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WHEN A COLLEAGUE BECOMES IMPAIRED: Obligations of Lawyers and Law Firms as to Incapacitated Partners or Associates

by
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An attorney in your firm starts to miss work more often. Some days when the lawyer comes to work you think you smell alcohol on his breath. Perhaps the lawyer seems to consistently forget things that you have just said. Perhaps there have been missed court dates or forgotten appointments with clients.

Maybe a filing deadline has been missed. Clients are calling the firm to complain that the lawyer is not returning telephone calls. Mail is piling up on the lawyer's desk. You start to suspect that the lawyer is suffering from a substance abuse problem or mental impairment. What should you do?

ABA Ethics Committee Formal Opinion 03-429 (June 11, 2003), discusses the duties of law firms in this situation and makes several suggestions as to how to respond. The ABA begins by noting that impaired lawyers have the same obligations under the rules of professional conduct as other lawyers. For example, a lawyer who misses deadlines or court dates has still violated Mass. R. Prof. C. 1.3, requiring diligence and promptness in representing clients, even if the failure to act is the result of an impairment. Mass. R. Prof. C. 1.16(a)(2) specifically addresses physical or mental impairments and requires an attorney to withdraw if the lawyer's condition materially impairs the lawyer's ability to represent the client.

Of course, the same impairment may prevent the lawyer from recognizing the problem. If the firm becomes aware that one of its attorneys is impaired, failure to take steps to assure that the attorney complies with the rules poses a great risk to both the lawyer's clients and to the firm. As the ABA opinion makes clear, the firm's overriding obligation is to protect the clients, notwithstanding the firm's sympathy for or loyalty to the impaired lawyer.

By taking action, the firm will be protecting itself and its individual members from possible liability for malpractice. Partners and supervising attorneys should also be aware of their professional responsibility under Mass. R. Prof. C. 5.1, which states:

(a) A partner in a law firm 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 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.

The steps that need to be taken depend upon the nature of the impaired attorney's disability and the extent of any violation of the rules of professional conduct. The ABA suggests that the first step may be to confront the impaired lawyer about the situation. If signs of impairment are present, this should be done even if the firm does not believe that any misconduct has occurred.

Partners or co workers considering such an undertaking may first wish to contact Lawyers Concerned for Lawyers (www.lclma.org; tel: (617) 482-9600 or (800) 525-0210) for advice as to how to handle the intervention. LCL is the lawyer assistance program in Massachusetts that helps members of the legal profession with personal, mental health and addiction problems. Communications between the impaired lawyer and LCL are confidential pursuant to Mass. R. Prof. C. 1.6 (c).

The firm needs to determine whether the lawyer recognizes and acknowledges the problem. Can the impairment be treated, controlled or cured? Can it be accommodated without harm to clients? Is the attorney willing to seek treatment for the problem? Is the attorney willing to contact LCL or another assistance program? Timely intervention could prevent future problems for the attorney and for the firm.

The next step would be to find out whether misconduct has in fact occurred and if so, to assess the damage that has been done. The most common misconduct caused by an attorney's impairment is neglect, failure to communicate with clients, or representation that is not competent, in violation of Mass. R. Prof. C. 1.1, 1.2 (a), 1.3 and 1.4.

The firm should inventory the lawyer's cases and determine the status of each matter. All steps necessary to correct or minimize the damage should be taken immediately. Clients must be made aware of any damage to their cases. If malpractice has been committed, the firm should notify its malpractice insurer and clients should be given the information necessary to file a claim should they choose to do so. If the firm wishes to negotiate a settlement with a client who has suffered harm, it may not do so without first advising that client in writing that independent representation is appropriate. See Mass. R. Prof. C. 1.8 (h)

If the impaired attorney was a signatory to the firm's IOLTA account, a determination should be made as to whether all clients' funds were handled appropriately pursuant to Mass. R. Prof. C. 1.15.

The firm must then determine whether the attorney can continue to practice law without harming clients. If the lawyer's impairment is temporary, intermittent or does not require long term treatment in order to control or cure it, and a client's case will not be materially affected or delayed by the impairment, withdrawal may not be necessary. It may also be possible for the attorney to continue representing clients if adequately supervised or assisted by another member of the firm.

If the lawyer's disability is serious or ongoing and the disability affects the lawyer's ability to adequately represent clients, the firm should refrain from assigning new clients to the lawyer and require the lawyer to withdraw from representation in all pending matters. However, if substantial responsibility for an ongoing case is assigned to another attorney, Mass. R. Prof. C. 1.4 (b) requires that the client be informed of and consent to this arrangement.

If the impaired attorney will not cooperate with treatment or restrictions suggested by the

firm, the lawyer's employment by or membership in the firm may have to be terminated. However, discharging the lawyer does not end the firm's obligations under the rules. As the ABA opinion notes, "Rule 1.4 requires the firm to advise existing clients of the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel. In doing so, the firm must be careful to limit any statements made to ones for which there is a reasonable factual foundation." The opinion suggests that the firm is not obligated to advise clients that it believes the departing lawyer is impaired, but that the firm should avoid any action that could be construed as an endorsement of that lawyer's ability to handle the case.

The law firm must also consider its obligations to report the impaired lawyer's conduct to bar counsel pursuant to Mass. R. Prof. C. 8.3. Impairment alone does not require a report. A report is mandatory only if the attorney has committed a violation of the rules of professional conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer. If the impairment can be successfully treated or controlled before a serious breach of the rules occurs, it need not be reported.

However, if the firm can do so without breaching the confidentiality owed to its clients under Mass. R. Prof. C. 1.6, it may nonetheless decide to report its concerns about the impaired lawyer to bar counsel even if there have as yet been no other violations of the rules of professional conduct. Bar counsel would then review the situation to determine what action is necessary, including whether to institute proceedings to transfer the attorney to disability inactive status pursuant to Supreme Judicial Court Rule 4:01, § 13.

Impairments resulting from chemical dependency, mental illness or infirmities of age are common, and have a serious negative impact on the legal profession. Partners and associates may be in a unique position to be able to detect problems at an early stage. Prompt action by the firm will protect clients, prevent malpractice, and avoid violations of disciplinary rules. It may also ultimately save the life and career of the impaired attorney.

Please direct all questions to webmaster@massbbo.org.

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