Your Ethical Duties....

Dealing With an Impaired Lawyer in Your Firm

BY DAVID D. DODGE

As if alcohol and substance abuse weren't enough to plague our profession,[1] now we have an aging lawyer population and the problems attendant to it.[2] And we all need to pay attention, because there are important ethical issues that affect you personally as well as any impaired lawyer working at your firm.

A lawyer may be "impaired" not only by drugs and alcohol but also by senility or dementia due to age, sickness or mental illness. You and I are not doctors, but we can't knowingly ignore impairment's warning flags waved by a lawyer with whom we work—such as patterns of memory lapse or inexplicable behavior not typical of the lawyer involved,

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such as repeated and unusual absences from the office, repeated missed deadlines, client complaints about lack of communication and expressions of concern from the lawyer's immediate staff.

The reason this is important is that ER 1.16 (Declining or Terminating Representation)[3] provides, at subsection (a)(2), that a lawyer shall not represent a client and must withdraw from representing a client if a physical or mental condition materially impairs his or her ability to represent the client. As explained below, ignoring the signs of impairment in another lawyer who should not be representing clients can land you and/or your firm in hot water. Unless you or someone else having managerial authority in your firm does something to resolve the situation, you may be deemed to have violated not only ER 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), discussed below, but also to have assisted another person (the lawyer) in violating the Rules of Professional Conduct contrary to ER 8.4 (Misconduct) at subsection (a).

The kind of impairment that you need to be concerned with is that which "materially" impairs the lawyer's ability to represent the client. Some impairments can be accommodated.

As pointed out in ER 1.16(a)(2), the kind of impairment that you need to be concerned with is that which "materially" impairs the lawyer's ability to represent the client. Some impairments can be accommodated: As pointed out in the ABA opinion cited in note 1, a lawyer may have difficulty doing trial work, because of a mental impairment, to the extent that other lawyers in the firm do not want him representing their litigation clients. Still, he may be extremely competent doing legal research or drafting legal documents. Depending on the nature of the impairment, firm management may have an obligation to supervise the services rendered by the accommodated lawyer and, in an appropriate case, ascertain that the lawyer will not be providing certain services to a particular client.

Confronting these situations can be stressful for all concerned. Having been personally on both sides of the problem, I can tell you that the emotions involved may range from sheer terror to ineffable sadness. Regardless of the personal feelings of the lawyers concerned, the overriding objective here is, and always will be, making sure the clients involved are protected.

A recent ethics opinion from the District of Columbia Legal Ethics Committee[4] outlines three basic areas of ethical concern.

What To Say to the Lawyer

ER 5.1 provides that if you are a partner or have comparable managerial authority over an impaired lawyer and know that the lawyer's problems may be affecting the representation of a client when the consequences thereof could have been avoided, you may be personally liable via disciplinary sanctions if you fail to take reasonable "remedial action." The "reasonable efforts" you are required to take as specified in the Rule will depend on the size of the firm.

A sole practitioner or a small firm will probably not need written policies on reporting as much as would a larger firm, which might include a designated partner as a "hotline" for both lawyers and staff, with the understanding that concerns can be received anonymously if desired, with no recriminations or consequences for the person reporting. Lawyers in the firm that have no managerial responsibilities need to report their concerns to lawyers who do, and they should be advised accordingly.[5] If you have any questions about the policies contemplated by the Rule, Comment [3] to ER 5.1 will give you some suggestions and examples.

Once a problem is acknowledged, remedial action may involve confronting the lawyer to seek help and explaining your ethical obligations in the situation if he or she refuses. Those obligations include but are not limited to preventing further representation of firm clients, advising the clients of the firm's concerns, terminating his/her association with the firm and/or reporting the situation to the State Bar. Encouraging the lawyer to get help instead of forcing you to communicate the firm's concerns to the clients and others will hopefully make the lawyer see that "voluntarily" getting help as the best way to proceed, and to give the lawyer the sense of being in control and allowing him or her to save face in the situation—as if seeking help was the lawyer's idea in the first place.

What to do if the lawyer won't seek help and who either is terminated or leaves the firm is discussed later in this article.

So much for the lawyer. Now it starts to get complicated.

What To Say to the Client

ER 1.4 (Communication), particularly at subsection (b) thereof, requires that, upon discovery of the problem, you as a lawyer with the requisite ER 5.1 supervisory authority over the impaired lawyer have a duty to see that the situation is explained to the extent reasonably necessary to permit the clients involved to make informed decisions regarding their representations. This would include situations both (a) where the impaired lawyer would continue to be employed by the firm but not on the client's case, and (b) where the lawyer decides to leave the firm and wants to take the uninformed client with him/her.

