



ETHICAL RESPONSIBILITIES FOR AN IMPAIRED PARTNER

BY KENNETH L. JORGENSEN

Impaired partners, like impaired family members and friends, can profoundly affect the lives of those who are close to them. Initially alcohol was identified as the impairment that disproportionately affected the legal profession.¹ More recently, mental or emotional impairments (depression or other psychiatric or psychological disorders) have appeared with increasing frequency in lawyer discipline and disability cases. Always present has been the mental decline or deterioration associated with aging that can reach the level of impairment before a lawyer retires.

Most law firms recognize the civil liability exposure associated with impaired members of their firm who are unable to properly discharge responsibilities to clients. Apart from malpractice judgments, law firms can suffer loss of clientele and goodwill due to the grumbling of disserved clients. Probably fewer lawyers comprehend the extent of their ethical obligations for an impaired partner or other lawyer employed by the firm.

This past summer the ABA issued Formal Ethics Opinion 03-429 entitled "Obligations with Respect to Mentally Impaired Lawyer in the Firm." The opinion analyzes the ethical obligations of partners to: (1) adopt measures to prevent impaired lawyers from violating the ethics rules; and (2) report ethical violations committed by impaired lawyers in the firm.

Rule 5.1 requires all "partners" in a law firm to make "reasonable efforts to ensure" that the firm has policies and procedures that give "reasonable assurance" that the conduct of all lawyers in the firm conforms to the Rules of Professional Conduct. Partners, like all lawyers, are also obligated to report knowledge of ethical violations by other lawyers if the violation raises a substantial question concerning the lawyer's "fitness as a lawyer."³ With respect to impairments, Rule 1.16(a)(2) mandates withdrawal from representation if a lawyer's mental or physical condition materially impairs his or her ability to represent a client. Read together, these rules impose professional duties upon law firm partners when any impairment of a lawyer in the firm begins to interfere with that lawyer's ability to adequately represent a client.

The Ostrich Phenomenon. One legal author contends that despite the fact our profession is self-regulating, "most lawyers are reluctant to report incompetent or impaired work. Instead, impaired attorneys are frequently protected or enabled by their colleagues and staff, which in turn fosters opportunities for misconduct and unethical behavior."⁴ This type of "enabling" behavior is sometimes motivated by misguided concern for the impaired lawyer. Others rationalize their inaction by characterizing impairment as a personal problem not appropriate for law firm involvement. Moreover, even among those partners who realize that lawyer impairment is indeed a firm matter, some still do not become involved because they find dealing with the impairment of a colleague to be too emotionally uncomfortable.

Lawyer Impairment is Not a Violation. Lawyer impairment by itself does not violate the Rules of Professional Conduct, nor does it trigger a partner's supervisory ethical obligations. The threshold issue is determining whether the impaired lawyer's ability to represent clients is "materially impaired."⁵ A pattern of missed filings or hearings, frequent unexplained absences, or multiple instances of neglect and noncommunication caused by a lawyer's continuing impairment clearly meet this standard and require firm action.

Other impairments may oscillate over time and yield different judgments on different days due to the ebb and flow of the impairment. Here, the ABA suggests that if the impairment has "an appreciable likelihood of recurring," partners may have no choice but to conclude that representation of clients will be materially impaired. Where the impaired lawyer is unable or unwilling to address the impairment, partners are obligated to take steps to "assure the impaired lawyer's compliance with the Rules of Professional Conduct." Where possible, partners may wish to consult with a psychologist, psychiatrist, or other trained health professional.

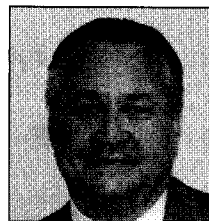
Responsibility for an Impaired Lawyer. Partner responsibility for impaired lawyers requires that measures be instituted to protect the interests of

clients. In a situation where a partner does not learn of an impaired lawyer's violations until after the fact, the partner is required to take action to avoid or mitigate the consequences of the violation.

Confronting an impaired partner is the first and most difficult step in protecting client interests. Many impairments, and especially chemical dependency, involve denial by the affected lawyer. Because lawyers are educated and trained to persuade and rationalize, they have "greater difficulty accepting and admitting" alcohol problems than the general population.⁶ According to one partner who was ousted from his firm despite being the top biller and rainmaker, an impaired partner is often "so ensconced in his or her denial that the motivation [for recovery] must come from external sources."⁷

Unfortunately, external factors such as friendly colleague advice are sometimes not enough to coax an impaired partner to seek treatment, let alone stop representing clients. Impaired partners at the height of their impairment are often by definition incapable of seeing the risk they present to clients as well as the firm. The disability provisions of existing partnership agreements are likely inadequate to address the problem of lawyer impairment. Many impaired lawyers will not meet the disability standards of existing partnership agreements, which usually correlate with disability criteria necessary to make one eligible for benefits under a disability policy. Moreover, most partnership agreements do not contemplate the denial aspects associated with many impairments. Firms may wish to consider whether additional terms are needed to

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provide the firm with the necessary authority to require treatment or therapy.

