaire, *549 A.2d 336, 337 (D.C.1988), and a lawyer who has misappropriated client funds and submitted fabricated documents to Bar Counsel does not "meet the essential eligibility requirements of membership" in our profession. "[Marshall] is not 'qualified' to be a member of the Bar because he committed serious misconduct and no 'reasonable modifications' are possible." The* Florida Bar v. Clement, *662 So.2d 690, 700 (Fla.1995); accord,* People v. Reynolds, *[933 P.2d 1295, 1305 (Colo. 1997)];* State Bar Ass'n v. Busch, *919 P.2d 1114, 1116-18 (Okla.1996). To paraphrase and adapt to this case the reasoning of the Supreme Court of Colorado in* People v. Reynolds, *"we see no reasonable accommodation which can be made with regard to Respondent's [misappropriation of client funds and fabrication of documents] which would accomplish the purpose of maintaining the integrity of the Bar and promoting the public's confidence in the [District's] many attorneys." 933 P.2d at 1305 (internal quotation marks omitted).*

Id. at 539-40.

***Florida Bar v. Clement*, 662 So.2d 690 (Fl. 1995): Disbarment for Misappropriating Client Funds by Lawyer with Bipolar Disorder Upheld and Not Precluded by Americans with Disabilities Act**

In *Florida Bar v. Clement*, 662 So.2d 690 (Fl. 1995), the Florida Supreme Court rejected Clement's various pleas to avoid disbarment given the gravity of the offense and even after accounting for Clement's mental condition, in part, because he engaged in improper conduct when Clement was not suffering from the effects of his mental condition:

> *"This Court has repeatedly asserted that misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment."* Florida Bar v. Shanzer, *572 So.2d 1382, 1383 (Fla.1991) (disbarment warranted for attorney who argued that his depression over personal problems led him to use funds in his trust account for personal purposes). While the referee in the instant case correctly considered Clement's mental condition in mitigation,* see, e.g., Florida Bar v. Perri, *435 So.2d 827, 829 (Fla.1983);* Florida Bar v. Parsons, *238 So.2d 644, 645 (Fla.1970), Clement's bipolar disorder continued while he was under the care of a psychiatrist. The referee rejected Butler's testimony in Count 1 regarding Clement's ability to distinguish right from wrong. The referee found clear and convincing evidence that the conduct in Count 2 occurred when Clement was not suffering from the effects of his bipolar disorder. In light of the facts of this case, we find that disbarment is the appropriate sanction.*

Id. at. 699.

The Florida Supreme Court also rejected an ADA defense because the referee in proceedings below rejected the testimony of Clement's psychiatrist "that Clement lacked the ability to distinguish right from wrong when these incidents occurred," and also found "'clear and convincing evidence that [Clement] was not emotionally impaired at the time he used Mr. Tisseaux's funds without authorization in October and November, 1991.'" *Id*. at 699-700.

> *Because Clement's misconduct was not a direct result of his bipolar disorder, sanctions do not violate the ADA.* See People v. Goldstein, *887 P.2d 634, 638 n. 2 (Colo.1994) (attorney's "success neurosis" was not direct cause of misconduct; thus court rejected attorney's claim that his disbarment violated ADA because there was no causal connection between his mental illness and the misconduct).

Id. at 700. In the alternative, the court also held that Clement was not a "qualified individual" under the ADA, i.e., meets the essential requirements for receiving a license to practice law:

> *Clement is not "qualified" to be a member of the Bar because he committed serious misconduct, and no "reasonable modifications" are possible. Although Clement was under psychiatric care for his bipolar disorder when the incidents in this case occurred, Clement also said he could fool his doctor into believing that he was in control during some of the period in question. This suggests that nothing could prevent repetition of the egregious misconduct that occurred in this case.*
>
> *Thus, while the ADA applies to the Bar, it does not prevent this Court from taking disciplinary action against Clement.*

Id.[56]

***Board of Overseers of the Bar v. Warren*, 34 A.2d 1103 (Me. 2011): Law Firm Failed to Have in Effect Measures Giving Reasonable Assurance that All Lawyers Conform to the Code of Professional Responsibility**

Board of Overseers of the Bar v. Warren, 34 A.2d 1103 (Me. 2011) presents the challenges that can face a law firm that must choose between compassion and compliance.

Duncan was a 30-year partner in the private clients group at Verrill Dana, a law firm. In June 2007, he was caught writing checks to himself from client accounts for legal fees he had earned but which should have gone to the law firm. He repaid the money and offered to resign. The law firm's executive committee discussed the matter. After hearing Duncan proclaim there were no other accounts from which he had taken funds, they declined the resignation offer. In their deliberations, the executive committee did not consider the Maine RPC, a fact that came back to haunt them as I explain in a moment. They also did not advise the law firm's general counsel of the facts. *Id*. at 1106.

However, they did designate one of their members, Warren, to tell the head of the private clients' group (Klebe) about what Duncan had done to allow Klebe "to implement practices to prevent similar events from occurring in the future." *Id*. Warren delayed in telling Klebe because of a worry that it might "drive an already fragile Duncan 'over the edge.'" *Id*. The rest of the executive committee acquiesced in the delay. *Id*.

In October 2007, Warrant finally told Klebe about Duncan's conduct. Klebe then investigated and found other accounts where Duncan had mishandled client funds. Later in October, the firm's general counsel (Libby) learned of the problem. His investigation uncovered the scope of Duncan's malfeasance. The firm then terminated Duncan and reported his conduct to the Board of Overseers of the Bar and federal and state prosecutors. *Id*. at 1107.

Libby then resigned from the firm and informed Bar Counsel that he had unprivileged knowledge of violations of Maine RPC at the firm. That lead to a subpoena from Bar Counsel to the firm, a motion to quash, and ultimately a ruling that there the attorney-client privilege protected the firm's communications with Libby, and the crime-fraud exception did not apply.

Separately, Bar Counsel also charged the firm with violations of Maine RPC for failing to investigate, discover, and report Duncan's misconduct and failing to mitigate client losses. *Id*. at *1107-08. This matter was heard by a single justice who ruled in favor of the law firm.

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[56] See also *In re Diamondstone*, 153 Wash.2d 430 (2005) where Diamondstone was involuntarily transferred to inactive status after a hearing in which an independent medical examiner determined that she suffered from a psychiatric disorder and the hearing officer determined that she lacked the capacity to practice law as a result. The court also rejected an ADA claim because it was untimely: "Because this claim was not presented to the hearing officer, we decline to reach it; the Association did not have an opportunity to develop facts at the hearing necessary to address Diamondstone's ADA claim. Specifically, the Association did not have the opportunity to show that placing Diamondstone on supervised probation, as she now suggests, would require a substantial modification of its licensing standards. Moreover, the record does not support a finding that Diamondstone is a qualified individual who can meet the Association's licensing requirements, even with her suggested accommodation." Id. at 442-43. See also Timmons, "Disability-Related Misconduct and the Legal Profession: the Role of the Americans with Disabilities Act," 69 U. Pitt. L. Rev. 609 (2008). The author writes: "To date, the ADA has played no effective role in attorney discipline cases." *Id*. at 615.

