MLRC Media Law Conference  
Sept. 29-Oct. 1, 2021  
Lansdowne Resort Hotel, Leesburg, VA

**ETHICS BOUTIQUE:**

**HOT ISSUES IN ETHICS FOR MEDIA LAWYERS**

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1. **Conflicts of Interest**

The recent increase in libel litigation and other claims against the media that are based, at least in part, on “political” claims, or involve claims against more than one news organization based on separate stories covering the same issue, creates potential ethical issues for media lawyers. Suppose, for example, a claimant demands from one news organization a retraction of or correction to a particular story, and the news organization agrees. Can the news organization’s lawyer represent a second client later when that client receives a similar demand from the same claimant arising out of a story which, although different, relates to the same general news event? Or, suppose the first client makes a confidential monetary payment in settlement of a potential claim; can that client’s lawyer represent a second news organization against the same claimant later?

These examples raise “material limitation” conflict of interest issues, which, unlike “directly adverse” conflict issues, can be challenging to analyze.

The starting point, of course, is the rule addressing conflict of interest issues involving current clients:

**ABA Model Rule 1.7** Conflicts Of Interest: Current Clients[[1]](#footnote-1):

1. Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
2. the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

1. Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

“Material limitation” conflicts can arise in a variety of situations and can be difficult to evaluate. One of the more challenging situations a lawyer may face is the “confidential information” conflict. This situation arises when a lawyer in the course of representing a client learns information the lawyer is obligated to keep confidential, and then that information may later become material in work the lawyer does for a subsequent client. Thus, if a lawyer represents news organization A in negotiations with a claimant, and those negotiations result in a monetary settlement, that information might be useful if news organization B receives a demand from the same claimant arising from stories about the same general subject. But what if the terms of client A’s settlement agreement are confidential?

New York City Bar Opinion 2005-02 (Feb. 2, 2005) concluded that possession of this confidential information, *without more*, does not create a conflict of interest. Instead, the opinion said, “the critical question is whether the representation of either client would be impaired.” But the opinion noted that a conflict would be likely if the lawyer cannot avoid using the confidential information in the representation of the second client or if possession of the confidential information would affect the lawyer’s independent judgment in the representation of the second client. Other authorities have taken a stricter view. For example, Kansas Opinion 03-03 (Sept. 16, 2002), concluded that a lawyer who obtained confidential information from one client that was material to the representation of a second client had a material limitation conflict.

In evaluating “material limitation” issues, it must be remembered that a lawyer owes duties to former clients, as well as to current clients:

**ABA Model Rule 1.9 Duties To Former Clients**

1. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
2. A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

1. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

i. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

ii. reveal information relating to the representation except as these Rules would permit or require with respect to a client.

**2. Ethical issues involving restrictions in settlement agreements on a lawyer’s ability to practice law.**

You are in-house counsel overseeing what you consider to be a frivolous lawsuit for sexual harassment brought against one of the company’s on-air stars, as well as the company, and yet again brought by the same obnoxious, grand standing, twitter sphere baiting, bottom-feeding opposing counsel. You direct your outside counsel to insert a clause in the settlement agreement prohibiting opposing counsel from representing anyone against the company or its talent ever again.

2.1 Is that ethical?

**ABA Model Rule: 5.6 Restrictions On Right To Practice**

A lawyer shall not participate in offering or making:

…

(b) an agreement in which a restriction on the lawyer's right to practice as part of the settlement of a client controversy.

2.2 If the parties agree not to disparage each other, can plaintiff’s counsel be bound by that?

2.3 If not, would a non-disparagement agreement prevent a lawyer who works for the network from retweeting a statement which asserted that the original lawsuit was frivolous? See https://jonathanturley.org/2020/07/28/did-cnns-stelter-shatter-the-sandmann-confidentiality-agreement/

2.4 Are there ways to prevent or deter future suits that would not violate Rule 5.6?

**THE UNAUTHORIZED PRACTICE OF LAW**

Unauthorized Practice of Law (UPL) issues can be complicated and the consequences potentially severe. A UPL finding can result in a reprimand, a delay in gaining admission in the “foreign” state, and, perhaps most significantly, the possibility of a disciplinary proceeding in the lawyer’s “home” state, as many state disciplinary rules contain “reciprocity” provisions such that discipline from another state may result in parallel discipline in the lawyer’s home state.

UPL issues generally arise in transactional matters and the rendering of advice, although it possible to face UPL issues in the litigation context as well. A third area of concern, the significance of which escalated in 2020, are UPL issues arising from telecommuting, or working remotely.

***Transaction and Advice issues:***

Is advising a news organization about the laws of a state in which the lawyer is not admitted considered the unauthorized practice of law?

Model Rule of Professional Conduct 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law:

(c)  “A lawyer admitted in another United States jurisdiction…may provide legal services on a temporary basis in this jurisdiction that:

(4)  are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.”

Comment 13: “Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.”

Comment 14: “Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer’s client may have been previously represented by the lawyer or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law….”

***Litigation issues:***

UPL issues arise less frequently in litigation, as it is widely understood that one may not appear in court or sign a pleading in a case pending in a court in which the lawyer is not admitted, either generally or *pro hac vice*.

Suppose, however, a lawyer attempts to negotiate a settlement of an out-of-state case without actually signing pleadings or appearing in court? For example, a lawyer might wish to negotiate an early settlement on behalf of a defendant before the client is even required to file a responsive pleading—is that lawyer facing a UPL issue if the lawyer is not admitted in the state in which the case is pending?

A troubling case, which should serve as a cautionary note to lawyers in this situation, is *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016). In that case, a Colorado lawyer not admitted to practice in Minnesota was asked by his in-laws, who were Minnesota residents, to assist in negotiating a settlement of a small claims judgment which had been rendered against them in Minnesota. The Colorado lawyer engaged in negotiations with the Minnesota lawyer representing the judgment creditor, all of which he conducted by telephone or email from his Colorado office. Over three dissents, a majority of the Minnesota Supreme Court concluded that the Colorado lawyer had engaged in the unauthorized practice of law in Minnesota.

***Working remotely from a jurisdiction in which the lawyer is not licensed:***

In a no longer hypothetical situation, suppose a lawyer is working remotely from a jurisdiction in which the lawyer is not licensed. Perhaps a lawyer licensed in Texas with an office in Texas works remotely from a vacation home in Colorado, where the lawyer is not licensed; or, a lawyer licensed in New York with an office in New York works remotely from her *permanent* residence in Connecticut, where she is not licensed. Are there Unauthorized Practice of Law issues in either, or both, scenarios?

Prior to 2020, “working remotely” generally meant doing occasional work from home (or elsewhere) on the weekend or while on vacation, and few people even considered the possibility of UPL issues. But as the pandemic’s “temporary” remote working protocols stretch well into their second year, are the hypothetical lawyers described above now “practicing law” in Colorado and Connecticut, states in which they are not licensed? While there are still few formal opinions on the subject, the consensus so far seems to be that the answer is no.

For example, in Opinion 24-20, the District of Columbia Committee on Unauthorized Practice of Law concluded that a DC resident not admitted to practice in DC may work from home under the “incidental and temporary practice” exception of the rules, provided that the lawyer “avoids using a District of Columbia address in any business document or otherwise [holds] out as authorized to practice law in the District of Columbia,” and does not “regularly conduct in-person meetings with clients or third parties in the District of Columbia.”

