

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 15th day of December 2016.

On October 19, 2016 came the Virginia State Bar, by Michael W. Robinson, its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, ¶ 10-4, and filed a Petition requesting consideration of Legal Ethics Opinion No. 1886.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1886 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 1886

Proposed LEO 1886 - Duty of Partners and Supervisory Lawyers in a Law Firm When Another Lawyer in the Firm Suffers From Significant Impairment.

INTRODUCTION

In this advisory opinion, the Committee analyzes 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.¹ The applicable Rule of Conduct is Rule 5.1² which requires

¹ This opinion seeks to address only the ethical obligations of lawyers in a law firm when faced with an impaired lawyer working in the firm. There may also be legal obligations to address in dealing with an impaired lawyer under the Americans with Disability Act, the Family Emergency Medical Leave Act and the Health Insurance Portability and Accountability Act, for example. These issues are beyond the purview of this committee and outside the scope of this opinion.

² Rule 5.1. Responsibilities of Partners and Supervisory Lawyers.

(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, 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

partners or other lawyers in the firm with managerial authority to make reasonable efforts to ensure that all lawyers in the firm conform to the Virginia Rules of Professional Conduct.³ Lawyers in a firm may have an obligation under Rule 8.3 to report an impaired lawyer to the Virginia State Bar if the impaired lawyer has engaged in misconduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law. However, this opinion addresses the obligations of partners and supervisory attorneys to take precautionary measures *before* a lawyer's impairment has resulted in serious misconduct or a material risk to clients or the public. This opinion relies upon ABA Committee on Ethics and Professional Responsibility, Formal Opinion 03-429 (2003) [hereinafter ABA Formal Op. 03-429] for its approach to the issues raised by the mental impairment of a lawyer in a firm.

SCOPE OF THE LAWYER IMPAIRMENT PROBLEM

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.⁴ The incidence of alcohol abuse is higher among lawyers aged 30 or less.⁵ Besides the potential lawyer impairment caused by substance abuse, the aging of the legal profession presents an increased

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.

(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 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.

³ The Committee is mindful that this opinion only addresses the duties of partners and supervisory lawyers pursuant to Rule 5.1 and does not consider a lawyer's ethical duties, if any, when dealing with a solo practitioner who suffers from a significant impairment.

⁴ Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Medicine, Issue 2 (March/April 2016). See also ABA Formal Op. 03-429 (2003) (citing George Edward Bailly, Impairment, the Profession, and Your Law Partner, 11 No.1 Prof. Law. 2 (1999)).

⁵ *Id.* The Hazelton Betty Ford Foundation survey reported that one in five lawyers (20%) suffers from alcoholism and approximately 30% of the lawyer population suffer from depression.

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.⁶ 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.

QUESTION PRESENTED

What are the ethical obligations of a partner or supervisory lawyer who reasonably believes another lawyer in the firm may be suffering from a significant impairment that poses a risk to clients or the general public?

HYPOTHETICALS

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.

⁶ Report, National Organization of Bar Counsel, Association of Professional Responsibility Lawyers Joint Committee on Aging Lawyers (May 2007) at 3.

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.

ANALYSIS

The Rules of Professional Conduct do not explicitly require lawyers to deal with an impaired lawyer in the law firm. However, Rule 5.1(a) requires that a firm have in place measures or procedures to ensure that *all* lawyers, not just impaired ones, comply with the Rules of Professional Conduct. The measures required depend on the firm's size, structure and nature of its practice. Cmt. [3], Rule 5.1. It follows, therefore, that Rule 5.1 requires that the partner or supervisory lawyer make reasonable efforts to ensure that an impaired lawyer in the firm or under their supervisory authority does not violate the Rules of Professional Conduct. In addition to the requirement that the firm establish appropriate preventive policies and procedures, Rule 5.1(b) requires a lawyer having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the supervised lawyer conforms to the Rules of Professional Conduct. When a partner or supervising lawyer knows or reasonably believes that a lawyer under their direction and control is impaired, Rule 5.1(b) requires that they take reasonable steps to prevent the impaired lawyer from violating the Rules of Professional Conduct.