> *The single justice concluded that the Board failed to prove, by a preponderance of evidence, that the six attorneys violated Rule 3.2(e)(1), based on its determination that the six attorneys "did not believe that the perceived-to-be aberrational misapplication of firm funds from one account ... [was] an action that, in light of Duncan's thirty-year history, 'rais[ed] a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer.'" (Quoting M. Bar R. 3.2(e)(1).)*

Id. at 1110-11. Applying Maine RPC 3.2(e)(1) (Maine's reporting rule similar to Model Rule 8.3(a)), the Maine Supreme Court determined that it was bound to accept this finding:

> *For many lawyers, the initial report of Duncan's actions certainly would have raised a substantial question as to his honesty, trustworthiness, or fitness as a lawyer in other respects. Nevertheless, each of the six attorneys testified that it never even occurred to him or her that Duncan's mishandling of funds gave rise to an obligation to report Duncan pursuant to Rule 3.2(e). Each flatly admitted that despite hearing of Duncan's conduct, no one discussed whether they should review the Bar Rules or whether they should consult the firm's counsel.*
>
> *This testimony, which the single justice found credible, supports the single justice's finding that the six attorneys did not subjectively believe that Duncan's acts raised a substantial question of his honesty, trustworthiness, or fitness as a lawyer. Given this testimony, the wholly subjective nature of the test to be applied, and the fact that the six attorneys reported Duncan as soon as they realized their trust was misplaced, we must affirm the single justice's determination that Bar Counsel failed to prove that the six attorneys violated M. Bar Rule 3.2(e).*

Id. (footnoted omitted).

The single justice also ruled that the law firm had satisfied its supervisory and managerial obligations under Maine's RPC 3.13(a)(1) (equivalent to Model Rule 5.1). The Maine Supreme Court had a different view, and this is where the six lawyers' testimony came back to haunt them:

> *We recognize that these six attorneys, comprising Verrill Dana's executive committee, were caught completely "off guard" by Duncan's conduct. We also recognize that they dealt with Duncan with compassion, and there is no suggestion of bad faith in their failure to refer his conduct to Bar Counsel or to individuals in the firm who were more capable of assessing the need for action, such as the firm's own counsel. However, we cannot ignore that, when faced with the significant malfeasance of a self-destructing partner, none of the attorneys even recognized that the Maine Code of Professional Responsibility required them to contemplate reporting that partner's conduct and subsequent breakdown. Notwithstanding the single justice's factual findings, when a firm's practices and policies do not require the firm's leadership to at least consider whether it has an ethical obligation to report a colleague in the circumstances presented by this case, we are compelled to find, as a matter of law, that the firm failed to have in effect "measures giving reasonable assurance that all lawyers in the firm conform to the Code of Professional Responsibility."*
>
> *In addition, although we generally agree with the single justice's legal conclusion that "[a]mong experienced lawyers in a firm, informal supervision and periodic*

review" are sufficient to meet the ethical requirements of Rule 3.13(a)(1), see Attorney Grievance Comm'n of Md. v. Kimmel*, 955 A.2d 269, 285–86 (Md.2008), that is not the case with respect to any lawyer who has recently been found to have acted in a substantially "aberrant" fashion, and whom his partners believe to be suicidal and at risk of being pushed "over the edge" if the partner responsible for the lawyer's day-to-day supervision is so informed. The obligations under Rule 3.13(a)(1) vary not only depending on whether an attorney is experienced or inexperienced, but also on whether the attorney is understood to be suffering from a serious emotional impairment. As the single justice found, Warren permitted Duncan to continue to practice law for more than three months without putting any additional measures into effect to ensure Duncan's ethical performance. This response, which was acceded to by the full executive committee, did not, as a matter of law, satisfy Rule 3.13(a)(1)'s requirement of "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Code of Professional Responsibility." Id.*

Accordingly, we conclude that the six attorneys, as the partners in the firm who were acting as the firm's executive committee, and the only lawyers within the firm who knew of Duncan's actions, violated M. Bar R. 3.13(a)(1).

Gautam v. Luca, 215 N.J. Super. 388 (1987): Failure to Properly Supervise an Associate May Constitute Negligence Especially Where the Associate is Hindered by an Illness

Plaintiff's medical malpractice claim was dismissed because of the negligence of Conte, a lawyer who had worked for Luca before leaving the practice due to "severe disabling headaches" that resulted in his misfeasance. Plaintiffs sued them both and recovered both compensatory and punitive damages for emotional distress. They did not seek any other damages. That was their downfall.

Luca appealed. The court was comfortable that malpractice could be found here against Conte and Luca.

[A]n attorney has an obvious duty to timely file and properly prosecute the claims of his client. Equally plain is the responsibility of an attorney to inform his client promptly of any information important to him. Obviously, this duty encompasses the responsibility to inform a client of the dismissal of his complaint.

The failure of an attorney to abide by these obligations plainly constitutes malpractice at least where there is no reasonable justification shown to support the opposite conclusion. Although our research has disclosed no published opinion bearing on the precise issue, we are equally convinced that an attorney's failure to properly supervise the work of his associate may constitute negligence particularly where, as here, the associate is hindered or disabled by virtue of his illness. We need not dwell upon the subject. Suffice it to say, a reasonable trier of fact could conclude that defendant was guilty of malpractice because he took no action to safeguard the rights of his law firm's clients despite his knowledge of Conte's disabling sickness.

Id. at 396-97 (citations omitted).

The court, however, concluded that emotional distress damages are not recoverable in legal malpractice cases, and even if they were, "they are impermissible in the absence of medical evidence

establishing a substantial bodily injury or severe and demonstrable psychiatric sequelae proximately caused by the tortfeasor's misconduct." *Id*. at 399. Because plaintiffs sought only emotional distress damages, Luca prevailed on appeal.

***White v. Beren*, 320 P.3d. 373 (Colo. Ct. App. 2013): Rule 1.4 Does Not Create A Fiduciary Duty to Disclose a Lawyer's Impairment to a Client Where Engagement Letter Allowed Firm to Select Attorneys to Handle Client Matters and Information on the Impairment was Not Material to the Representation**

White v. Beren, 320 P.3d. 373 (Colo. Ct. App. 2013) was an action by a law firm against a former client to recover legal fees. The client counterclaimed for breach of fiduciary duty. Beren claimed that White had intentionally concealed the fact that "Attorney A," who worked on Beren's matter, "had a history of disciplinary proceedings, mental illness, alcoholism, and related arrests." *Id*. at 375.

To give readers a good sense of the law firm's conduct, I set forth below pertinent parts of the court's findings of fact:

- Attorney A suffered from clinical depression, other medical issues, marital problems, and alcoholism starting in 2007. In 2008, he pleaded guilty to a charge of driving while ability impaired. Despite undergoing intensive outpatient alcohol treatment, he relapsed in 2008. In December 2008, police arrested him on a domestic violence charge. Following the arrest, he entered intensive inpatient alcohol treatment. In March 2009, he returned to work at Moye White after his treating physician and psychologist certified that he was mentally and emotionally fit to practice law.
- Attorney A self-reported the above information to the Office of Attorney Regulation Counsel (OARC), which conducted a full investigation. At the conclusion of the investigation, Attorney A's license to practice law in Colorado was suspended, with a complete stay of the suspension conditioned on his receiving ongoing substance abuse treatment. Under a stipulation with the OARC, Attorney A was placed on a monitoring program that tested him for alcohol consumption. On three occasions, between March and June 2010, Attorney A tested positive for alcohol consumption. Although he admitted to consuming alcohol on those occasions, he denied relapsing. From June 2010 until the date of the trial court's order, Attorney A remained sober. Attorney A did not report the three positive tests to Moye White, but admitted at trial that he should have done so.
- Moye White was aware of Attorney A's medical and substance abuse issues, arrests, and stayed suspension. The firm worked closely with Attorney A to monitor his progress and treatment. Before Attorney A was allowed to return to work, Moye White consulted with his treating psychologist, and instituted a supervision plan under which his legal work would be reviewed by another attorney.
- In a routine annual performance review of Attorney A's work for Moye White, other attorneys at the firm described his work as "excellent," and the attorney monitoring his work product never reported any issues. In August 2009, the firm received a follow-up report from Attorney A's treating psychologist, which stated that he continued to do well in therapy, was emotionally stable, and was having no problems.
- Moye White never advised Beren regarding Attorney A's medical and arrest history, and his stayed suspension. Beren remained unaware of Attorney A's medical and arrest history until after Moye White moved to withdraw from representing him in July 2010. However, the information was part of the public record. Beren became aware of the above facts in January 2012, after conducting "his own research."

