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Lawyers' Manual on Professional Conduct™

When Life Happens, We Are Our Partner's Keeper

By Katharine R. Ciliberti

According to recent studies, lawyers are at a greater risk of suffering from alcoholism, substance abuse, depression, and other mental health issues than the general population – and when these problems arise, mistakes can happen that affect the attorney's entire firm. That was the topic of a panel discussion at the Spring 2017 National Legal Malpractice Conference in Boston, Massachusetts. The conference was presented on April 19-21 by the ABA Standing Committee on Lawyers' Professional Liability.

Mark Bassingthwaighte, Risk Manager at ALPS Corporation, moderated the discussion, which centered on attorney impairment, its consequences, and various ways to identify and respond to it. The panel, whose main message was that attorneys at law firms must be vigilant for signs that their partners are suffering from impairment, also included Barbara Bowe, LICSW at Lawyers Concerned for Lawyers Massachusetts; Regina E. Roman, Partner at Sugarman, Rogers, Barshak & Cohen; and Michael Frederickson, Board Member of Massachusetts Board of Bar Overseers.

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Ethical Obligations

The panel's first topic of discussion was whether there is an ethical obligation for a partner, or someone with supervisory authority at a firm, to act when he thinks there may be an issue with attorney impairment. The panelists concluded that there absolutely is.

Roman explained that under the Model Rule of Professional Conduct 5.1(a) and many states' comparable rules, partners, managers, and individuals with supervisory responsibility at a firm must take reasonable measures to ensure that individual attorneys are satisfying the rules of professional conduct. And multiple rules are implicated when an attorney is impaired.

For one, under the Model Rules, an impaired lawyer is held to the same standard as any lawyer in terms of competency, diligence, communication, and responsiveness to clients. A seriously impaired lawyer will have difficulty meeting this standard. Thus, there is an ethical obligation to establish procedures to aid in detecting impairment before it results in legal representation that falls beneath the standard. In addition, under Model Rule 1.16, a lawyer must withdraw from a representation if he has an impairment. Thus, the firm has an obligation to take reasonable measures to identify an impairment and effect a withdrawal if necessary.

Roman suggested a number of measures that can help a firm detect a problem before it becomes serious: (1) establish thorough conflict check procedures; (2) institute supervision over individuals with control of trust accounts; and (3) designate someone within the firm to receive concerns about potential impairment. As to the last, Roman noted that staff are often the first to notice a problem, and will benefit by having someone to whom they can bring their concerns confidentially.

Roman continued that Model Rule 5.1(c) comes into play after the firm is aware of a violation of the Rules of Professional Conduct; it states that lawyers violate the rule if they fail to take remedial action, such as implementing some sort of supervision, or removing the impaired attorney from practice temporarily or permanently.

Finally, Roman explained, Model Rule 8.3 also imposes ethical obligations in situations of attorney impairment: it requires lawyers to *report* certain rule vio-

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lations. (Though this is an area where the rules vary from jurisdiction to jurisdiction.) Under Rule 8.3, reporting is mandatory if there is a substantial question as to the attorney's honesty, trustworthiness, or fitness as a lawyer. Unfortunately, the Model Rules do not shed light on what constitutes a ''substantial question.''

Warning Signs

Bassingthwaighte noted that lawyers often bristle at the idea that they should be responsible for diagnosing their colleagues with alcoholism or depression. In response, the panel discussed that lawyers are not expected to diagnose their colleagues, nor should they try. To the contrary, their responsibility is only to be on the lookout for warning signs, and to be familiar with the resources and proper courses of action when they identify any of the signs.

Bowe listed the following as some potential warning signs of impairment:

- The attorney becomes more moody, irritable, irascible, distracted, and/or internally preoccupied;
- The attorney is unable to stay on schedule as well as he/she used to;
- The attorney seems to be frequently absent, such that other attorneys and staff are always looking for or covering for him/her;
- There are rumblings from staff, other attorneys, or even clients who are concerned about the attorney;
- The attorney's appearance changes—for instance, a finicky dresser suddenly has a disregard for personal appearance, or an attorney gains or loses a lot of weight;
- There is a change in the attorney's speech patterns—for instance, all of a sudden the attorney becomes flighty, rapidly moving from one topic to the next;
- The attorney mismanages case filings or misses deadlines; or
- The attorney's typical response to stress becomes worse, more noticeable, or exacerbated.

Proactive Measures

The panel acknowledged that it is difficult or impossible to prevent impairment, but said there are nevertheless proactive steps that can protect the firm and its clients. Roman said that one such measure is fostering or promoting an atmosphere at the firm that encourages open communication from staff and others, which can help with problem-spotting. Bowe agreed, adding that a firm also can try to create a culture of openness around, and acceptance of, the idea that ''life happens.'' They can introduce monthly or weekly meditation, or bring in speakers to talk about topics like wellness, healthy eating, stress management, and seasonal affective disorder. These kinds of measures send a message about what is encouraged, what is okay, and what is not okay at the firm.