Similarly, in August of 2020, the Florida Bar’s Standing Committee on Unlicensed Practice of Law issued a Proposed Advisory Opinion, FAO #2019-4, in which it concluded that a New Jersey-licensed attorney employed by a New Jersey law firm and who practices “solely on matters that concern federal intellectual property rights” could work remotely from his permanent and exclusive residence in Florida. The Florida Supreme Court approved the opinion on May 20, 2021. *The Florida Bar Re: Advisory Opinion—Out-of-State Attorney Working Remotely From Florida Home,* No. SC20-1220 (May 20, 2021).

A pre-pandemic Utah Ethics Opinion, presumably triggered by inquiries relating to second-home owners in Utah, put it bluntly, asking: “[W]hat interest does the Utah State Bar have in regulating an out-of-state lawyer’s practice for out-of-state clients simply because he has a private home in Utah? The answer is…none.” Utah Ethics Opinion 19-03 (2019).

On December 16, 2020, the ABA Standing Committee on Ethics and Professional responsibility issued a Formal Opinion in which it concluded that, under the Model Rules, “a lawyer may practice the law authorized by the lawyer’s licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer’s presence or availability to perform legal services in the local jurisdiction.” Formal Opinion 495.

On August 12, 2021, the State Bar of California issued a proposed formal opinion addressing several issues related to remote working by lawyers, including issues arising from the lawyer working remotely from a jurisdiction in which the lawyer is not licensed. The proposed opinion cautions California lawyers working remotely in another state to consult the unauthorized practice rules of the state in which they are physically located. Similarly, the proposed opinion advises lawyers not licensed in California who may be working remotely from California to consult the “relevant authorities” from California. Citing a 1998 case, however, the proposed opinion notes that one may engage in the unauthorized practice of law in California, even if physically located elsewhere, “by advising a California client on California law in connection with a California legal dispute by…modern technological means.” *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup. Ct.* (1998) 17 Cal. 4th 119-128-129 [70 Cal. Rptr. 2d 304]. This would suggest that the focus will be on the work the lawyer is doing rather than on the lawyer’s physical location at the time.

The California Bar has opened a public comment period on the proposed rule, which will run until November 12, 2021. The text of the rule and the procedure for making comments may be found at https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2021-Public-Comment/Proposed-Formal-Opinion-Interim-No-20-0004-Ethical-Obligations-When-Working-Remotely.

***Other Issues Facing Attorneys Working Remotely***

On March 10, 2021, the ABA Standing Committee issued a Formal Opinion addressing the minimum requirements and best practices for virtual practice. Formal Opinion 498 stressed the increased importance of technology security, adequate supervision of associates and staff, and maintaining client confidentiality, among other issues. As the ABA stressed in its conclusion, “The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision.” Formal Opinion 498.

As should now be obvious, a lawyer’s ethical obligations do not disappear simply because the lawyer is working from home—or because the courtroom in which he is practicing is virtual. A recent case out of Michigan underscored this point. *Somberg v. Cooper*, 2021 WL 3510960 (E.D. Mich. Aug. 10, 2021) arose out of actions by a criminal defense attorney who took a photograph of a Zoom state court proceeding and posted it on social media, along with commentary regarding the prosecuting attorney. The prosecutor brought contempt charges against the defense attorney, arguing that this action violated a Michigan court rule prohibiting the recording of court room proceedings. The state trial court ultimately dismissed the contempt charges on procedural grounds, but said she was “chagrined and troubled by the allegations, if true…because of Defendant’s status as a member of the State Bar of Michigan.” The court quoted Michigan Rule of Professional Conduct 1.0, which provides that:

A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.

This saga continues. The defense attorney filed suit in the Eastern District of Michigan, challenging the ban on recording virtual court proceedings on First Amendment grounds. The federal court denied his motion for summary disposition, *see* *Somberg v. Cooper*, 2021 WL 3510960 (E.D. Mich. Aug. 10, 2021), and he seeks to appeal that ruling. Though ultimately not resulting in any rule violation, this case is a good reminder that the rules still apply in full force to remotely working attorneys. Remotely working attorneys must be cautious not to exploit technology—such as by recording a court proceeding from home—beyond the bounds of the applicable rules.

**JUDGES AND SOCIAL AND POLITICAL RELATIONSHIPS**

Should judges be disqualified based on social or political relationships with attorneys or with parties?

* American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 488 – Judges’ Social or Close Personal Relationship with Lawyers or Parties as Grounds for Disqualification or Disclosure (Sept. 5, 2019), https://www.americanbar.org/content/dam/aba/administrative/professional\_responsibility/aba\_formal\_opinion\_488.pdf: “Rule 2.11 of the Model Code of Judicial Conduct identifies situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned— including cases implicating some familial and personal relationships—but it is silent with respect to obligations imposed by other relationships. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in evaluating ethical obligations those relationships may create under Rule 2.11: (1) acquaintanceships; (2) friendships; and (3) close personal relationships. In short, judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Judges’ disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(C) of the Model Code.”
* *Barone v. Wells Fargo Bank, N.A.*, 757 F. App’x 877 (11th Cir. 2018), *cert. denied,* 139 S. Ct. 2725 (2019): Ordinary commercial relationship between a party and judge does not require recusal from a case. Standard consumer transactions made within the ordinary course of business are permissible. The fact that the judge’s home mortgage was serviced by Wells Fargo did not require recusal from the case due to a personal relationship or bias.
* Do political contributions and/or relationships require disclosure or disqualification?
  + In *Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868 (2009), a justice of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of a $50 million jury verdict even though the lead defendant’s CEO had provided significant financial support to the justice’s campaign.[[2]](#footnote-2) The United States Supreme Court “conclude[d] that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent,” and that under those circumstances due process required recusal.
  + *Caperton* involved facts which the Supreme Court found to be “extreme by any measure.” In less “extreme” situations, however, appellate courts have routinely rejected attempts to force recusals of judges whose political campaigns have accepted campaign contributions from lawyers representing a party in the case. Illustrative of the common holding in these situations is *Collier v. Griffith*, No. 01-A-019109CV00339, 1992 WL 44893, at \* 6 (Tenn. Ct. App. March 11, 1992) (“As long as judges must be elected, members of the bar…will be a principal source of campaign contributions….[T]he fact that a judge has received contributions from an attorney for one of the parties is not grounds for automatic disqualification.”).[[3]](#footnote-3) Some courts have suggested that an attorney’s leadership role in a judge’s current campaign might be grounds for disqualification, although in those situations the attorney generally will have a close relationship with the judge independent of the political campaign. *See, e.g., MacKenzie v. Super Kids Bargain Store,* *Inc.,* 565 So. 2d 1332, 1338, n. 5 (Fla. 1990).
  + The issue of judicial recusal based upon the judge’s relationship with a litigant arose recently in a libel suit against an Alabama newspaper, *Ex parte Boone Newspapers, Inc.,* So. 3d , 2021 WL 524485 (Ala., Feb. 12, 2021). In *Boone Newspapers*, a woman sued a newspaper, alleging that it defamed her by falsely indicating that she illegally removed Confederate flags from a public cemetery and that she illegally removed a political campaign sign from private property. The newspaper filed a motion to recuse the trial judge, stating that “it is undisputed that the [trial judge] has a close and longstanding personal relationship with [Plaintiff and her husband], stemming from, among other things, their long professional relationship as law partners and the [Plaintiff and her husband’s] political support over the years.” Without conducting a hearing, the trial judge denied the motion, and the newspaper filed a writ of mandamus in the Alabama Supreme Court. Over one dissent, the Supreme Court denied the newspaper’s petition, stating that the newspaper had cited no authority “for the proposition that a judge must recuse himself in a case in which a former law partner is a party,” and that the newspaper had brought forward no evidence of the Plaintiff’s political support for the judge. The newspaper did establish that the judge, while a lawyer, had represented the Plaintiff in a different libel suit in 2000, but the Supreme Court stated that the newspaper cited no authority “for the proposition that a judge must recuse himself if he represented a party two decades earlier.”
* What obligations, if any, do lawyers have with respect to these issues?