Id. at 376-77.

The court held that the law firm had a common law duty to disclose "material information." The facts set forth above did not meet this standard: "[W]e conclude that the information was not material, because the evidence presented at trial demonstrated that Attorney A's medical and arrest history did not adversely affect the quality of Moye White's representation." *Id*. at 378. The court elaborated, crediting the law firm's internal monitoring procedures to ensure that Attorney A's work product was not compromised by his condition:

> *The trial court's undisputed factual findings demonstrated that Moye White established numerous procedures to monitor the effect of Attorney A's alcoholism and other medical issues, and to ensure that his work product did not suffer. The trial court also found that numerous medical professionals had certified Attorney A fit to practice law. Most importantly, the trial court found that at no point during the representation was Attorney A "materially impaired." We also ascribe significance to the OARC's decision to stay Attorney A's suspension, which evidences its confidence in his ability to practice law competently.*

Id.

Then considering Colorado RPC 1.4 (comparable to Model Rule 1.4), the court held that it was not applicable and thus did not represent a standard of care that the law firm had violated, in part because Attorney A's condition was not material to the representation:

> *Rule 1.4 is inapposite to the situation presented here. Rule 1.4 relates to disclosure of information necessary for a client to give informed consent. Here, Beren provides no authority requiring a client's informed consent before a law firm can allow an additional attorney to work on a case, nor are we aware of any. Further, Beren agreed to allow Moye White to "draw upon the abilities of various members of [the] Firm as necessary or appropriate to handle [his] matters efficiently and effectively." In doing so, he effectively delegated the decision of who could work on his case to Moye White. Accordingly, under the Agreement, his informed consent was expressly not required. Therefore, Rule 1.4 does not evidence a standard of care that would require disclosure of such information under the facts presented here.*
>
> *Even if Beren's informed consent were required, Rule 1.4 does not apply here because, as discussed above, information regarding Attorney A's medical and arrest history was not material to Moye White's representation of Beren. Thus, we hold that Colo. RPC 1.4 is inapposite and does not evidence the existence of a fiduciary duty to disclose nonmaterial information to a client.*

Id.at 380.

***Beck v. Law Offices of Edwin Terry*, 284 S.W. 3d. 416 (Tex. Ct. App. 2009): Failure to Disclose Lawyer's Alcoholism and Substance Abuse Does Not Support a Claim for Breach of Fiduciary Duty**

Alcoholism and substance abuse were in issue in *Beck v. Law Offices of Edwin Terry*, 284 S.W. 3d. 416 (Tex. Ct. App. 2009). A divorce client sued Terry and his law firm for, among others, breach of

fiduciary duty, in connection with the alleged mistakes made in handing Beck's divorce settlement. They claimed, in part, that the Terry Defendants failure to disclose Terry's impairments was a breach of fiduciary duty. However, the court held that a failure to disclose a lawyer's "incompetence" implicates "only the lawyer's duty of ordinary care and is not independently actionable as a fiduciary duty." *Id*. at 431. The court elaborated:

> *[A]ppellants' complaint that the Terry Defendants failed to disclose Terry's "alcohol and substance abuse addictions" is a negligence claim as a matter of law because it goes to the adequacy of the Terry Defendants' representation. This legal conclusion does not depend on the quantum of proof appellants presented that Terry actually had "alcohol and substance abuse addictions," the extent of that problem, or that his colleagues might have known about it while Beck did not. With or without appellants' summary-judgment evidence, it remains that their complaint implicates only the Terry Defendants' duty of ordinary care and not an independently actionable fiduciary duty. Consequently, appellants did not defeat appellees' entitlement to summary judgment as to this breach-of-fiduciary-duty theory.*

Id. a 435-36.

***Oklahoma Bar Ass'n v. Whitworth*, 183 P.3d 984 (Okla. 2008): Lawyer With Admitted Drug Addiction Should Have Been Prosecuted Under a Oklahoma Disciplinary Rule Applicable to Lawyers With a "Personal Incapacity to Practice Law" and Cannot Be Reinstated After His Suspension Until Meeting the Conditions of That Rule**

Oklahoma Bar Ass'n v. Whitworth, 183 P.3d 984 (Okla. 2008) involved a lawyer with both an alcohol and drug (methamphetamine) abuse addiction, both of which were admitted and both of which resulted in findings of professional misconduct for violations of Oklahoma's equivalent RPC to Model Rules 1.1, 1.3, and 1.4, among others. He was suspended for two years.

The focus of the Oklahoma Supreme Court was on the appropriate rule of the Oklahoma Rules Governing Disciplinary Proceedings (ORGDP)[57] under which the Bar should have proceeded. The case was brought under Oklahoma Disciplinary Rule 6, which governs generally all matters involving professional misconduct. But the court questioned why the matter was not brought under Rule 10, which addresses suspension from the practice of law "for personal incapacity to practice law."[58]

In a Rule 6 proceeding, the discipline sought is discretionary. If a lawyer is suspended for two years or less in a Rule 6 proceeding, under Oklahoma Disciplinary Rule 11, the lawyer is automatically reinstated when the suspension period ends. Otherwise, Rule 11 sets forth procedures for seeking reinstatement, beginning with a petition for reinstatement filed with the Oklahoma Supreme Court.

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[57] http://www.okbar.org/wp-content/uploads/2018/09/RulesGoverningDisciplinary.pdf.

[58] Rule 10.1, ORGDP, defines "personally incapable of practicing law" as follows: "The term 'personally incapable of practicing law' shall include: (a) Suffering from mental or physical illness of such character as to render the person afflicted incapable of managing himself, his affairs or the affairs of others with the integrity and competence requisite for the proper practice of law; (b) Active misfeasance or repeated neglect of duty in respect to the affairs of a client, whether in matters pending before a tribunal or in other matters constituting the practice of law; or (c) Habitual use of alcoholic beverages or liquids of any alcoholic content, hallucinogens, sedatives, drugs, or other mentally or physically disabling substances of any character whatsoever to any extent which impairs or tends to impair ability to conduct efficiently and properly the affairs undertaken for a client in the practice of law."