Getting Help and Moving Forward

The panel discussed practical tips for what to do after the firm has spotted a problem with attorney impairment. Roman suggested that the firm contact Lawyers Concerned for Lawyers (LCL), or similar organizations for advice. Aside from that, the firm should determine the necessary level of remediation, which might involve asking the following kinds of questions:

- Does the attorney need supervision, and to what extent?
- Can the firm reduce the attorney's caseload, change the type of work he/she is doing, or assign a second attorney on all matters?
- Does the attorney need time off, and if so, how will that be structured?
- (If the attorney is not a partner) Does the ADA or other federal or state law require accommodations?

Bowe added that she often receives last minute calls from managing partners who want advice for handling a conversation with an impaired attorney, which is not ideal because a lot of thought and planning needs to go into such a conversation. Bowe offered the following tips for conversations about attorney impairment:

- Make sure that everyone who will be part of the conversation has the same information in advance and is on the same page.
- Build your case regarding the problem, but stick to the facts, and do not try to interpret behavior. For instance, explain that you have noticed changes in punctuality, appearance, mood, and work product.
- If you're comfortable doing so, put the concerns on paper, so the attorney can have that as a reference point.
- There is no need to provide a diagnosis or to fish around for one.
- There is no need to designate a treatment plan, because it is not always clear what is going on with the attorney. Instead, consider asking the attorney to make an appointment at LCL or a similar organization, and ask for some confirmation that the attorney has followed through with that request.

In addition, if the firm believes the attorney needs time away from work, the decision-makers should consider the following questions in advance:

- Does the firm want the attorney to seek help while he/she is out?
- Will the attorney be paid while on leave?
- Will the firm help with health insurance coverage?
- What will the firm say to other attorneys, staff, and clients about why the lawyer is gone and what is being done?
- How will the firm know when the attorney is ready to come back?
- How will the firm educate the staff about reentry?
- How will the firm monitor the attorney's performance after reentry?

Regarding monitoring performance after reentry, Bowe offered that decision-makers should consider having an organization like LCL act as a middleman between the

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lawyer and the firm to report on whether the lawyer has complied with his treatment.

Reporting and Rule 1.6

The panel also discussed a firm's obligations to report attorney impairment in certain circumstances. Frederickson explained that there is not a lot of jurisprudence on this topic, in part because of the way Rule 8.3 is structured. Model Rule 8.3 states that the obligation to report a lawyer's impairment is trumped by the confidentiality of client information under Rule 1.6. Because impairment that has resulted in a violation of the Rules of Professional Conduct usually is intertwined with the representation of a client and confidential client information, the confidentiality rule usually swallows up the obligation to report.

Of course, if a firm decides that an attorney's conduct is serious enough to report, but intertwined with confidential client information, the firm can ask the client's permission to reveal the information for the purpose of reporting. However, the client's consent must be informed, so the firm must explain all of the circumstances and implications before obtaining consent. This raises the difficult question of when a firm *has* to seek the client's permission. Frederickson submitted that the obligation to report might *require* a firm to ask the client's permission to reveal confidential information.

Roman added that in some states, like Massachusetts, it is no longer the case that everything an attorney learns during the course of a representation is considered confidential – instead, only information that will embarrass the client or that is subject to the attorney-client privilege is ''confidential.'' (New York has a similar rule.) This new approach opens the door to more reporting of attorney impairment and related conduct.

Departing Attorneys

The panel then discussed whether, if the lawyer with the impairment resigns and attempts to take his clients with him, the firm has an obligation to report the lawyer's conduct to the client or anyone else.

The panelists noted that the question is difficult because the firm technically holds the attorney-client relationship until the client decides to leave with the departing lawyer. Thus the firm ethically cannot sit back and let the client be harmed. On the other hand, the firm has to be careful not to interfere with the commercial rights of the attorney. One solution might be for the firm to write a letter to the client expressing its concern. While this option is ethical as long as the firm does not make any misrepresentations, it carries risk of a lawsuit from the departing lawyer. In any event, whatever the firm does, it should not take any action that resembles endorsing the departing lawyer.

Bassingthwaighte added that in this situation, the firm also should consider reporting the lawyer's conduct to LCL or a similar organization in order to help the attorney get help.

Takeaways

In conclusion, the panelists noted that the questions and issues surrounding attorney impairment are very difficult. However, the panelists warned the audience not to let that difficulty and uncertainty lead them to do nothing in regard to attorney impairment. The decision not to act is a decision, and it too has consequences. Bassingthwaighte added that with the graying of the profession and the increase in dementia as a form of attorney impairment, these issues are only going to become more prevalent. The panel implored the audience to be aware of the issues, and to take action.