Generally, the issue of judicial disqualification or recusal is an issue for the judge, not the lawyer. But Model Rule 8.4 (f) provides that a lawyer may not “knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct.” If a judge fails to disclose a personal or political relationship with the lawyer, is the lawyer obligated to disclose it to the opponent?

**Ethical Duties when a Lawyer is Mentally Impaired**

**Introduction**

Lawyers working with a mentally impaired lawyer have ethical obligations under the American Bar Association’s Model Rules of Professional Conduct (“the Rules”) and may be subject to other obligations based upon the state in which they are barred or practice.

**Background**

The fundamental purpose of identifying an addressing lawyer impairment is to **encourage individuals who are suffering from mental impairment to seek and obtain assistance and treatment.[[4]](#footnote-4)**

Lawyers disproportionately struggle with mental-health and substance abuse issues. In a 2017 study by the National Task Force on Lawyer Well-Being, in a study of “13,000 practicing lawyers, 28 percent struggled with depression; 19 percent struggled with anxiety; and between 21 and 36 percent qualified as ‘problem drinkers.’ Most at risk for depression and drinking problems are ‘younger lawyers in the first ten years of practice and those working in private firms.’”[[5]](#footnote-5) There are resources available for struggling lawyers in every jurisdiction.[[6]](#footnote-6)

**Definition**

Mental impairment of a lawyer has been defined by the ABA as “a condition that materially and adversely affects a person’s judgment, memory, intellectual functioning, or otherwise interferes with work performance and the rendering of legal services in a manner consist with” ABA standards and the Rules.[[7]](#footnote-7)

Mental Impairment was also defined in an October 2019 opinion by the District of Columbia Legal Ethics Committee “as a chronic or temporary condition arising out of or related to age, substance abuse, a physical or mental health condition or other circumstance affecting the lawyer.”[[8]](#footnote-8) Additionally, it A fellow attorney may identify the deterioration of fitness to practice in an attorney when they have acted in a way to raise a “substantial question” about honesty, trustworthiness or fitness to practice law.[[9]](#footnote-9)

**ABA Obligations & Suggestions**

**ABA Obligations**

The ABA issued a formal opinion, “Obligations with Respect to Mentally Impaired Lawyers in the Firm” in 2003.[[10]](#footnote-10) The obligations are listed below:

1. **Obligations to Adopt Measures to Prevent Impaired Lawyers in the Firm from Violating the Model Rules**
   1. 1.16(a)(2): Requires firm to take steps to protect the interests of its clients, including confronting the impaired lawyer with the facts of their impairment and insisting upon steps to assure that clients are represented appropriately notwithstanding the lawyer’s impairment.
   2. 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.
   3. 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.
   4. 5.1(c): Use reasonable efforts to accommodate lawyer with impairments, changing type of work or deadlines.
2. **Obligations When an Impaired Lawyer in the Firm has Violated the Model Rules**
   1. 8.3(a): Obligation to report violations of the ethics rules by an impaired lawyer to the appropriate professional authority when violation raises a “substantial question” as to the violator’s honesty, trustworthiness, or fitness as a lawyer.
   2. 1.4(b): Responsibility to discuss with the client that circumstances surrounding the change of responsibility when there is an impaired lawyer on the case or removed from the case.
3. **Obligations When an Impaired Lawyer is No Longer in the Firm**
   1. 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.

**ABA Suggestions**

In 2019, the ABA Policy Committee of the Commission on Lawyer Assistance Programs and the ABA Working Group to Advance Well-Being in the Legal Profession developed the “Well-Being Template for Legal Employers.”[[11]](#footnote-11) The template includes suggestions for Well-Being Initiatives,

By adopting this template, employers will be committing to proactive wellness initiatives in addition to (1) early identification of impairment and proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) preventing ABA standards and the quality of work from being compromised by any personnel member’s impairment.

Law firms can take a pledge to adopt the Well-Being Template from the ABA.

Additionally, the ABA recommends mandatory substance abuse and mental health CLE, one hour every three years.[[12]](#footnote-12) California, Florida, Illinois, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oregon, Pennsylvania, South Carolina, and West Virginia already have required substance abuse CLE.[[13]](#footnote-13)

**District of Columbia Obligations & Suggestions**

The Washington, D.C. Ethics Committee issued an opinion in October 2019 explaining the obligations of partners, supervisory attorneys, subordinate lawyers, and non-lawyer employees when they reasonably believe that a lawyer in their firm, government agency, or corporate in-house legal departments has a significant mental impairment that poses a risk to clients.

In an effort to **create a culture of compliance** within firms and agencies and to promote an office culture that **encourages those in need to seek assistance**, the DC Rules create obligations for (1) partners and other managerial and supervisory lawyers to take steps to prevent an impaired lawyer from violating the Rules, to develop policies address impairment, and to create a firm or agency culture that allows subordinate lawyers and other personnel to report concerns regarding the impairment of a lawyer without reprisal; (2) reporting by a lawyer who knowns that an impaired lawyer in the same firm or agency has violated the Rules; and (3) lawyers when an impaired lawyer leaves a firm.

The obligations outlined in the October 2019 opinion include:[[14]](#footnote-14)

* Law firm managers or those who supervise other lawyers, must closely supervise the conduct of a lawyer reasonably believed to be impaired, because of the risk of harm to clients. (See Model Rule 5.1).
* If the impaired lawyer’s violation of an ethics rule raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness to practice, all lawyers, whether supervisors or not, have a duty to report it to appropriate professional authorities  — unless client confidentiality duties (or other law) prohibits disclosure. On the other hand, client consent can lift the prohibition.  The reporting duty is not eliminated even if the impaired lawyer is removed or leaves the firm. (See Model Rule 8.3).
* The firm might have communication obligations to clients that are considering whether to stay with the firm or transfer their representation to the departing lawyer.  But the firm must also be cautious — other law and the impaired lawyer’s privacy rights can limit the information permissible to disclose. (See Model Rule 1.4).
* Mental impairment does not lessen the duties owed to clients, and a lawyer has a duty to withdraw if a mental or physical condition materially impairs the lawyer’s ability to represent the client. (See Model Rule 1.16(a)(2)).
* The firm’s ultimate ethical obligation is to protect the interests of its clients, and if an impaired lawyer does not or will not take steps to address the problem, then the lawyer’s partners, managers or supervisors must do so.