In a Rule 10 proceeding, if a lawyer is suspended due to personal incapacity, the lawyer can only be reinstated by filing a petition for reinstatement with the Oklahoma Supreme Court that follows the Rule 11 reinstatement process but adds additional requirements to prove "personal capacity," including the potential need to submit to a medical examination. Rule 10.11, ORGDP.[59]

There is another significant difference. A Rule 6 proceeding is open to the public. A Rule 10 proceeding in large part is confidential.[60]

The court was concerned with consistent treatment of lawyers with similar conditions. Whitworth had an admitted "serious drug problem." Id. at 993. His situation was similar, the court explained, to that presented in *State ex rel. Oklahoma Bar Association v. Albert*, 2007 OK 31, 163 P.3d 527., *id*., but the outcomes were very different—drug use was argued to *mitigate* Albert's punishment under Rule 10, but to *enhance* Whitworth's punishment under Rule 6:

> *Albert was charged with "eleven counts of professional misconduct resulting from irresponsible and neglectful representation of clients."* Id. *¶ 1, 163 P.3d at 529. The Bar Association alleged "ineffective communication with clients, neglecting clients, mishandling cases, and failing to appear in court on behalf of clients."* Id. *The allegations of client neglect, failure to appear in court, and habitual drug use are very similar in the two cases. Yet, the resolution of the two matters could not have been more different.*
>
> *The* Albert *matter was pursued under Rule 10, which provides for a suspension for personal incapacity to practice law, as well as Rule 6, which controls formal public proceedings involving lawyer misconduct. He was suspended initially for personal incapacity based on his addiction to alcohol and cocaine. The lawyer's addiction became a* mitigating *factor in the eventual imposition of discipline under Rule 6 despite his admission of "criminal conduct [possession of a controlled substance] which could have resulted in a conviction had the matter been pursued."* Id. *¶ 22, 163 P.3d at 537. The lawyer received a retroactive suspension of approximately fourteen months "from the date he self-suspended" for treatment of his addiction until the opinion of this Court was adopted.* Id. *¶ 23, 163 P.3d at 537.*
>
> *In stark contrast to* Albert*, this matter was pursued only under Rule 6 despite the General Counsel's knowledge of Respondent's habitual methamphetamine use. There is no indication that anyone in the disciplinary process ever considered applying*

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[59] Rule 10.11, ORGDP, provides: "(a) Procedures for reinstatement of a lawyer suspended because of personal incapacity to practice law shall be, insofar as applicable, the same as the procedures of reinstatement provided in Rule 11 following suspension upon disciplinary grounds. The petition shall be filed with the Clerk of the Supreme Court and the petitioner will be required to supply such supporting proof of personal capacity as may be necessary. In addition, the petitioner may be required to submit to examinations by physicians selected by the Professional Responsibility Tribunal. After the matter is submitted to the Professional Responsibility Tribunal, the Trial Panel may require such additional testimony and proof as may be helpful in determining whether the petitioner should be reinstated."

[60] Rule 6.9, ORGDP, provides: "Hearings before the Trial Panel and the Supreme Court in disciplinary proceedings shall be open to the public." In contrast, Rule 10.12 provides: "Except where disciplinary proceedings are involved (Rule 10.4), all proceedings under this Rule 10 shall remain confidential and shall not be a matter of public record, unless otherwise ordered by the Supreme Court. A separate, non-public docket and files shall be maintained for this purpose, under the supervision of the Chief Justice."

> *Rule 10 to these facts. Rather, the OBA urges that Respondent's "serious and continuing drug abuse" should be considered in imposing discipline. Thus, a substance addiction which mitigated the discipline imposed in* Albert *is urged to* enhance *the Rule 6 discipline to be imposed in this matter.*

Id. (emphasis in original).

Why the different treatment? The court observed that the inconsistency seemed to be based on the community stature of the lawyer, and not the impairment:

> *When compared with other disciplinary matters involving addicted lawyers such as Albert, this matter demonstrates the inconsistent manner in which such lawyers are treated within the disciplinary process. The wide disparity in the discipline of addicted lawyers raises an important question: What determines whether a matter is pursued only under Rule 6 rather than Rule 10 when habitual substance abuse is involved? The process appears to be influenced more by the lawyer's status in the legal community than by his or her impairment.*

Id. at 993-994. This stinging criticism was further highlighted by the lawyer's ability to return to the practice in a Rule 6 disciplinary setting:

> *In the context of a suspension for personal incapacity based upon a lawyer's drug addiction, Rule 10's reference to Rule 11 gives this Court a mechanism to insure that the lawyer has effectively dealt with the addiction as a condition of reinstatement. No such mechanism exists for a Rule 6 suspension on disciplinary grounds if the suspension is for two years or less. In that instance, the lawyer is automatically readmitted whether or not the lawyer remains impaired by habitual substance abuse.*

Id. at 994.

The court then determined that triggering a Rule 6 or a Rule 10 proceeding should be based on the difference between recreational use and chemical dependence:

> *The role of the General Counsel initially and of this Court ultimately is to discern between instances of recreational illegal drug use and performance-impairing habitual drug use. Recreational drug use brings disrepute to the profession and may signal a lack of respect for the law and the legal system. It is properly the subject of a Rule 6 proceeding. Chemical dependence which impairs or tends to impair a lawyer's representation of clients, however, falls squarely within the purview of Rule 10.*

Id. The court then determined that the record was sufficient to demonstrate a chemical dependence on methamphetamines, and Rule 10 would be applicable if a reinstatement petition was filed:

> *There is overwhelming evidence in the record that Respondent is personally incapacitated by his methamphetamine addiction. He is immediately suspended from the practice of law until such time that his Rule 6 suspension expires and until such time that he can demonstrate his sobriety and meet all the requirements for Rule 11 reinstatement. These include, but are not limited to, the payment of costs, reimbursement to the client security fund, and clear and convincing evidence that Respondent's conduct will conform to the high standards required of a member of the*

> *bar. Upon the expiration of Respondent's Rule 6 suspension, any further proceedings will be conducted confidentially pursuant to Rule 10.12.*

Id. at 995.

***Oklahoma Bar Association v. Townsend*, 277 P.3d 1269 (Okla. 2012): Lawyer Suffering From Depression and Anxiety Who Agreed to Interim Suspension While Undergoing Treatment Reinstated After Proving Success of Treatment at Disciplinary Hearing**

In *Oklahoma Bar Association v. Townsend*, 277 P.3d 1269 (Okla. 2012), the court reinstated a lawyer who had voluntarily agreed to a suspension of his license due to his depression.

Ten years after being admitted into the practice of law, the Bar Association received "grievances regarding the attorney's: failure to communicate with clients; missing of court dates, resulting in the entrance of dismissals, summary adjudications, and award of attorney fees to opposing counsel; not returning files; refusing timely to refund unearned fees; and not completing or instigating promised legal representation." *Id*. at 1272. The cause? Townsend had a significant emotional impairment:

> *It is undisputed that during the same period that complaints were being received, Townsend was involved in significant personal and professional situations which resulted in his entering an extended period of debilitating depression and anxiety severe enough to bring on panic attacks. Factors contributing to the attorney's mental state included: a difficult divorce involving child custody issues, resulting in the attorney receiving an unsatisfactory visitation schedule; the suicide of a close friend for which, to some extent, Townsend thought himself responsible; an extended illness of an office mate increasing the attorney's work load; and an unplanned office split in which the partnering attorney took all the office furniture, the client files, the computer, had the office telephone number transferred, and drained all cash from bank accounts leaving Townsend with business-related bills and no resources to pay them.*

Id. at 1272-73.

Without admitting any incapacity, Townsend agreed to an interim suspension. The Oklahoma Supreme Court entered an order to this effect. Pursuant to Rule 10.12, ORGDP, "all documents were filed in a non-public docket maintained under the supervision of the Chief Justice." *Id*. at 1273.

Twenty-two months later, Townsend filed a petition for reinstatement. The court recast the petition as a motion to lift the suspension and "directed the Bar Association to set the matter for a hearing before the trial panel either on allegations that the attorney was personally incapable of practicing law or was subject to discipline." The order placed the burden of proof on the Bar Association under a clear and convincing evidence standard. *Id*.