After intervention, reasonable measures require firm monitoring of the treatment and recovery process. Appropriate releases should be obtained to allow the firm to not only monitor, but also participate in the recovery process, by reporting the firm's observations of the impaired lawyer's progress. The firm's authority to monitor treatment can also be included in the impairment clause of a partnership agreement.

Depending upon the severity of the impairment, some impairments may be accommodated. Accommodations may include reassigning the lawyer to a less pressured environment or changing the type of legal work (e.g., from litigation to transactional representations). Where the impairment is so severe as to preclude accommodation by the firm and the lawyer's ability to represent clients is materially impaired, the firm is obligated to institute measures to prevent the lawyer from rendering legal services to firm clients.⁸

Reporting an Impaired Partner's Misconduct. Partners are obligated to report only violations that raise a substantial question concerning the impaired lawyer's honesty, trustworthiness, or fitness as a lawyer. Most impairment-related reporting situations revolve around the impaired lawyer's fitness. The ABA Opinion advises that, if the impairment has ended or the firm, through close supervision, is able to eliminate the risk of future violations, no report is required. Making such judgments will be extremely difficult for law firms that fail to actively monitor an impaired partner's recovery.

Severe impairments — and the impaired lawyer's continued denial of the

impairment — may eliminate supervision as an available remedy. Where the impairment persists and the firm is unable to ameliorate the potential for further violations or client prejudice, it is clear that the violations must be reported to lawyer discipline authorities.

CONCLUSION

Confronting impaired law partners and scrutinizing their recovery might seem overly paternalistic. At the same time, failing to do so can lead to civil liability for the firm and disciplinary exposure for responsible partners.

Lawyers may take some solace in knowing that similar measures were necessary to deal with the impairments of some of society's highest placed lawyers. In his book *Leaving the Bench: Supreme Court Justices at the End*, David Atkinson recounts the mental and physical impairments of various justices in their final years on the bench. Included is the infamous physical and mental deterioration of Justice William O. Douglas. In Douglas's last years on the Court, his brethren, over Justice White's objection, would not let Douglas's vote decide any important issue.⁹ Another details justices having to cajole the infamous Oliver Wendell Holmes to resign at age 90.

Impairments resulting from chemical dependency, mental illness, or infirmities of age are a fact of life. As lawyers we counsel clients on preparing for the foreseeable and unforeseeable contingencies in life. Devising a partnership plan to guide the firm in addressing and managing lawyer impairment will better situate partners to cope with this arduous task. It will also serve as a testament to the firm's commitment to place client interests above those of the firm's lawyers. □

NOTES

1. Beck et al., "Lawyer Distress: Alcoholic-Related Problems & Other Psychological Concerns Among a Sample of Practicing Lawyers," 10 J. L. & Health 1, 2 (1995-96).
2. The Comment to Rule 5.1 defines partners as every lawyer who has management authority for the firm or any lawyer with supervisory authority over the impaired lawyer.
3. See Rule 8.3(a), Rules of Professional Conduct.
4. Heil, "Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline," 24 St. Mary's L.J. 1263, 1278-79 (1993).
5. See Rule 1.16(a)(2) which states that if a lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, the lawyer shall decline representation or if representation has commenced, withdraw from representation.
6. Allan, "Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?" 31 Creighton L. Rev. 265, 268 (1997). See also Benjamin et al., "Comprehensive Lawyer Assistance Programs: Justification and Model," 16 Law & Psychol. Rev. 113-14 (1992).
7. Baily, "Impairment, The Profession, and Your Law Partner," 11 No. 1 Prof. Law. 2 (1999). Baily was a successful CPA who was afflicted with alcoholism and later became addicted to narcotics. After being forced out of his CPA partnership and eventually recovering from both addictions, he entered law school.
8. ABA Formal Opinion 03-429 (06/11/03) at p. 4.
9. A similar approach was used with Justice Joseph McKenna after he refused his colleagues' advice to retire because of a mental disability. Atkinson, *Leaving the Bench*, University Press of Kansas (1999) at p. 174.

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