In addition to the ethical obligations, the D.C. Ethics Committee also suggested steps to be taken to promote compliance and help connect struggling lawyers with resources:

* Develop internal policies and procedures to encourage early reporting to appropriate personnel within the office;
* Develop internal policies & procedures with which an impaired lawyer will be expected to comply;[[15]](#footnote-15)
* Keep in mind that duties to clients might include removing an impaired lawyer from involvement with client matters; and,
* Keep in mind that the substantive law will inform the firm or office on how to deal with an impaired lawyer’s privacy and employment rights.

**Other States’ Obligations & Suggestions**

In addition to ABA guidance, different states impose both requirements and suggestions for dealing with an impaired attorney. The following ethics board opinions are featured on the ABA’s website:

* California: the State Bar of California Standing Committee on Professional Responsibility and Conduct releases advisory opinions regarding the ethical propriety of hypothetical attorney conduct, which are encouraged but not binding. Opinions are available here.[[16]](#footnote-16)
* Illinois: An attorney may not use or reveal information given him by a doctor/client concerning the doctor’s patient (an attorney considered to be incompetent to practice law) but he may suggest alternatives that the doctor can pursue with the patient and his family.[[17]](#footnote-17)
* Maryland: Maryland’s Rules of Professional Conduct, specifically 19-301.1 (Competence), govern mental incapacity, which is overseen by the Maryland Attorney Grievance Commission.
* North Carolina: Follows ABA guidelines and has answered specific scenario questions in a formal opinion in 2014.[[18]](#footnote-18)
* Virginia: Follows ABA guidelines and answered specific scenario questions in formal opinion in 2016.[[19]](#footnote-19)[[20]](#footnote-20)

A growing number of states have lawyer and judicial assistance programs. These programs traditionally focused on addressing substance abuse and other mental health matters and are now increasingly focused on age-related cognitive impairment issues.[[21]](#footnote-21)

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[**Client-Lawyer Relationship 28**](file:///C:\Users\th23307\AppData\Local\Microsoft\Windows\INetCache\Content.Outlook\2KGCM72C\ImpairedLaywerCLE.docx#_Toc48729489)

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[Rule 1.3 (Diligence and Zeal) 28](file:///C:\Users\th23307\AppData\Local\Microsoft\Windows\INetCache\Content.Outlook\2KGCM72C\ImpairedLaywerCLE.docx#_Toc48729491)

[Rule 1.4 (Communication) 28](file:///C:\Users\th23307\AppData\Local\Microsoft\Windows\INetCache\Content.Outlook\2KGCM72C\ImpairedLaywerCLE.docx#_Toc48729492)

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[Rule 1.16 (Declining or Terminating Representation) 29](file:///C:\Users\th23307\AppData\Local\Microsoft\Windows\INetCache\Content.Outlook\2KGCM72C\ImpairedLaywerCLE.docx#_Toc48729494)

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[Rule 8.3 (Reporting Professional Misconduct) 31](file:///C:\Users\th23307\AppData\Local\Microsoft\Windows\INetCache\Content.Outlook\2KGCM72C\ImpairedLaywerCLE.docx#_Toc48729500)

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**Appendix A: District of Columbia Bar Legal Ethics Comm., Op. 377, October 19, 2019**

**Duties When A Lawyer is Impaired**

Introduction

The District of Columbia Legal Ethics Committee has examined the ethical duties of partners; other managerial or supervisory lawyers and subordinate lawyers; and non-lawyer employees to take appropriate measures when they reasonably believe another lawyer in the same law firm or government agency is suffering from a significant impairment that poses a risk to clients.[[22]](#footnote-22) A related question involves the duties owed to clients and the profession when an impaired lawyer leaves a law firm or government agency, particularly when the lawyer may continue to practice law, regardless of whether clients are, or may be, terminating their relationship with the firm in order to remain clients of the departing lawyer.[[23]](#footnote-23)

This Opinion deals only with mental impairment, which may be a chronic or temporary condition arising out of or related to age, substance abuse, a physical or mental health condition or other circumstance affecting the lawyer. This Opinion supplements the guidance contained in Legal Ethics Opinion 246, with a specific focus on the issue of impaired lawyers, whose conduct may or may not trigger mandatory reporting obligations under the Rules, as discussed herein. This Opinion also relies, in part, upon ABA Committee on Ethics and Professional Responsibility Formal Opinion 03-429 (2003).

The impairment of a lawyer may fluctuate over time, regardless of its cause. However, if a lawyer’s periods of impairment are on-going or have a likelihood of recurrence, then partners, or other lawyers with managerial or supervisory authority may have to conclude that the lawyer’s ability to represent clients is materially impaired.

A range of ethics rules are implicated, including those setting forth the duties owed by lawyers to clients and the profession, and those addressing issues of supervising lawyers and non-lawyer employees. At the outset, and as discussed within this opinion, the Committee recognizes that there are tensions between ethical duties that arise under the D.C. Rules of Professional Conduct (the “Rules”) and requirements or prohibitions that may exist under the substantive law, specifically with respect to employee privacy and other rights. Lawyers and law firms must be cognizant of the legal landscape in which these difficult issues occur.[[24]](#footnote-24)

Mental impairment may lead to an inability to competently represent a client as required by Rule 1.1, to complete tasks in a diligent and zealous manner as required by Rule 1.3, and to communicate with clients about their representation as required by Rule 1.4.

Rule 5.1 requires partners or other lawyers with managerial or supervisory authority to make reasonable efforts to ensure that all lawyers and those under their supervision comply with the applicable Rules and to ensure that their law firm or government agency has in effect measures giving reasonable assurance that all lawyers in the firm or agency conform to the Rules. These provisions require managerial or supervisory lawyers who reasonably believe or know that a lawyer is impaired to closely supervise the conduct of the impaired lawyer because of the risk of violations of the Rules and resulting harm to clients. Rule 5.2 may also apply to subordinate lawyers if they know of and ratify the conduct of the impaired lawyer.

Rule 8.3 requires a lawyer, regardless of managerial or supervisory authority, to report an impaired lawyer to the appropriate professional authorities including, but not limited to, the District of Columbia Office of Disciplinary Counsel,[[25]](#footnote-25) if the impaired lawyer has committed a violation of the Rules that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness to practice law, unless such disclosure would be prohibit- ed under the duty of confidentiality owed to clients under Rule 1.6 or other law. *See* Footnote 3. Further, if the firm or government agency removes the impaired lawyer from a matter, it may have an obligation under Rule 1.4 to discuss with the client the change in staffing on the matter. The duty to discuss removal of government lawyers from a matter may be different because of government policies or regulations.

If the impaired lawyer resigns, is removed or otherwise leaves the law firm, the firm may have additional disclosure obligations under Rule 1.4 to clients who are considering whether to remain with the firm or to transfer their representation to the departing lawyer. However, the firm should be cautious to limit any disclosures to necessary information permissible to disclose under applicable law. The obligation to report misconduct under Rule 8.3 is not eliminated if the impaired lawyer leaves the firm.