After some procedural questions were clarified, the Bar Association proceeded under Rule 6's disciplinary proceeding rules. In this proceeding, Townsend did not claim any disability. The matter proceeded to what appeared to be an agreed-upon resolution that allowed Townsend to return to the practice of law:

> *The Bar Association suggested a private reprimand along with the payment of costs as the appropriate discipline. Townsend agreed. After taking the matter under advisement before concluding the hearing, the trial panel recommended the same,*

> *but made the recommendation of a private reprimand contingent on the respondent maintaining monthly contact for a year with Lawyers Helping Lawyers. Townsend indicated that he had no problem with the continued contact with his Lawyers Helping Lawyers advisor. Nevertheless, the trial panel report, filed on January 17, 2012, does not contain the recommendation regarding continued counseling. Rather, it recommends: 1) the imposition of a private reprimand; 2) if any suspension be imposed, it run from the time of the voluntary interim suspension; and 3) the payment of costs.*

Id. at 1273-74 (footnotes omitted).

Conducting a *de novo* review of the record, the court had no difficulty determining numerous violations of the Oklahoma RPC. *Id*. at 1276-77. The court also recognized the "incredible amount of stress" Whitworth was under. His situation could only be described as dire:

> *Townsend has two sons. During the time of the misconduct, he was going through a difficult divorce resulting in time with the children being limited. He felt guilty for failing his sons. Originally, Townsend had three attorneys in his firm. One of the lawyers experienced an extended illness during which she was absent from the office, resulting in work loads being increased on the two remaining attorneys. Becoming frustrated with the situation, the second attorney left the practice, leaving Townsend responsible for his own clients and those of the remaining lawyer. To add insult to injury, the attorney for whom Townsend had been covering came in and took all the office furniture, files, computer, and other equipment, and drained the firm's operating accounts, leaving Townsend with bills but no assets. During this period, Townsend had already begun to withdraw and was spending most of his time locked in his apartment. One friend tried to call him every day over several weeks, but Townsend could not bring himself to pick up the phone. His guilt and withdrawal became worse when he was informed that the friend had committed suicide. Townsend began to have panic attacks whenever he attempted to go into his office or to answer phone calls.*

Id. at 1277.

At his Rule 6 hearing, Townsend presented testimony from a licensed marriage and family therapist acting through Lawyers Helping Lawyers. He had suffered acute depression and anxiety, the therapist testified, but on the day of the hearing, the therapist "felt those issues had been resolved and that Townsend had acquired the skills, along with a system of support, to allow him to return to the practice of law without relapse." *Id*.

Townsend was supported in his reinstatement request by the complaining parties, the Assistant General Counsel prosecuting his case, and the trial panel hearing his case. He "expressed true remorse for his actions." *Id*. He had "communicated apologies to all clients involved and has returned all fees related to

the complaints, even where he may have been entitled to some form of recompense." *Id*. "He willingly participated in Lawyers Helping Lawyers and agreed to do the same in the future." *Id*.[61]

The court then identified the factors it considers in a reinstatement petition that weigh "most heavily" when a suspension arises out of incapacity:

> *The factors weighing most heavily when a suspension arises out of incapacity are: 1) the extent of rehabilitation of the affliction attributable to the incapacity; 2) the conduct subsequent to the suspension and treatment received for the condition; and 3) the time which has elapsed since the suspension.*[27]

Then in gratifying findings for Townsend, the court determined that Townsend could return to the practice of law:

> *It has been in excess of two years since the agreed interim suspension was entered. Upon de novo review, we find that clear and convincing evidence*[29] *demonstrates that: 1) Townsend engaged in misconduct warranting discipline; 2) respondent is no longer under an incapacity which would preclude him from practicing law; and 3) respondent's conduct will conform to the high standards required of the Bar Association.*

Id. at 1278 (footnote omitted).

The court then addressed the difference between discipline and punishment in determining the level of discipline warranted here:

> *This Court determines the appropriate discipline to be administered to preserve public confidence in the bar. Our responsibility is not to punish but to inquire into and gauge a lawyer's continued fitness to practice law, with a view to safeguarding the interest of the public, of the courts, and of the legal profession. Discipline is imposed to maintain these goals rather than as a punishment for the lawyer's misconduct. Disciplinary action is also administered to deter the attorney from similar future conduct and to act as a restraining vehicle on others who might consider committing similar acts. Discipline is fashioned to coincide with the discipline imposed upon other lawyers for like acts of professional misconduct. Although this Court strives to be even-handed and fair in disciplinary matters, discipline must be decided on a case-by-case basis because each situation involves unique transgressions and mitigating factors.*

Id. at 1279 (footnotes omitted).

The court then explained how a mental or physical condition could be a mitigating factor in deciding the level of discipline if it is a "causal factor" for professional misconduct:

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[61] There was other helpful testimony: "An Assistant United States Attorney testified that Townsend was revered in the legal community. His mother, close friend, and therapist all opined that, with the experience of depression and anxiety, he has built up a system of support which should assist him in not returning to his formerly debilitating state of mind. The attorney has participated in continuing legal education seminars and stayed current on the law and legal developments. He is current on all Bar-related fees." 277 P.3d at 1277-78.

> *Mitigating circumstances may be considered in the process of assessing the appropriate quantum of discipline. When mental or physical conditions are presented as mitigating factors for assessment of one's culpability, there must be a causal relationship between the conditions and the professional misconduct. Though emotional, psychological, or physical disability may serve to reduce the actor's ethical culpability, it will not immunize one from imposition of disciplinary measures that are necessary to protect the public.*

Id. at 1280.

The court then imposed a public reprimand on Townsend, thereby allowing him a "second chance" to practice law. It did not require continued therapy sessions through Lawyers Helping Lawyers but suggested that Townsend continue such meetings on a regular basis for twelve months from the date of the opinion:

> *We are impressed with the Bar Association's investigator's tenacity in directing the attorney to a therapist through Lawyers' Helping Lawyers and with Townsend's willingness to seek and benefit from counseling sessions and appropriate medications. The majority of Townsend's wronged clients recommended that he be given a second chance. The attorney has repeatedly and sincerely expressed remorse for his actions. Considering the attorney's misconduct, discipline imposed in similar causes, and the mitigating circumstances, we determine that the attorney should be disciplined by public reprimand. Townsend indicated to the trial panel that he would be happy to continue seeing his therapist through Lawyers Helping Lawyers. We do not require the sessions as a condition of reinstatement. Nevertheless, we would suggest that those meetings take place on a regular basis for twelve months following the date of this opinion.*

Id. at 1280-81 (footnotes omitted).

***In re Ortiz*, 304 P.3d 404 (N.M. 2013): Lawyer Diagnosed with Bipolar Disorder After a Hearing on Lawyer's Incivility Towards Others Has Order of Suspension Rescinded Upon Post-Hearing Proof of Treatment**

In re Ortiz, 304 P.3d 404 (N.M. 2013) presents a different aspect of professional misconduct than that raised by Rules 1.1., 1.3, 1.4, and 5.1 Ortiz was rude and crude in a series of verbal assaults on others resulting in the conclusion that she had violated the New Mexico equivalent to Model Rules 4.1, 4.4, 8.2 and 8.4:

> *[T]he hearing committee concluded that Respondent violated several Rules of Professional Conduct. See Rule 16–401(A) NMRA (prohibiting a lawyer from knowingly making a false statement of material fact to a third person); Rule 16–404(A) (prohibiting a lawyer during the course of representing a client from engaging in conduct that has "no substantial purpose other than to embarrass, delay or burden a third person"); Rule 16–802(A) (prohibiting a lawyer from making statements concerning the qualifications or integrity of a judicial officer that the lawyer knows are false or that are made with reckless disregard for the truth); Rule 16–804(A) (violating or attempting to violate the Rules of Professional Conduct constitutes professional misconduct by a lawyer); Rule 16–804(C) (engaging in*

> *conduct that involves misrepresentation); Rule 16–804(D) (engaging in conduct that is prejudicial to the administration of justice constitutes professional misconduct by a lawyer).*

Id. at 406. The hearing committee recommended a six-month suspension.

