

1 LEO 1886 DUTY OF PARTNERS AND SUPERVISORY LAWYERS IN A LAW FIRM
2 WHEN ANOTHER LAWYER IN THE FIRM SUFFERS FROM SIGNIFICANT
3 IMPAIRMENT

4 Introduction

5 In this advisory opinion, the Committee analyzes the ethical duties of partners and supervisory
6 lawyers in a law firm to take remedial measures when they reasonably believe another lawyer in
7 the firm may be suffering from a significant impairment that poses a risk to clients or the general
8 public.¹ The applicable Rule of Conduct is Rule 5.1² which requires partners or other lawyers in
9 the firm with managerial authority to make reasonable efforts to ensure that all lawyers in the
10 firm conform to the Virginia Rules of Professional Conduct.³ Lawyers in a firm may have an
11 obligation under Rule 8.3 to report an impaired lawyer to the Virginia State Bar if the impaired
12 lawyer has engaged in misconduct that raises a substantial question as to that lawyer's honesty,
13 trustworthiness or fitness to practice law. However, this opinion addresses the obligations of
14 partners and supervisory attorneys to take precautionary measures *before* a lawyer's impairment
15 has resulted in serious misconduct or a material risk to clients or the public. This opinion relies
16 upon ABA Committee on Ethics and Professional Responsibility, Formal Opinion 03-429 (2003)
17 [hereinafter ABA Formal Op. 03-429] for its approach to the issues raised by the mental

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 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.

18 impairment of a lawyer in a firm. For further guidance, readers are encouraged to refer to the
19 ABA opinion.

20 Scope of the Lawyer Impairment Problem

21 Studies report that lawyers experience depression, alcohol and other substance abuse at a rate
22 much higher than other populations and 2 to 3 times the general population.⁴ The incidence of
23 alcohol abuse is higher among lawyers aged 30 or less.⁵ Besides the potential lawyer impairment
24 caused by substance abuse, the aging of the legal profession presents an increased incidence of
25 cognitive impairment among lawyers. As of 2016, Virginia State Bar membership records
26 revealed that of the 23,849 active members located in the Commonwealth, 8,366 or 35% are ages
27 55 or older. Fifteen percent of these attorneys or 3,584 members are 65 or over. These numbers
28 reflect that Virginia's lawyers, like lawyers nationally, are moving into an older demographic
29 profile, and they continue to practice as they age. Moreover, in the years ahead, the number of
30 lawyers that will continue to practice law beyond the traditional retirement age will increase
31 dramatically.⁶ The substantial percentage of aging lawyers presents both opportunities and
32 challenges for the state bars, and the scope and nature of the challenges and the best way to
33 manage the challenges have been examined by bars around the country.

34 Question Presented

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

38 Hypotheticals

39 James practices in a mid-sized law firm in a large metropolitan area. One day, a junior associate
40 informs James that Bill, a senior associate, has a serious cocaine and alcohol problem. The
41 information is credible, detailed, and alarming; it also points to the potential for trust fund
42 violations or other misconduct associated with substance use. James has also received calls
43 from several clients complaining that Bill has missed appointments, appeared in court late,
44 disheveled and smelling like alcohol, and has failed to return phone calls. Another client
45 complains that Bill missed a filing deadline and placed the client in default. James has observed

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.

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

46 that Bill has problems remembering instructions, has difficulty completing familiar tasks, is
47 challenged in problem solving at meetings, and experiences changes in mood and personality.
48 When James confronts Bill about these issues, Bill denies having any substance abuse problems,
49 attributes his work performance to stress caused by marital discord, and promises to improve.

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

62 Analysis

63 The Rules of Professional Conduct do not explicitly require lawyers to deal with an impaired
64 lawyer in the law firm. However, Rule 5.1(a) requires that a firm have in place measures or
65 procedures to ensure that *all* lawyers, not just impaired ones, comply with the Rules of
66 Professional Conduct. The measures required depend on the firm's size, structure and nature of
67 its practice. Cmt. [3], Rule 5.1. It follows, therefore, that Rule 5.1 requires that the partner or
68 supervisory lawyer make reasonable efforts to ensure that an impaired lawyer in the firm or
69 under their supervisory authority does not violate the Rules of Professional Conduct. In addition
70 to the requirement that the firm establish appropriate preventive policies and procedures, Rule
71 5.1(b) requires a lawyer having direct supervisory authority over another lawyer to make
72 reasonable efforts to ensure that the supervised lawyer conforms to the Rules of Professional
73 Conduct. When a partner or supervising lawyer knows or reasonably believes that a lawyer
74 under their direction and control is impaired, Rule 5.1(b) requires that they take reasonable steps
75 to prevent the impaired lawyer from violating the Rules of Professional Conduct.