Beyond the ethical obligations embodied in the D.C. Rules, a fundamental purpose of identifying and addressing lawyer impairment is to encourage individuals who are suffering from mental impairment to seek and obtain assistance and treatment. This purpose should not be forgotten as lawyers, firms and agencies seek to comply with the ethical mandates discussed herein.

Background on Impairment Issues in the Legal Profession:

In 2016, the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation published the results of national research on the issue of substance abuse and other mental health concerns among American lawyers. The study reported rates of sub- stance abuse among lawyers that were far higher than those in other professions. The results also showed that the most common barrier for a lawyer seeking help was fear of others finding out and general concerns about confidentiality.

Roughly a quarter of the study participants identified their substance abuse or mental health issues as having first started prior to law school. In August 2017, the National Task Force on Lawyer Well-Being, a commission comprised of lawyers, judges, academics and medical professionals, issued a report, *The Path To Lawyer Well-Being: Practice Recommendations for Positive Change*,[[26]](#footnote-26) which addresses issues of substance abuse and impairment and provides recommendations and action plans for lawyers, law firms and other appropriate communities.

Applicable Rules

* Rule 1.1 (Competence)
* Rule 1.3 (Diligence and Zeal)
* Rule 1.4 (Communication)
* Rule 1.6 (Confidentiality of Information)
* Rule 1.16 (Declining or Terminating Representation)
* Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
* Rule 5.2 (Subordinate Lawyers)
* Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
* Rule 8.3 (Reporting Professional Misconduct)
* Rule 8.4 (Misconduct)

Discussion

This Opinion addresses three potential scenarios that impose obligations under the Rules with respect to a lawyer who is known by other lawyers or staff in the same law firm or government agency to be suffering from an impairment. First, the opinion addresses the obligations of partners and other managerial and supervisory lawyers to take steps to pre- vent an impaired lawyer from violating the Rules, to develop policies addressing impairment, and to create a firm or agency culture that allows subordinate lawyers and other personnel to report concerns regarding the impairment of a lawyer without reprisal. Second, it addresses the reporting obligations of a lawyer who knows that an impaired lawyer in the same firm or agency has violated the Rules. Third, it addresses the obligations of lawyers when an impaired lawyer leaves a firm.

The Committee agrees with ABA Formal Opinion 03-429 that, “[i]mpaired lawyers have the same obligations under the [Rules] as other lawyers. Simply stated, mental impairment does not lessen a lawyer’s obligation to provide clients with competent representation.” Importantly, Rule 1.16(a) prohibits a lawyer from rep- resenting a client or requires a lawyer to withdraw if “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.”[[27]](#footnote-27) Managerial and supervisory lawyers should be aware that an impaired lawyer may be unaware, or in denial, that the impairment has impacted the lawyer’s ability to represent clients. If the impaired lawyer does not or will not take affirmative steps to mitigate the consequences of the impairment, then the lawyer’s partners, managers, or supervisors are obligated under Rule 5.1 to take steps to ensure the lawyer’s compliance with the Rules.

A. Duties of partners, managerial lawyers or supervisory lawyers who reasonably believe that another lawyer is or may suffer from significant impairment.

Rule 5.1(a) requires that partners and comparable managerial lawyers in a firm or government agency make reasonable efforts to ensure that the firm or agency has in effect measures giving reasonable assurance that all lawyers conform to the Rules. The Rule also requires partners and managerial lawyers to make reason- able efforts to establish internal procedures and policies designed to provide reasonable assurance that all lawyers will conform to the Rules of Professional Conduct. *See* Rule 5.1, Comments 1 & 2. Similarly, Rule 5.1 requires lawyers having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the other lawyer’s conduct conforms to the Rules of Professional Conduct. *See* Rule 5.1(b).[[28]](#footnote-28)

What constitutes a “reasonable” effort or assurance is not defined, because the reasonableness of any measures will depend, in part, on the firm or agency’s size, structure and the nature of its practice. *See* Rule 5.1, Comment 3. Measures should, however, include processes ensuring that the firm or agency can identify and address issues of impairment among its lawyers. Whether other measures such as a written policy or a reporting procedure are appropriate will depend, in part, on the factors set out in Comment 3. For example, a written policy might be unnecessary for a solo practitioner, although it may be appropriate for a solo practitioner to instruct or provide resources for office staff on addressing issues of potential impairment in the workplace.

The Committee does not believe that a written policy regarding impairment is required in order to comply with Rule 5.1. As noted above, whether a firm or agency is required under Rule 5.1 to have written policies or procedures to address impairment issues depends largely on the type and size of the firm or agency. However, even if a written policy is reasonably determined to be unnecessary, firms and agencies may want to have a written policy to provide consistency in the guidance available to lawyers and other firm or agency personnel. Firms and agencies should strongly consider implementing practices and procedures that encourage and support reporting of concerns or observed impairment to the appropriate firm or agency personnel. Such procedures may include establishing a reporting hotline, permitting anonymous reporting or designating a “neutral” firm or agency lawyer who does not supervise or manage subordinate lawyers or non-lawyer employees to receive reports. Such measures can encourage reporting by removing concerns regarding reprisal or retaliation against subordinate lawyers and non-lawyer employees. Firm and agency reporting procedures should strike the balance of encouraging reports without mandating reports from these subordinate lawyers and non-lawyer employees, except as may be required by Rule 8.3.

The firm or agency’s ultimate ethical obligation is to protect the interests of its clients.[[29]](#footnote-29) To accomplish this task, a firm or agency should consider the following steps appropriate when dealing with an impaired lawyer: (1) speaking with the impaired lawyer about the perceived

impairment and need for remediation; (2) requiring the impaired lawyer to seek assistance or professional evaluation as a condition of continued employment; or (3) referring the lawyer to the Bar’s confidential Lawyer Assistance Program. It may also be appropriate to provide the lawyer a list of firm-developed referrals or resources for education or assistance/ consulting with outside mental-health professionals or other medical professionals. Depending on the circumstances, it may also be appropriate for the firm or government agency to consult with mental-health or medical professionals about the lawyer, prior to engaging in any remedial activities. To the extent such consultation is sought, the firm should ensure that its disclosures regarding the lawyer comply with applicable laws. *See* Footnote 3.

Firms and agencies should seek to create a culture of compliance that encourages reporting within the organization, including by lawyers and staff who do not have managerial or supervisory responsibilities. Although there is no provision in the Rules requiring subordinate lawyers to take steps to ensure that another lawyer’s conduct complies with the Rules, Rule 5.2 requires subordinate lawyers to abide by all Rules, even when acting at the direction of others.[[30]](#footnote-30) Subordinate lawyers should be reminded that (1) even when acting at the direction of another, a subordinate lawyer should not take actions that would ratify the misconduct of an impaired lawyer, and (2) if reporting is mandatory under Rule 8.3, then a subordinate lawyer’s duties may be discharged only by a report to the Office of Disciplinary Counsel, as discussed below. Rule 5.3 imposes upon lawyers an obligation to ensure that non-lawyers employed by or otherwise associated with lawyers engage in conduct that is compatible with the professional obligations of the lawyers.