Before the New Mexico Supreme Court, Ortiz "did not challenge the evidence of her misconduct, but focused instead on her contention that the recommended six-month suspension was too harsh because she had shown remorse for her misconduct and because her misconduct may have been caused, at least in part, by a previously undiagnosed bipolar disorder." *Id*. at 407.

The New Mexico Supreme Court was sympathetic to the argument and upheld the hearing committee's recommendation but delayed implementing the suspension to allow Ortiz to provide evidence of the role her "newly diagnosed bipolar condition" played in her misconduct:

> *After deliberations following oral argument, we announced Respondent's discipline from the bench and then issued a written order to memorialize our ruling, which included a six-month suspension from the practice of law, a concurrent two-year period of supervised probation, additional continuing legal education in ethics and professionalism, successful completion of an anger management program, and payment of the costs of the disciplinary proceeding. Regarding the period of suspension, however, we delayed implementing the suspension for 90 days to give Respondent the opportunity to provide evidence that her newly diagnosed bipolar condition contributed to her misconduct and that treatment of the condition would prevent the recurrence of such misconduct.*

Id.

Ortiz was able to provide the proof and the Court eliminated the suspension from her discipline with the admonition that a relapse would be met with severe consequences:

> *As it turned out, Respondent was able to provide this Court with uncontested medical evidence demonstrating that her prior outbursts were quite likely caused by a long-standing but untreated bipolar condition, and the treatment she was receiving would prevent such misconduct from recurring. We therefore ultimately rescinded Respondent's suspension, but retained the period of supervised probation. The outcome does not diminish the seriousness of Respondent's misconduct in this case. Regardless of the cause, her offensive language and unfounded accusations caused real harm. We are confident that with continued treatment and a heightened awareness of the importance of civility in all her communications, Respondent will not come before this Court again to answer new disciplinary charges. However, should she relapse, we will not hesitate to impose a more severe disciplinary sanction next time.*

Id. at 409.

Fla. Bar v. Brownstein, 952 So.2d 502 (Fla. 2007): A Lawyer Suffering from Depression at the Time of His Misconduct Could Not Overcome the Presumption of Disbarment for Misappropriation of Client Funds

A lawyer's impairment is not such a mitigating factor that it will prevent disbarment for misappropriation of client funds, among other RPC violations. *Fla. Bar v. Brownstein*, 952 So.2d 502 (Fla. 2014).

Brownstein admitted to all of violations of the Florida RPC filed against him. A hearing referee recommended that Brownstein be suspended for three years. The Florida Bar regarded the discipline as too light for Brownstein's conduct. The Florida Supreme Court agreed and disbarred Brownstein for five years.

Brownstein was clinically depressed at the time of his misconduct. His doctor testified at his grievance hearing:

> *Brownstein met seven out of nine criteria for major depressive disorder and eighteen out of the twenty-one criteria on the Beck's Depression Scale. He further asserted that this disorder was recurrent, affecting three different periods of Brownstein's life. The prior episodes did not last as long, however, and were less serious. Based on his diagnosis, Dr. Eustace recommended that Brownstein become involved in a comprehensive program of mental health treatment, including medication, individual treatment, and family treatment. Dr. Eustace last saw Brownstein shortly before testifying and stated it was his opinion that there was marked improvement, including his observations that Brownstein was no longer exhibiting suicidal ideations, had more energy, was beginning to interact with family and friends, and was willing to face the consequences of his bad acts. Dr. Eustace's opinion was that the misconduct was a symptom of the disorder--that "but for" the depression, he would not have committed the acts.*

Id. at 506-07.

The Court acknowledged this testimony, but Brownstein had too many strikes against him to overcome the gravity of his conduct:

> *Brownstein has been a successful lawyer who received very substantial financial benefits from the practice of law involving sophisticated legal services. Yet, during this time, he misappropriated his clients' money and breached their trust. We recognize that Brownstein and Dr. Eustace testified that during this period of time, Brownstein suffered from clinical depression. We accept the referee's finding that Brownstein's depression was established as a mitigating factor. However, we find it significant that Brownstein did not seek medical or psychological care until after the Bar's investigation began. [] [W]hen Brownstein took money from the trust account, he was not on medication that clouded his judgment. Further, after he saw Dr. Eustace and began to take medication, Brownstein still did not undertake to provide the Bar with the subpoenaed records, cooperate with the Bar in reconstructing records, or rectify his wrongful acts of failing to pay his secretary's withholding taxes and payroll taxes or his own back taxes.*
>
> *As we have repeatedly stated, disbarment is the presumed sanction for the misappropriation of client funds, and the presumption will be overcome only in unique circumstances. This case involves five substantial aggravators: (1) a*

> *dishonest or selfish motive; (2) bad faith obstruction of the disciplinary proceedings; (3) substantial experience in the practice of law; (4) multiple offenses; and (5) a pattern of misconduct. In contrast to this weighty aggravation, eight mitigators circumstances are present: (1) an absence of a prior disciplinary record; (2) timely good-faith effort to rectify consequences of misconduct; (3) otherwise good reputation and character; (4) mental impairment; (5) interim rehabilitation; (6) imposition of other penalties and sanctions; (7) remorse; and (8) FLA supervision. While we acknowledge the referee's findings regarding the mental depression suffered by Brownstein, we find that the mitigation is insufficient to overcome the presumption of disbarment based upon our case law. As we do not find Brownstein has overcome the presumption, we conclude that the appropriate discipline in this case is disbarment.*

Id. at 512.

CONCLUSION

Hopefully, this survey of the rules of professional conduct, ethics opinions, and court decisions that may be applicable in the context of a lawyer suffering from a well-being impairment has raised readers' sensitivity to the numerous ethics issues that can be applicable not just to the lawyer needing assistance but also supervisory lawyers, lawyers with managerial responsibility, or lawyers who have knowledge of the conduct of the lawyer needing assistance. In a law firm, there should be at least one other lawyer who can play an important role in ensuring compliance with the rules of professional conduct by all lawyers in the law firm. Staff should also be alert to conduct that should be brought to the attention of firm supervisory or managerial lawyers. Solo practitioners are well advised, and may be required in some states, to establish procedures at the outset of a law practice that guard against diminished capacity relating to a well-being impairment and to identify and train staff to share in the task of ensuring the solo lawyer's compliance with the rules of professional conduct.

We are a self-regulated profession as the Preamble to the Model Rules reminds us. We have an obligation to promote the competence of all lawyers whether as part of a law firm or as a colleague in the profession. When we become aware of a lawyer in need of assistance, we have to promptly examine our ethical responsibilities to be sure we discharge them properly. But ethics aside, we also have to be willing to reach out as a friend or in some other appropriate way where doing so might save a career, and maybe even a life.

