ENDORSEMENT OF D.C. BAR ASSOCIATION ETHICS OPINION 377: DUTIES WHEN A LAWYER IS IMPAIRED

D.C. Bar Ethics Opinion 377 (October 2019) provides thoughtful advice on how to address ethical issues that can arise when dealing with an attorney whose illness or addiction is significantly impairing the lawyer’s ability to provide competent and diligent representation. The PBA Committee on Legal Ethics and Professional Responsibility (“PBA Ethics Committee”) formally endorses Opinion 377.

As Opinion 377 recognizes at the outset, ethics rules are only one set of regulations that apply in the context of an employee or partner who is suffering from a mental or physical impairment. The Rules of Professional Conduct must also be viewed in the context of a substantive body of law governing privacy and other rights. Notwithstanding this substantive law, Opinion 377 addresses three specific questions:

- What is the duty of partners or supervisory lawyers who believe that another lawyer is suffering from a significant impairment?

- When is an attorney required to report another attorney to the Disciplinary Board based on a perceived impairment?

- What duties does a firm have if a lawyer with a significant impairment leaves the firm?

As to the first issue, Rule 5.1(a) in the Pennsylvania Rules of Professional Conduct (“PA RPC”) states that “a partner in a law firm, and a lawyer who … possesses comparable 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.” (An in-house department of a corporation or other organization is included in the term “firm.” See PA RPC 1.0(c)). Under Rule 5.1(c), a lawyer in a managerial or supervisory position is responsible for a subordinate lawyer’s misconduct if the supervising lawyer “knows of the conduct at a time when its
consequences can be avoided or mitigated but fails to take reasonable remedial action.” The Rules do not provide specific guidance on what “reasonable efforts” will provide “reasonable assurance” that all lawyers will follow the Rules. However, no matter how small a law firm or legal department may be, a written policy will be useful. The policy can provide for an anonymous reporting mechanism for suspected impairment and also specify what steps the firm will take to ascertain whether an impairment exists and how to address it, including a requirement for appropriate remediation of the issue. The goal of a written policy is twofold: first, to provide consistency in the handling of difficult situations; and second, to create a culture where both reporting problems and providing support for mental health issues are equally encouraged. It is critical that subordinate lawyers and staff understand that reporting an issue will not lead to retaliation or other negative consequences. It is also critical that the firm provide an environment where an attorney suffering from addiction, depression, anxiety, or other illness that can often accompany the stress of practicing will find constructive assistance.

Depending on the seriousness of the issue, a firm may decide that a lawyer should withdraw from a representation under Rule 1.16(a)(2) because “the lawyer’s … mental condition materially impairs the lawyer’s ability to represent the client.” If this occurs, or even if the lawyer’s participation in a matter is merely curtailed, there will likely be a need to advise the client, at least of the change in the handling of the matter, pursuant to Rule 1.4(a)(3)’s requirement that clients be kept reasonably informed of the status of their matters. According to Opinion 377, “the circumstances surrounding the removal … may be material to the representation and therefore, need to be disclosed ….” On the other hand, such disclosure may violate the impaired lawyer’s privacy or other legal rights and, when necessary, should be made with great caution and in the least intrusive way possible. The fact of a lawyer’s removal from the matter will often be enough information to provide to a client, with no need to disclose the underlying circumstances.

Turning to the second question: when is the duty to report to disciplinary authorities triggered? Under Rule 8.3, if the factors listed in the Rule apply, the duty to report is mandatory, not discretionary. Rule 8.3(a) requires a “lawyer who knows that another lawyer has committed a violation of the Rules … that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” However, the Rule “does not require disclosure of information otherwise protected by Rule 1.6 ….” If one lawyer in a firm reports the impaired lawyer, this relieves the other lawyers of the obligation to also report.

Finally, what is a firm’s obligation when an impaired lawyer leaves the firm? On this issue, the Opinion 377 relies on an ethics opinion issued by the Philadelphia Bar Association Professional Guidance Committee Opinion 2000-12. Opinion 2000-12 suggested “a direct approach” by appealing to the impaired lawyer not to solicit firm clients. If this fails, pursuant to Rule 1.4, the duty to communicate, there may be an obligation to inform the clients to the extent reasonably necessary to permit their informed decisions of whether to follow the impaired lawyer. However, this communication should include only the demonstrable, proven facts, not only to protect
the departing lawyer’s former firm from liability, but also to avoid potentially inadvertently falsely maligning the departing lawyer. Further, in a departure from the recommended practice in similar circumstances (See PBA Ethics Committee and Philadelphia Bar Association Professional Guidance Committee Joint Formal Opinion 2007-300), no joint letter from the firm and the impaired attorney advising the clients of the impending departure should be sent, as this could convey the misimpression that the Firm is vouching for the impaired attorney’s capabilities. Instead, the Firm should send a separate letter. Finally, it may be that the impaired lawyer’s insistence on continuing to represent clients triggers the mandatory reporting requirement under Rule 8.3.

The legal profession is improving in its awareness of these issues and in its understanding of how to help and support colleagues that are suffering from substance abuse or other mental issues. Lawyers and members of the public who know of a lawyer who needs help can call the 24/7 confidential hotline number for Lawyers Concerned for Lawyers at 888-999-1941 or visit the website at https://www.lclpa.org/.


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