If a managerial or supervisory lawyer in a law firm or agency receives a report from a lawyer or staff member, the managerial or supervisory 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. If the firm or agency declines to act, then the reporting lawyer should seek guidance as to the lawyer’s professional responsibilities from the Bar’s Legal Ethics Helpline or from appropriate legal ethics advisors within or out- side the lawyer’s organization.

If the firm or agency makes reasonable efforts to ensure compliance with the Rules, as set forth in Rule 5.1, then managerial and supervisory lawyers will not be ethically 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 but failed to take reasonable remedial action. *See* Rule 5.1(c)(2).

To protect more directly the interests of the client, the firm or agency should consider whether the impaired lawyer has a duty to refrain from practicing or if the lawyer must withdraw from representation under Rule 1.16(a)(2). Depending on the circumstances, the firm or agency may determine that it is appropriate to limit the ability of the impaired lawyer to handle legal matters or to deal with clients. Depending on the nature of the lawyer’s practice, and the effect the impairment has on the lawyer’s abilities, it may be appropriate to change the lawyer’s work environment or duties, such as removing the lawyer from trials or negotiations, and assigning tasks such as legal research or drafting. However, if the lawyer is performing any legal tasks, the firm or agency is responsible for supervising the work performed by the lawyer and the work product produced by the lawyer.

Rule 1.4 imposes a requirement that clients be reasonably informed of the status of a matter. Depending on the role that the impaired lawyer played on the legal team, the circumstances surrounding the removal of an impaired lawyer from the case may be material to the representation and therefore need to be disclosed, in order to allow the client to make informed decisions regarding the representation. Assuming disclosure does not violate substantive law, clients should be informed of sufficient facts about the lawyer’s impairment to permit a reasonable client to decide whether and how to continue the representation and to make a decision about the client’s matter. Comment 2 to Rule 1.4 states that the lawyer “must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete.” If it is determined that disclosures are required by Rule 1.4 and permissible under law, then lawyers should be careful to disclose only necessary and material information to the clients, balancing truthful disclosures with the impaired lawyer’s privacy or other legal rights. It may not be appropriate, under the substantive law, to disclose any details regarding the nature (or suspected nature) of the impairment because, while it may be material to a client that a lawyer is being removed from the matter, the specific reasons for removal would likely not be material to the client’s ability to make an informed decision with regard to its matter or its continuing relationship with the firm.[[31]](#footnote-31)

B. Rule 8.3 Obligations to Report Violations of the Rules.

Rule 8.3 imposes a mandatory reporting obligation, under certain circum- stances, on every lawyer with respect to other lawyers’ violations of the Rules. As set forth in Rule 8.3(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.

However, pursuant to Rule 8.3(c), “this rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.” If reporting requires the disclosure of protected client information, the report may only be made with the client’s informed consent.

Rule 8.3 does not distinguish among managerial, supervisory or subordinate lawyers with respect to their reporting obligations and requires reporting when there is knowledge that another lawyer has committed a violation of the rules that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer.[[32]](#footnote-32)

In Opinion 246, we adopted the four- part test established by other jurisdictions for determining whether the standard under Rule 8.3 is met. The duty to report is obligatory only if:

1. the reporting lawyer has actual knowledge of the violation;
2. reporting can be accomplished with- out disclosure of client confidences or secrets;[[33]](#footnote-33)
3. the violation involves a disciplinary rule; and,
4. the violation raises a substantial question as to honesty, trustworthiness or fitness to practice law.

Government lawyers are advised to review department or agency guidance that may impose additional obligations before disclosing information protected by Rule 1.6, including an obligation to report allegations of misconduct internally for the purpose of reviewing the allegations and determining whether and what information should be disclosed in connection with a referral to the appropriate disciplinary authorities. *See, e.g.*, Justice Manual §§ 1-4.300, 1-4. 340.

If the duty to report is triggered under Rule 8.3, it is mandatory. Reliance on the expectation that another lawyer will make a report is insufficient to discharge duties under Rule 8.3. That said, a firm or agency may make a report on behalf of a lawyer or a group of lawyers who have a reporting obligation. In such instances, a single report submitted on behalf of one or more lawyers with an obligation to report will discharge the reporting obligation of each lawyer. Except as con- strained by Rule 1.6, the lawyer’s duty is to make a report to the appropriate professional authority. If the impaired lawyer is licensed to practice in the District of Columbia, the report must be made to the Office of Disciplinary Counsel. Even if the firm or agency determines that the impaired lawyer did not violate the Rules and that, therefore, there is no duty to report under Rule 8.3, or if obligations imposed by Rule 1.6 or other law prohibit reporting, it may still be appropriate to encourage the lawyer to seek the assistance of the D.C. Bar Lawyer Assistance Program in an effort to provide assistance and support to the impaired lawyer. In addition, the Lawyer Assistance Program may serve as a resource for law firms, government agencies and lawyers navigating an employee’s impairment.

C. What is the duty of a managerial or supervisory lawyer when a lawyer with a significant impairment leaves the law firm?

In addition to any duty to report, managerial or supervisory lawyers may have a duty to any current client of the firm who is represented by the departing lawyer to ensure that the client has sufficient information to make an informed decision about continuing to be represented by the impaired lawyer.

The Committee believes that the approach adopted by the Philadelphia Bar Association in Philadelphia Bar Association Ethics Opinion 2000-12 is instructive. The Philadelphia Bar suggested taking a direct approach with the departing lawyer, urging the departing lawyer not to solicit the firm’s clients or to indicate that the departing lawyer would handle their cases in any kind of substantive way.

However, if the departing impaired lawyer intends to solicit current firm clients to follow the lawyer to a new practice, then Rule 1.4(b) requires a managerial or supervisory lawyer to explain the situation to the clients to the extent reasonably necessary to permit the clients to make informed decisions regarding the representation, again assuming that the explanation is not prohibited by law. This obligation exists whether or not the firm had taken previous steps to protect the clients, including but not limited to supervising the impaired lawyer or removing the impaired lawyer from the matter and informing the clients of such removal.[[34]](#footnote-34) In the end it remains the clients’ decision whether to follow the departing lawyer to a new practice, to remain with their current firm, or to retain a new firm.

Any communication with firm clients should be carefully worded to convey only demonstrable facts about the lawyer’s departure. Managerial and supervisory lawyers should be careful to disclose only necessary and material information to the clients, balancing truthful disclosures with the impaired lawyer’s privacy rights under the substantive law. Law firms are advised to consult the substantive law regarding what may or may not be said. *See* Footnote 3. If disclosure of information relating to the circumstances surrounding the lawyer’s departure is prohibited under substantive law, then no such disclosure may be compelled under the Rules. In this regard, the Committee believes that the existence of policies and procedures addressing the handling of issues of impairment within the law firm or government agency are helpful to demonstrating compliance with the Rules.