APPENDIX

Excerpts from City of Philadelphia Bar Association Legal Ethics Opinion 2014-100 (December 2015) Addressing the "Assisting Attorney" Concept in Succession Planning for a Solo Practitioner and, Alternatively, "Best Practices" in Succession Planning

III. THE "ASSISTING ATTORNEY" CONCEPT

Notwithstanding that the Rules do not create an express affirmative duty of succession planning, the potential adverse consequences to clients of an unanticipated closing of a practice in these circumstances may result in violations of several of the Rules. Thus, given the continuing ethical duties created by the Rules, preparing a succession plan for an unanticipated death or disability is a best practice for all attorneys. A lawyer trying to anticipate the fallout from the unfortunate circumstance of disability or sudden death should, therefore, give careful thought to the mechanics of protecting his or her clients (and the value of his or her practice) by complying with the subset of duties specifically enumerated by the Rules, including, but not limited to, the following:

Diligence (Rule 1.3)

Communication (Rule 1.4)

Confidentiality (Rule 1.6)

Conflicts of interest (Rules 1.7 through 1.11)

Declining or Terminating Representation (Rule 1.16) Safekeeping Property (Rule 1.15)

Responsibilities of Partners, Managers and Supervisory Lawyers (Rule 5.1)

Professional Independence of a Lawyer (Rule 5.4)

Along the lines suggested by Opinion 92-369,[62] a number of jurisdictions have concluded that appointment by a lawyer of a "backup attorney" – more often called an "assisting attorney" – is the favored mechanism for dealing with the closure, sudden or otherwise, of a law practice. See, "Contingency Planning for Closing of a Law Practice", Texas State Bar (2011), "Succession Planning Handbook for New Mexico Lawyers", " Lawyer Succession and Transition Committee of the New Mexico Supreme Court (July, 2012); "Plan Ahead: Are You Prepared For The Unthinkable," Michaelis, Beverly, Oregon State Bar Bulletin (July, 2005).

In addition to the mechanics of planning – forms, client notifications, records updating – appointment of an Assisting Attorney presents a number of complicating issues. To this end, it is strongly advisable for the exiting attorney and his or her intended Assisting Attorney to enter into a written agreement for

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[62] This is a reference to ABA Formal Ethics Opinion 92-369 (1992) addressing the need of every lawyer to prepare a contingency plan in the event of death, and called attention to the "recommendation … approved by the House of Delegates in 1997 that 'urges state, local and territorial jurisdictions, that do not now have programs in place, to address the issue of death or disability of lawyers and to develop and implement through court rule or other appropriate means effective procedures for the protection of clients' interests and property and the ethical closure or disposition of their practices.'"

services to address these complications for the protection of the exiting attorney's clients. Among these complications are questions such as:

(a) *Who does the Assisting Attorney represent?*

The Assisting Attorney can represent the lawyer or the clients of the lawyer but obviously not both:

If the assisting attorney represents the planning attorney, he or she may be prohibited from representing the planning attorney's clients on some or possibly all matters. The assisting attorney would be prohibited, without consent, from informing clients of any legal malpractice or ethical violations. If the assisting attorney is not representing the planning attorney, he/she may be able to become the successor attorney for some or all client matters and
may have an ethical obligation to advise clients of any malpractice or ethical problems discovered in winding up or handling the practice.

"Handling an Attorney's Death, Disability or Disappearance," Shaw, Betty M., Minnesota Lawyer (October 8, 2001).[63] See also, "The Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of your Disability, Retirement or Death", New York State Bar Association Committee on Lawyer Practice Continuity, Appendix 1.

(b) *Access to Trust Accounts*

Will the Assisting Attorney become a signatory on the lawyer's trust and/or business accounts? Alternatively, will there instead be a power of attorney contingent upon the happening of a triggering event?[64] The requirements about supervision of escrow account signatories as found in Rule 1.15 need to also be considered.

(c) *How are conflicts of interest between the lawyer and the Assisting Attorney to be handled?*

Designation by agreement of the role to be played by the Assisting Attorney will determine how conflicts are to be addressed in some measure. At the very least, the lawyer and the proposed Assisting Attorney must prepare a comprehensive inventory of their respective clients and matters, jointly review it to identify matters in which the Assisting Attorney may be prohibited from undertaking the representation of either the lawyer or the lawyer's clients and establish a mechanism for obtaining waivers or making referrals as appropriate. These inventories and the review process should be updated on a regular periodic basis.

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[63] In note 4 to the opinion, the ethics committee noted here: "Jurisdictions deal with this issue in different ways. Virginia Rule of Professional Conduct 1.6(b)(3) provides, for example: 'To the extent a lawyer reasonably believes necessary, the lawyer may reveal information necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence.'"

[64] In note 5 to the opinion, the ethics committee noted here: "'When and under what circumstances should the assisting attorney have access to your trust account in order to disburse client money? If the assisting attorney has signatory power on the trust account, client consent to this arrangement would need to be obtained. Conflicts issues may also make this a difficult or unworkable option. If authorization is only upon the occurrence of an event and for a limited time (using a power of attorney), there will need to be an agreement regarding who will determine whether the planning attorney is disabled, incapacitated or otherwise unable to conduct business affairs and for how long the power of attorney will last. A close relative and/or the personal representative of the planning attorney's estate should be made aware of the agreement and the planning attorney should consult his or her bank regarding these documents.' Minnesota Lawyer, id."

IV. POSSIBLE 'BEST PRACTICES'

Whether or not a lawyer chooses to appoint an Assisting Attorney as a hedge against the closure of his/her practice, there are certain practice organization steps – or updates – which can smooth the path for an attorney's successors. There are a number of resources from state bar associations and ethics authorities accessible online which set out, some in greater detail than others, such steps. (For reference, the Committee has appended a list of representative "Resources.") Many of these resources include or refer to "checklists." Common items on these "checklists" include:

(a) Preparing a written office manual containing key details of the practice such as: (1) names, addresses, phone numbers and job descriptions of support and other key personnel (office sharers, of counsel attorneys, office manager, secretary, bookkeeper, accountant, landlord, malpractice carrier and other insurance brokers—disability, life and property), the personal representative and other important contacts; (2) location, account numbers and signatory name(s) for business and trust accounts; (3) location and access information for safety deposit box and/or storage facilities; (4) computer and voice mail access codes; and (5) location of important business documents such as leases, maintenance contracts, business credit cards, client ledgers and other books and records relating to the business and trust accounts, etc.;

(b) Consulting with the bank to ensure that the provisions of any backup agreement pertaining to authority over bank accounts will be honored. It may be necessary to prepare a separate, specific durable power of attorney to satisfy the bank's preferences;

(c) Ensuring that staff or software can produce an accurate list of current clients, addresses and telephone numbers;

(d) Ensuring that staff or software can produce an accurate list of deadlines in pending matters;

(e) Maintaining complete and updated billing and trust account records;

(f) Consolidating and indexing the holdings of original client documents (e.g., wills, abstracts) in a safe location (not in client files) or returning them to clients;

(g) Periodically purging old files after proper notice to the clients and passage of the suggested minimum retention periods;

(h) Including provisions in engagement letters and fee contracts regarding disposition of client files once a matter is concluded, and notice regarding the existence of the backup plan.

V. CONCLUSION

In summary, the Committee is of the opinion that succession planning for attorneys practicing in the Commonwealth of Pennsylvania is not mandatory under the Pennsylvania Rules of Professional Conduct. Nevertheless, the Committee emphasizes that solo or small firm practitioners should, pursuant to the language of Comment [5] to Pennsylvania Rule of Professional Conduct 1.3, pay special attention to planning for the contingency of death or disability as a bulwark against breaches of ongoing professional duties to clients which may occur after the lawyer is no longer able to personally comply with those duties. Finally, the Committee notes that the above discussion should in no way be understood as relieving attorneys practicing in settings other than those specifically described in Comment [5] to Rule 1.3 of the ongoing post-practice obligations identified in this Opinion.