Be careful here: Privacy concerns dictate that you should give only enough general information to allow the client to understand why the firm became concerned,[6] and that the client can stay with the firm and be served by another firm lawyer or can, if they wish, hire a new lawyer outside the firm. The client can get the details from the lawyer—if the lawyer involved is willing to disclose them.

You might say something like:

> Jack has developed some medical issues that all of us, including Jack, believe make sense for him (to take some time off) (to retire) (to decrease his workload) and we have asked Jill, one of the other partners, to take over your case, at no extra cost to you. You of course have the right to take your case to another lawyer and we will, without charge, assist whoever you choose to get up to speed.

If the impaired lawyer refuses to step aside and get help, or decides to leave the firm with the lawyer's clients, what then?

Your ER 1.4 responsibilities don't end if the lawyer resigns or is terminated and the lawyer's clients stay with the firm.[7] But what if the lawyer simply leaves and takes clients with him/her? The only authority I've been able to find that addresses the issue directly concludes that once your ER 1.4 duties to firm clients have been met before they leave, those duties will not apply once they have become former clients.[8] And your ER 5.1 duties probably would be discharged by urging the impaired lawyer to desist from making any misrepresentations to the clients that go with him about the lawyer's ability to competently represent them. The preference normally expressed for a joint letter to the clients—announcing the lawyer's departure sent from the firm and the departing lawyer[9]—should still be honored if possible with the proviso that nothing should be said or implied by the firm that can be misunderstood as an endorsement of the competence or diligence of the departing lawyer.[10]

It's been acknowledged, however, that these situations can result in the lawyers involved being unable to agree on a joint letter announcing the lawyer's departure, and that separate client notifications would be acceptable.[11] But if the lawyer denies there's a problem, refuses to seek help, and leaves the firm, then it can get really complicated.

What To Say to Third Parties, Including the State Bar

With the now-former clients duly informed in accordance with ER 1.4, what's the next step when an impaired lawyer leaves? The next question that may arise is whether there is a duty to forewarn the impaired lawyer's new firm of your mutual history. If, as noted above, there is no continuing duty to former clients, and because ER 4.1 (Truthfulness in Statements to Others) is premised on your duties while "in the course of representing a client," it would seem that that would end the matter. But then there's that pesky ER 8.3 (Reporting Professional Misconduct), otherwise known as "The Rat Rule," making us responsible whenever we know[12] that another lawyer has violated ethical rules that raise a substantial question concerning the lawyer's fitness.

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The continuing questionable conduct of a former partner or associate may require other considerations, and it seems to be the general consensus that ER 8.3 responsibilities to the State Bar do not go away when a lawyer leaves your firm. Under the category of things that are easier said than done, Comment [3] to ER 8.3 provides that, "This Rule [ER 8.3] limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule."

So what would you do about a lawyer who, when confronted, acknowledges the problem and agrees to get help? Do you really think reporting this to the State Bar is something that raises a substantial question about the lawyer's fitness in other respects or that constitutes a situation that you must vigorously endeavor to prevent?

How about the lawyer who acknowledges the problem but refuses to get help? Would it make any difference if the problem was that the lawyer was not returning telephone calls from clients? How about billing for time not actually spent on client matters? You can see how hard it is to come up with a "bright-line rule" here. Until something better comes along, Comment [3] will have to serve as the only guidance we'll have in our profession as it continues to attempt to present lawyers who want to do the right thing with not always easy answers.

endnotes

1. *Legal Ethics and the Impaired Lawyer*, Ariz. Att'y (Jan. 2017) at 10; and see generally, ABA Formal Ethics Op. 03-429 (Obligations with Respect to Mentally Impaired Lawyer in the Firm) (June 11, 2003).
2. *Ethics and the Aging Lawyer*, Ariz. Att'y (Nov. 2013) at 12.
3. Arizona Rules of Professional Conduct; Rule 42, Ariz.R.S.Ct.
4. Duties When a Lawyer is Impaired, Ethics Op. 377 (Oct. 2019).
5. Comment [4] to ER 5.1.
6. There may be legal obligations limiting how much you can say that are imposed under the Americans With Disabilities Act, the Family Medical Leave Act, the Health Insurance Portability and Accountability Act and any Arizona statutory and regulatory equivalents and that are beyond the scope of this article.
7. D.C. Ethics Op. 377 ¶ C.
8. Philadelphia Bar Ass'n Ethics Op. 2000-12 (Dec. 2000).
9. *Clients Come First When Lawyers Leave Firms*, Ariz. Att'y (April 2002) at 12.
10. D.C. Ethics Opinion 377, *supra* note 7.
11. "Knows" is a defined term under ER 1.0 (Terminology) at subsection (f) and denotes actual knowledge of the facts in question, which in turn can be imputed from the circumstances.
12. ABA Formal Ethics Op. 03-431 (Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment) (Aug. 8, 2003).