If a communication intended to request that the clients remain with the law firm will be sent by the law firm, then it should be drafted to avoid making false or misleading communications about the firm’s services or any misrepresentations that violate Rule 8.4(c). The law firm should avoid any action that might be interpreted as an endorsement of the impaired lawyer or the lawyer’s competence, such as sending a joint letter regarding the lawyer’s departure from the firm, or other correspondence from the law firm that could be considered an endorsement of the services of the departing attorney. The law firm may, of course, send a letter to its clients encouraging them to remain with the firm, but cannot reasonably prevent the departing lawyer from independently doing the same, provided that such communications are consistent with the departing lawyer’s ethical, legal or contractual obligations to the firm.[[35]](#footnote-35) To the extent the guidance in this Opinion endorses the use of a separate letter from the law firm to the clients, the Commit- tee notes that the circumstances regarding the departure of an impaired lawyer from a law firm are extraordinary and warrant a departure from advice previously provided on the issue of departing lawyers.[[36]](#footnote-36)

If an impaired lawyer leaves a firm and does not take firm clients, or the firm later learns that a former firm client has retained the impaired lawyer, then the law firm has no duty to supply those clients with facts about the impaired lawyer, as long as the firm avoids any action that might be interpreted as an endorsement of the services of the impaired lawyer or the lawyer’s competence.

**Conclusion**

In circumstances where a law firm or government agency addresses the issue of an impaired lawyer, there is a crucial balancing between protecting the interests of the clients and properly discharging the law firm or government agency’s obligations to protect the privacy of the lawyer under substantive law. Having appropriate policies and procedures designed to encourage reporting and to address issues of impairment within the law firm or government agency are important steps in ensuring that an impaired lawyer does not violate the Rules and that partners, and managerial and supervisory lawyers properly discharge their duties under the Rules.

**Published October 2019**

**Appendix B: Applicable Model Rules of Professional Conduct**

Client-Lawyer Relationship

Rule 1.1 (Competence)

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

Rule 1.3 (Diligence and Zeal)

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 (Communication)

1. A lawyer shall:
2. 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;
3. reasonably consult with the client about the means by which the client's objectives are to be accomplished;
4. keep the client reasonably informed about the status of the matter;
5. promptly comply with reasonable requests for information; and
6. 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.
7. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 (Confidentiality of Information)

1. A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
2. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
3. to prevent reasonably certain death or substantial bodily harm;
4. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
5. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
6. to secure legal advice about the lawyer's compliance with these Rules;
7. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
8. to comply with other law or a court order; or
9. to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
10. A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.16 (Declining or Terminating Representation)

1. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
2. the representation will result in violation of the rules of professional conduct or other law;
3. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
4. the lawyer is discharged.
5. Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
6. withdrawal can be accomplished without material adverse effect on the interests of the client;
7. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
8. the client has used the lawyer's services to perpetrate a crime or fraud;
9. the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
10. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
11. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
12. other good cause for withdrawal exists.
13. 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.
14. 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.

Law Firms and Law Associations

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

1. 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.
2. 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.
3. A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
4. the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
5. 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.

Rule 5.2 (Subordinate Lawyers)

1. A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
2. 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.

Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)

With respect to a nonlawyer employed or retained by or associated with a lawyer:

1. 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;
2. 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
3. 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:
4. the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
5. 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.

Maintaining the Integrity of the Profession

Rule 8.3 (Reporting Professional Misconduct)

1. 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.
2. 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.
3. 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.

Rule 8.4 (Misconduct)

It is professional misconduct for a lawyer to:

1. 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;
2. commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
3. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
4. engage in conduct that is prejudicial to the administration of justice;
5. state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
6. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
7. engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