ABOUT THE AUTHOR

John M. Barkett

Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude)* and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami School of Law. Mr. Barkett was a member of the Advisory Committee for Civil Rules of the Federal Judicial Conference from 2012-18, and served on the Discovery Subcommittee that developed the December 1, 2015 amendments to the rules, the Rule 23 Subcommittee that developed the 2018 amendments to Rule 23, and the Rule 30(b)(6) and MDL subcommittees. He is now serving for the second time as a member of the American Bar Association Standing Committee on Ethics and Professional Responsibility. He is also a member of the American Law Institute. He is a fellow of the College of Commercial Arbitrators, the American College of Civil Trial Mediators, and the American College of Environmental Lawyers.

Mr. Barkett is a commercial (contract, corporate, and banking disputes, employment, trademark, and antitrust) and environmental lawyer (CERCLA, RCRA, and toxic tort) having handled scores of complex and simple litigation matters in Federal and state courts or before an arbitration tribunal.

Mr. Barkett is also a problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of commercial, environmental, and reinsurance contexts. He is a certified mediator under the rules of the Supreme Court of Florida and the Southern and Middle Districts of Florida and a member of the London Court of International Arbitration and the International Council for Commercial Arbitration, and serves on the AAA and ICDR roster of neutrals, and the CPR Institute for Dispute Resolution's "Panel of Distinguished Neutrals." He has served or is serving as a neutral in scores of matters involving in the aggregate more than $4 billion. He has conducted or is conducting commercial domestic and international arbitrations under AAA, LCIA, ICDR, UNCITRAL, and CPR rules.

Mr. Barkett chaired the Miami International Arbitration Society (MIAS) "Task Force on Issues Related to Expedited Arbitration in connection with the UNCITRAL Rules to be considered at the Sixty-Ninth Session of UNCITAL Working Group II," and wrote the Report of the Task Force that was submitted to UNCITRAL for consideration by Working Group II as well as a draft of Expedited Procedures under the UNCITRAL Rules.

In November 2003, Mr. Barkett was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the multi-billion dollar restoration of the Florida Everglades. He has also served as a Special Master for judges on the Southern District of Florida or the Miami-Dade County Circuit Court to address a wide variety of discovery and e-discovery issues in complex litigation.

Mr. Barkett also consults with major corporations on the evaluation of legal strategy and risk in commercial disputes, and conducts independent investigations where such services are needed. He also is consulted by other lawyers on questions of legal ethics.

Mr. Barkett is a recipient of the Burton Award for Legal Achievement which honors lawyers for distinguished legal writing. Mr. Barkett has published two books, *E-Discovery: Twenty Questions and Answers* (Chicago: First Chair Press, 2008) and *The Ethics of E-Discovery* (Chicago: First Chair Press, 2009). Mr. Barkett has also prepared analyses of the Roberts Court the past eleven years, in addition to a number of other articles on a variety of topics:

- *Superfund Year in Review,* (ABA Section of Environment, Energy, and Resources) (co-author, January 2019)
- Trinity Industries v. Greenlease*: Allocation Roulette Under CERCLA?* 76 Chem. Waste. Lit. Reporter 11 (November 2018)
- *The 2018 Amendments to the Federal Class Action Rule* (ABA National Institute on Class Actions, Chicago, October 2018)
- *The Roberts Court 2017-18: A Return to the Norm Before Wading Into a New Era* (ABA Webinar, August 2018)
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- *The Roberts Court 2016-17: A Quiet Term, or the Calm Before the Storm?* (ABA Webinar, August 16, 2017)
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- *Arbitration Ethics: A Sampler* (Shook, Hardy & Bacon Update on the Law, Kansas City, Missouri, June 22, 2017 updated from a paper presented at the CPR Annual Meeting, Miami, March 3, 2017)
- *Work Product Protect for Draft Expert Reports and Attorney-Expert Communications* (Environmental & Energy Litigation Committee, Section of Litigation, May 30, 2017)
- *Securing Law Firm Data: When the Advice Givers Need Advice* (Shook Hardy & Bacon Private Seminar, May 2017 updating a paper presented at the ABA National Institute on E-Discovery, May 15, 2015, New York)
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- *Refresher Civil Procedure: Cost-Shifting Under the Federal Rules* (Georgetown Advanced E-Discovery Institute, Washington D.C., November 10, 2016)
- *Class Action Reform,* 31 N.R.E. 54 (Fall 2016)
- *The Roberts Court 2015-16: An Untimely Death and Its Impacts* (ABA Annual Meeting, San Francisco, August 5, 2016)

- *Antonin Scalia: A Retrospective* (Shook, Hardy & Bacon Update on the Law, Kansas City, June 23, 2016)
- *The First 100 Days (or so) of the 2015 Civil Rules Amendments* (Bloomberg BNA Digital Discovery and e-Evidence, 16 DDEE 178 (April 14, 2016) adapted from a longer piece by the same title at http://src.bna.com/d6z.
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- *Cheap Talk? Witness Payments and Conferring with Testifying Witnesses* (ABA Webinar, October 2015)
- *Ethics in ADR: A Sampling of Issues* (ABA Webinar, September 30, 2015)
- *The Roberts Court 2014-15: Individual Rights, Voting Rights, Fair Housing, and the Importance of (Con)Text* (ABA Annual Meeting, Chicago, July 31, 2015)
- *Securing Law Firm Data: When the Advice Givers Need Advice* (ABA National Institute on E-Discovery, May 15, 2015, New York)
- *Arbitration: Hot Questions, Cool Answers* (ABA Section of Litigation Annual Conference, New Orleans, April 2015)
- *Work Product Protection for Draft Expert Reports and Attorney-Expert Communications* (ABA Section of Litigation Annual Conference, New Orleans, April 2015)
- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses* (ABA Webinar, October 2014, updating a presentation first made at the ABA Annual Meeting, Chicago, 2009)
- *Ethics in ADR: A Sampling of Issues* (ABA Webinar September 2014 updating an October 31, 2013 webinar for the Professional Education Broadcast Network))
- *The Roberts Court 2013-14: First Amendment, Equal Protection, Privacy, and More (or Less) Unanimity* (ABA Annual Meeting, Boston, August 7, 2014)
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- *The Roberts Court 2012-13, DOMA, Voting Rights, Affirmative Action, More Consensus, More Dissent* (ABA Annual Meeting, San Francisco, August 10, 2013)
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Mr. Barkett is also the author of Ethical Issues in Environmental Dispute Resolution, a chapter in the ABA publication, *Environmental Dispute Resolution, An Anthology of Practical Experience* (July 2002) and the editor and one of the authors of the ABA Section of Litigation's Monograph, *Ex Parte Contacts with Former Employees* (Environmental Litigation Committee, October 2002).

Mr. Barkett is a former member of the Council of the ABA Section of Litigation and currently serves as co-chair of the Ethics and Professionalism Committee of the Section of Litigation. At the University of Miami Law School, Mr. Barkett teaches "E-Discovery," and in the past has taught a course entitled, "Environmental Litigation."

Mr. Barkett has been recognized in the areas of alternative dispute resolution or environmental law in a number of lawyer-recognition publications, including *Who's Who Legal* (International Bar Association) (since 2005); *Best Lawyers in America* (National Law Journal) (since 2005); *Legal Elite* (since 2004), (Florida Trend), *Florida Super Lawyers* (since 2008), and Chambers USA *America's Leading Lawyers* (since 2004). Mr. Barkett can be reached at jbarkett@shb.com.