76 Impaired lawyers have the same ethical obligations as any other lawyer. Like all lawyers, an
77 impaired lawyer owes a duty to represent a client competently and with diligence and to
78 communicate with the client. A lawyer's impairment does not excuse the lawyer from
79 compliance with the Rules of Professional Conduct. The lawyer's impairment may very well be
80 the reason for the lawyer's failure to act competently or with diligence, or to communicate with

81 the client. However, the lawyer's impairment is neither a defense to, nor an excuse for, those
82 ethical breaches.⁷

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

87 As the ABA's Standing Committee on Ethics and Professionalism observed in ABA Formal Op.
88 03-429:

89 The firm's paramount obligation is to take steps to protect the interests of
90 its clients. The first step may be to confront the impaired lawyer with the
91 facts of his impairment and insist upon steps to assure that clients are represented
92 appropriately notwithstanding the lawyer's impairment. Other steps
93 may include forcefully urging the impaired lawyer to accept assistance to prevent
94 future violations or limiting the ability of the impaired lawyer to handle
95 legal matters or deal with clients.

96
97 The law firm may be able to work around or accommodate some impairment situations. For
98 example, the firm might be able to reduce the impaired lawyer's workload, require supervision or
99 monitoring, or remove the lawyer from time-sensitive projects. The impaired lawyer may not be
100 capable of handling a jury trial but could serve in a supporting role performing research and
101 drafting documents. Depending on the nature, severity, and permanence (or likelihood of
102 periodic recurrence) of the lawyer's impairment, the firm may have an obligation to supervise
103 the work performed by the impaired lawyer or may have a duty to prevent the lawyer from
104 rendering legal services to clients of the firm, until the lawyer has recovered from the
105 impairment. The impaired lawyer's role might be restricted solely to giving advice to and

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.

106 drafting legal documents only for other lawyers in the firm who in turn can evaluate whether the
107 impaired lawyer's work product can be used in furtherance of a client's interests.

108 In order to protect its clients, the firm should have an enforceable policy that would require, and
109 a partner or supervising lawyer should insist, that the impaired lawyer seek appropriate
110 assistance, counseling, therapy, or treatment as a condition of continued employment with the
111 firm. For example, the firm could recommend, encourage or direct that the impaired lawyer
112 contact Lawyers Helping Lawyers⁹ for an evaluation and assessment of his or her condition and
113 referral to appropriate medical or mental health care professionals for treatment and therapy.
114 Alternatively, making a confidential report to Lawyers Helping Lawyers may be an appropriate
115 step for the firm. The firm or its managing lawyers might instead find it necessary or appropriate
116 to consult with a professional medical or health care provider for advice on how to deal with and
117 manage an impaired lawyer, including considering options for an "intervention" or other means
118 of encouraging the lawyer to seek treatment or therapy.

119 In the first hypothetical, it is clear that James, as a managing partner in a law firm, and any other
120 lawyer that has supervisory authority over the impaired lawyer, are required by Rule 5.1 to
121 promptly make reasonable efforts to ensure that the impaired senior associate does not engage in
122 any further conduct that breaches ethical duties owed to his clients. While the senior associate's
123 past conduct might be considered violations of the Rules of Professional Conduct, only
124 violations that raise a substantial question as to the violator's honesty, trustworthiness, or fitness
125 as a lawyer must be reported. Rule 8.3(a). If James and any other supervising attorney have
126 taken appropriate action to prevent the senior associate from engaging in further conduct that
127 may violate the Rules of Professional Conduct, and the senior associate is in recovery from his
128 impairment, i.e., the condition that caused the violations has ended, there is nothing to report to
129 the bar. If, for example, the firm is able to eliminate the risk of future violations of the duties of
130 competence and diligence under the Rules of Professional Conduct through close supervision of
131 the lawyer's work, it would not be required to report the impaired lawyer's violation. On the
132 other hand, if the past conduct of the impaired lawyer involves dishonesty, i.e., embezzlement of
133 client funds, or stealing firm funds or assets, James and any other lawyer in the firm that knows
134 of such misconduct must report it to the bar under Rule 8.3(a). This would be required even if

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.

135 the violating lawyer was participating with Lawyers Helping Lawyers and in recovery.¹⁰ The
136 reporting duty under Rule 8.3(a), however, does not diminish the importance of making a
137 confidential report to a lawyer assistance program such as Lawyers Helping Lawyers. Both
138 reports fulfill important objectives. The report to the lawyer disciplinary agency is necessary to
139 address the misconduct and protect the public. The report to the lawyer assistance program is
140 necessary to address the underlying illness that may have caused the misconduct. In the end,
141 both reports protect and serve the public interest.

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

147 Further, if reasonable measures or precautions have been taken by James and any other lawyers
148 in the firm to ensure that the impaired lawyer complies with the Rules of Professional Conduct,
149 neither the partners or supervisory lawyers in the firm are ethically responsible for the impaired
150 lawyer's professional misconduct, unless they knew of the conduct at a time when its
151 consequences could have been avoided or mitigated and failed to take reasonable remedial
152 action. Rule 5.1(c).

153 In the second hypothetical, it is not clear that George has committed any violation of the Rules of
154 Professional Conduct. Obviously, George's impairment, unaccompanied by any professional
155 misconduct, does not require any report to the bar under Rule 8.3(a). Yet his mental condition,
156 as observed by his partner, Rachelle, would require that Rachelle make reasonable efforts to
157 ensure that George does not violate his ethical obligations to his clients or violate any Rules of
158 Professional Conduct. This would include, as an initial step, Rachelle or someone else having a
159 confidential and candid conversation with George about his condition and persuading him to
160 seek evaluation and treatment.

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).