1. References to the “Rules” mean to the ABA Model Rules of Professional Conduct, unless otherwise specifically indicated. [↑](#footnote-ref-1)
2. The executive made a direct contribution to the justice’s campaign of $1,000, the maximum allowed by law, but he also contributed approximately $2.5 million to a Political Action Committee which supported the justice and made approximately $500,000 in independent expenditures in support of the justice’s campaign. [↑](#footnote-ref-2)
3. One of the more famous cases reaching this conclusion is *Texaco, Inc. v. Pennzoil Co.,* 729 S.W. 2d 768, 845 (Tex. App.—Houston [1st. Dist.] 1987, writ ref’d, n.r.e.), in which the Court affirmed a $7.53 billion compensatory damages award and $1billion of a $3 billion punitive damage award against Texaco. After the suit was filed, Pennzoil’s lead trial lawyer contributed $10,000 to the trial judge’s election campaign, a contribution which, while legal under Texas law at the time, was then considered an extraordinarily large contribution for a local trial court campaign. The Court found “no evidence in the record that [the trial judge] was either biased or prejudiced in any manner.” [↑](#footnote-ref-3)
4. District of Columbia Bar Legal Ethics Comm., Op. 377 (Oct. 19, 2019). [Appendix A]. [↑](#footnote-ref-4)
5. Karen Rubin, *Dealing with an Impaired Lawyer: D.C. Identifies Ethics Duties*, Thompson Hine (Oct. 31, 2019) https://www.thelawforlawyerstoday.com/2019/10/dealing-with-an-impaired-lawyer-d-c-identifies-ethics-duties/. [↑](#footnote-ref-5)
6. *Directory of Lawyer Assistance Programs*, American Bar Association, https://www.americanbar.org/groups/lawyer\_assistance/resources/lap\_programs\_by\_state/. [↑](#footnote-ref-6)
7. *Well-Being Template for Legal Employers*, American Bar Association (2019) https://www.americanbar.org/content/dam/aba/administrative/lawyer\_assistance/well-being-template-for-legal-employers-final-3-19.pdf. [↑](#footnote-ref-7)
8. District of Columbia Bar Legal Ethics Comm., Op. 377 (Oct. 19, 2019). [Appendix A]. [↑](#footnote-ref-8)
9. Melissa Heelan Stanzione, *Duty Requires Reporting Fellow Attorney Mental Issue, DC Bar Says*, Bloomberg Law (Oct. 21, 2019), https://www.bloomberglaw.com/document/XBJS9M1C000000?bna\_news\_filter=us-law-week&jcsearch=BNA%25200000016dee9fd7fda37feedf6f2b0000#jcite. [↑](#footnote-ref-9)
10. ABA Standing Committee on Ethics and Professional Responsibility, *Obligations with Respect to Mentally Impaired Lawyers in the Firm*, American Bar Association, (June 11, 2003) https://www.americanbar.org/content/dam/aba/administrative/professional\_responsibility/aba\_formal\_opinion\_03\_429.pdf. [↑](#footnote-ref-10)
11. *Well-Being Template for Legal Employers*, American Bar Association (2019) https://www.americanbar.org/content/dam/aba/administrative/lawyer\_assistance/well-being-template-for-legal-employers-final-3-19.pdf. [↑](#footnote-ref-11)
12. Michael McCabe, *ABA Recommends Mandatory Substance Abuse and Mental Health CLE*, McCabe Ali LLC, https://ipethicslaw.com/aba-recommends-mandatory-substance-abuse-and-mental-health-cle/. [↑](#footnote-ref-12)
13. Cynthia Brown, et al., *Continuing Legal Education: What’s Required and Opportunities for Members and Staff to Satisfy Those Requirements*, Congressional Research Service (Mar. 25, 2019) https://fas.org/sgp/crs/misc/LSB10278.pdf. [↑](#footnote-ref-13)
14. Karen Rubin, *Dealing with an Impaired Lawyer: D.C. Identifies Ethics Duties*, Thompson Hine (Oct. 31, 2019) https://www.thelawforlawyerstoday.com/2019/10/dealing-with-an-impaired-lawyer-d-c-identifies-ethics-duties/. [↑](#footnote-ref-14)
15. *See also* Michael Kennedy, *Wellness Wednesday: the ABA Well-Being Template for Legal Employers*, Ethical Grounds: The Unofficial Blog of Vermont’s Bar Counsel (Oct. 16, 2019), https://vtbarcounsel.wordpress.com/2019/10/16/wellness-wednesday-the-aba-well-being-template-for-legal-employers/. [↑](#footnote-ref-15)
16. Ethics Opinions, State Bar of California, https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Senior-Lawyers-Resources/Opinions. [↑](#footnote-ref-16)
17. Illinois State Bar Association Advisory Opinion on Ethical Conduct Opinion No. 92-12 (1993; affirmed 2010) https://www.isba.org/sites/default/files/ethicsopinions/92-12.pdf. [↑](#footnote-ref-17)
18. North Carolina 2013 Formal Ethics Opinion 8 - Responding to the Mental Impairment of Firm Lawyer (July 25, 2014) https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-8/. [↑](#footnote-ref-18)
19. Virginia Supreme Court LE) 1886 – Duty of Partners and Supervisory Lawyers in a Law Firm When Another Lawyer in the Firm Suffers from Significant Impairment (Dec. 15, 2016) https://filehost.thompsonhine.com/uploads/Virginia\_Legal\_Ethics\_Opinion\_1886\_cfbd.pdf. [↑](#footnote-ref-19)
20. Virginia Supreme Court LEO 1887 – Duties When a Lawyer Over Whom No One has Supervisory Authority is Impaired (Aug. 30, 2017) https://www.vsb.org/docs/SCV-LEO1887-order-083017.pdf. [↑](#footnote-ref-20)
21. *Intervention and Impairment Assistance*, American Bar Association, https://www.americanbar.org/groups/professional\_responsibility/resources/lawyersintransition/interventionandimpairmentassistance/. [↑](#footnote-ref-21)
22. Whether two or more lawyers constitute a “firm” or a “law firm” can depend on specific facts. *See* Rule 1.0(c). While the Rules exclude government agencies or other government entities within the definition of “firm” or “law firm,” the Rules do not exempt lawyers practicing in a government agency or other government entity, who are other- wise subject to the District of Columbia Rules of Professional Conduct, from the ethical obligations set forth herein. *See, e.g.*, 28 U.S.C. § 530B. [↑](#footnote-ref-22)
23. An additional question, dealing more broadly with obligations to report a lawyer that is not employed by the same law firm or agency, may be answered by reference to D.C. Legal Ethics Opinion 246 (*A Lawyer’s Obligation to Report Another Lawyer’s Misconduct*) (1994). Lawyers that may be concerned about the impairment of lawyers outside their firm or agency over whom they do not have managerial or supervisory authority may nonetheless find the guidance within this Opinion instructive. [↑](#footnote-ref-23)
24. This Opinion addresses only the ethical obligations of lawyers when faced with an impaired lawyer. There may also be legal obligations imposed under the District of Columbia Human Rights Act, the Americans with Disabilities Act, the Family Medical Leave Act, the Health Insurance Portability and Accountability Act or other state or federal laws that are beyond the scope of this Committee and this Opinion. There may also be fiduciary or contractual obligations imposed by partnership or employment agreements with an impaired lawyer. Further, as discussed in this Opinion, lawyers employed in government agencies may have obligations imposed by their department or agency with regard to reporting obligations. [↑](#footnote-ref-24)
25. The duty to report is not limited to the District of Columbia Office of Disciplinary Counsel. If the reporting lawyer is aware that the impaired lawyer is also a member of other bars or another profession that is subject to professional regulation, then the duty to report may also extend to reporting to those other entities. [↑](#footnote-ref-25)
26. https://www.americanbar.org/content/dam/aba/ images/abanews/ThePathToLawyerWellBeingRe- portFINAL.pdf [↑](#footnote-ref-26)
27. Rule 1.16(a)(2). [↑](#footnote-ref-27)
28. Supervisory lawyers are “‘lawyers who have supervisory authority over the work of other lawyers [and nonlawyers] in the office’ regardless of their status in the organization. . . . ‘Even if a lawyer is not a partner or other general manager, he or she may have direct supervisory authority over another lawyer. . . .’ The key to responsibility under paragraph (b) is the relationship between the two lawyers in the matter. The supervisory lawyer ‘need not be over the entirety of the second lawyer’s practice. . . [Rule 5.1(b)] would apply to direct supervision in a particular case, or to one partner [or manager] who has been given supervisory authority over another partner [or manager’s] work in a case or practice area.’” ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 14-467 (Sept. 8, 2014) (quoting Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility § 5.1-2(b), at 1009 (2014); Geoffrey C. Hazard, W. William Hodes & Peter R. Jarvis, The Law of Lawyering § 42.3 (3d ed., Supp. 2010); first, third and fourth alterations in the original). [↑](#footnote-ref-28)
29. *See* Rule 1.3. [↑](#footnote-ref-29)
30. Rule 5.2(b) provides that “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.” [↑](#footnote-ref-30)
31. Nothing in this Opinion should be interpreted to alter or diminish any obligation to make disclosures otherwise required under the Rules. For example, if the impaired lawyer committed malpractice or violated the standard of care in the representation, such conduct would have to be dis- closed to the client under the Rules. Similarly, violations of the Rules may have to be reported to the Office of Disciplinary Counsel as set forth in Rule 8.3. The disclosure of such conduct, however, does not require the disclosure of the lawyer’s personal information protected under the law. [↑](#footnote-ref-31)
32. The Committee notes that the reporting obligation requires that a lawyer report actual knowledge of a Rule violation implicating the lawyer’s honesty, trustworthiness or fitness to practice law; even if the violating lawyer is not affiliated or employed with the reporting lawyer. Rule 8.4(g) allows for voluntary reporting of conduct to Disciplinary Counsel, so long as there is no threat to seek criminal charges or disciplinary charges *solely* to obtain an advantage in a civil matter. A complaint or report filed in good faith cannot be said to have been filed solely for the purpose of gaining an advantage in a civil matter*. See* D.C. Legal Ethics Opinion 220 (*Threats to File Disciplinary Charges*) (1991). [↑](#footnote-ref-32)
33. Rule 8.3(c) was amended in 2007 to include a limitation on the duty to report when prohibited by “other law.” Opinion 246 should now be read consistent with that amendment. [↑](#footnote-ref-33)
34. The Committee envisions a possible scenario in which the impaired attorney’s response to being confronted regarding the impairment is to leave the firm to practice elsewhere. In such cases, the firm may not have had the opportunity to remove the impaired lawyer from client matters, to take other protective measures, or to inform clients of the removal of the impaired lawyer from matters. As noted herein, however, the duty to address an issue of impairment, to communicate material information to a client or to mitigate harm may first arise long before the lawyer decides to leave the law firm. [↑](#footnote-ref-34)
35. *See* D.C. Legal Ethics Opinion 273 (*Ethical Considerations for Lawyers Moving From One Private Law Firm to Another*) (1997). [↑](#footnote-ref-35)
36. *See* D.C. Legal Ethics Opinion 372 (*Ethical Considerations in Law Firm Dissolutions*) (2017) *citing* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 99-414 (1999). [↑](#footnote-ref-36)