Bar Counsel’s Message
by Edward L. Davis

Attorney Impairment and the Duty to Assist

On December 15, 2016, the Supreme Court of Virginia approved Legal Ethics Opinion (LEO) 1886, which addresses the duties of supervising attorneys who reasonably believe that a lawyer in their firm may be suffering from an impairment. The Supreme Court’s approval of this opinion made it a decision of the Court.¹

The reasoning behind this is twofold: protection of clients and the public, and the prevention of disciplinary actions resulting from attorney impairment.

What is impairment? The Rules of Court define it as any physical or mental condition that materially impairs the fitness of an attorney to practice law.² LEO 1886 makes it clear that partners and other lawyers who have managerial authority over attorneys in a law firm may not ignore the impairment of another attorney in the firm. The opinion cites Rule of Professional Conduct (RPC) 5.1, which addresses the ethical responsibilities of partners and supervisory lawyers in a law firm. It provides that under RPC 5.1, partners and supervisory attorneys must take precautionary measures before a lawyer’s impairment results in serious misconduct or material risk to the client or public. When a supervising lawyer knows or reasonably believes that a lawyer under his or her supervision is impaired, RPC 5.1 requires the supervising lawyer to take reasonable steps to prevent the impaired lawyer from committing ethical misconduct.

The LEO also provides that a lawyer whose physical or mental health materially impairs his or her capacity to represent clients has the same ethical obligations as any other lawyer. In other words, a lawyer’s impairment does not excuse the lawyer from compliance with the Rules of Professional Conduct. The impairment may be the cause of ethical misconduct; however, it is neither a defense nor an excuse for a lawyer’s failure to meet the ethical obligations owed to his or her clients.³ In disciplinary proceedings, however, impairment may be a mitigating factor in determining a sanction.

These principles reinforce the need for a supervising attorney to take action when the supervisor reasonably believes that a lawyer in the law office suffers from an impairment. The supervisor may confront the attorney about the problem and encourage the attorney to seek help from a lawyers’ assistance program, such as Lawyers Helping Lawyers. The supervising lawyer may also limit the duties of the subordinate lawyer to matters that are not time sensitive, or matters that do not involve client interaction, such as research and writing. On the other hand, the impairment may be such that the lawyer suspected of impairment cannot represent clients or practice law competently. In such cases, the supervising attorney may need to restrict the subordinate from practicing law altogether while seeking rehabilitative measures.

Proactive efforts such as these not only protect the public, but potentially protect the impaired attorney from disciplinary action, too. Impairment, and the neglect and inattention that follow, often lead to disciplinary complaints. The resulting disciplinary investigations may reveal evidence of impairment. If the Virginia State Bar receives evidence suggesting impairment during a disciplinary investigation, it may investigate.⁴ In furtherance of this process, the bar counsel may petition the Disciplinary Board to order the attorney to undergo a psychiatric or medical examination, and provide releases to health care providers authorizing the release of medical records to the bar. If, following an evidentiary hearing, the board determines that an impairment exists, it shall enter an indefinite suspension of the attorney’s license. The suspension shall be terminated only upon determination by the board that the attorney is no longer impaired.⁵ Impairment proceedings are confidential and closed to the public; however, final orders of impairment are published to inform the public of the suspension. To protect the attorney’s medical privacy, the orders are devoid of any details of the impairment.

During the fiscal year that ended on June 30, 2017, five attorneys suffered the indefinite suspension of their licenses to practice law after the board determined that they were impaired. Proactive intervention by other lawyers or lawyer assistance programs may have helped to prevent the misconduct that led to the impairment proceedings.

At a recent disciplinary trial, an attorney introduced evidence of impairment as a defense to some of the misconduct charges. Counsel argued that the impairment negated the element of specific intent required...
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to prove intentional neglect of client matters and misappropriation of client property. The Disciplinary Board determined that the impairment did not excuse the misconduct or negate the element of specific intent. In doing so, however, it did not reach the question of whether an attorney may introduce such evidence as a defense in the misconduct phase of a non-impairment proceeding.4

Again, it is settled law that impairment may be introduced as a mitigating factor in disciplinary proceedings.7 Typically, the attorney must show that the impairment caused the misconduct, and that the attorney is in a sustained program of recovery with no likelihood of relapse.8

Attorneys seeking help from lawyer assistance programs should not be concerned about anyone reporting their information to bar disciplinary authorities. Comment 5 to RPC 8.3 provides that the duty to report attorney misconduct does not apply to a lawyer who is participating in an approved lawyer assistance program. Without such confidentiality, lawyers may hesitate to seek assistance from such programs, causing additional harm to their careers and the welfare of their clients and the public.

In sum, supervising attorneys now have an express obligation to take proactive measures if they determine that an attorney under their supervision is impaired. There is no final LEO, however, addressing whether a lawyer must intervene with a sole practitioner who the lawyer believes to be impaired. Proposed LEO 1887, approved by the Virginia State Bar Council at its June meeting, addresses this issue. The proposed opinion, currently under review by the Supreme Court of Virginia, encourages lawyers to contact an approved lawyer assistance program for guidance on how to address impairment that they may observe, and to encourage impaired attorneys to seek help.

Regardless, addressing impairment issues with affected attorneys is a duty that all of us should embrace. Encouraging lawyers to seek needed help not only protects the public, but also helps attorneys avoid the dire consequences of disciplinary action.

Endnotes:

1   Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 10-4(A).
2  Rules of Court, Part 6, Section IV, Paragraph 13-1.
3  See “Ethics Counsel, LEO 1886 — Partners’ Duties to Deal with a Colleague’s Impairment,” Virginia Lawyer, February 2017.
4  Rules of Court, Part 6, Section IV, Paragraph 13-23(C).h
5 Paragraph 13-23(A).
6 See the matter of Chiles, VSB Docket No. 16-033-104323, 097624, Virginia State Bar Disciplinary Board, April 24, 2017.
7 Paragraph 13-23(A)
8 See, for example, Standards for Imposing Lawyer Sanctions, American Bar Association Center for Professional Responsibility, p. 51 (2005).