Impaired lawyers have the same ethical obligations as any other lawyer. Like all lawyers, an impaired lawyer owes a duty to represent a client competently and with diligence and to communicate with the client. A lawyer's impairment does not excuse the lawyer from

compliance with the Rules of Professional Conduct. The lawyer's impairment may very well be the reason for the lawyer's failure to act competently or with diligence, or to communicate with the client. However, the lawyer's impairment is neither a defense to, nor an excuse for, those ethical breaches.⁷

A lawyer whose physical or mental health "materially impairs" his capacity to represent clients has a duty to refrain or withdraw from representation. Rule 1.16(a)(2).⁸ Unfortunately, the impaired lawyer may not be cognizant of the scope and nature of the impairment, and does not recognize the need to withdraw from the representation.

As the ABA's Standing Committee on Ethics and Professionalism observed in ABA Formal Op. 03-429:

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.

The law firm may be able to work around or accommodate some impairment situations. For example, the firm might be able to reduce the impaired lawyer's workload, require

⁷ ABA Formal Op. 03-429 (2003) (A lawyer's impairment does not excuse failure to meet a lawyer's duty to a client.). See also *Columbus Bar Ass'n v. Korda*, 760 N.E.2d 824 (Ohio 2002) (impaired lawyer who filed a brief on behalf of her clients but failed to take any further actions in the case suspended for failing to act diligently); *Attorney Grievance Comm'n v. Wallace*, 793 A.2d 535 (Md. 2001) (lawyer who claimed to be undergoing personal and psychological problems was disbarred for being negligent in his representation in six cases); *In re Sheridan*, 813 A.2d 449 (N.H. 2002) (impaired lawyer who failed to successfully file the articles of incorporation for his client and did not notify the client of his failure suspended for failing to communicate with his client); *In re Francis*, 4 P.3d 579 (Kan. 2000) (depressed lawyer failed to respond to client's request for information, misrepresented the status of the client's case to her, and failed to communicate the problems he was experiencing in providing representation); and *State v. Southern*, 15 P.3d 1 (Okla. 2000) (lawyer with B-12 deficiency publicly censured after failing to respond to requests for information from client and bar association).

⁸ See, e.g., *In re Taylor*, 959 P.2d 901 (Kan. 1998) (alcoholic lawyer failed to withdraw from representation although he had failed to appear in court on behalf of his clients or otherwise provide competent counsel); see also *State v. Southern*, 15 P.3d. at 8.

supervision or monitoring, or remove the lawyer from time-sensitive projects. The impaired lawyer may not be capable of handling a jury trial but could serve in a supporting role performing research and drafting documents. 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 drafting legal documents only for other lawyers in the firm who in turn can evaluate whether the impaired lawyer's work product can be used in furtherance of a client's interests.

In order to protect its clients, the firm should have an enforceable policy that would require, and a partner or supervising lawyer should insist, that the impaired lawyer seek appropriate assistance, counseling, therapy, or treatment as a condition of continued employment with the firm. For example, the firm could recommend, encourage or direct that the impaired lawyer contact Lawyers Helping Lawyers⁹ 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.

In the first hypothetical, it is clear that James, as a managing partner in a law firm, and any other lawyer that has supervisory authority over the impaired lawyer, are required by Rule 5.1 to promptly make reasonable efforts to ensure that the impaired senior associate does not

⁹ 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.

engage in any further conduct that breaches ethical duties owed to his clients. 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 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.¹⁰ 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, 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.

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

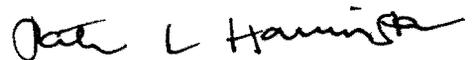
¹⁰ N. C. State Bar Ethics Op. 2013-8 (2014), Inquiry No. 3 (If an impaired lawyer has committed misconduct that a lawyer must report under Rule 8.3(a), a lawyer may not fulfill that reporting duty by reporting the impaired lawyer to a lawyers assistance program, but not the Attorney Grievance Committee of the State Bar).

Conduct, neither the partners nor 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).

In the second hypothetical, it is not clear that George has committed any violation of the Rules of Professional Conduct. Obviously, George's impairment, unaccompanied by any professional misconduct, does not require any report to the bar under Rule 8.3(a). 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 a confidential and candid conversation with George about his condition and persuading him to seek evaluation and treatment.

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "Paul L. Hammit". The signature is written in a cursive style with a horizontal line through the middle of the letters.

Clerk