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When All Is Not Well: Law Firm Risk Management and Impaired Lawyers

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Both academic research and the popular legal media have increasingly discussed the "wellness" challenges facing the legal profession.[1] At the same time, the organized bar both nationally and locally have undertaken significant initiatives to better address these challenges.[2] Although precise statistics are not available, anecdotal evidence from case reports suggests that lawyer "impairment" in one form or another puts lawyers at disciplinary risk and firms at malpractice risk.[3]

This article surveys two related questions for law firm risk management within the context of lawyer impairment: (1) what are a law firm's supervisory responsibilities for lawyers[4] who may be impaired? and (2) what are the reporting obligations of law firms for an impaired lawyer?[5] With each, the word "impairment" is used in the broadest sense of a condition—regardless of the cause—that affects a lawyer's ability to competently represent clients.[6]

Supervisory Duties

Idaho Rule of Professional Conduct ("RPC") 5.1(a) outlines the regulatory duties of law firm partners and others with "comparable managerial authority" for creating an ethical infrastructure within their firms. To account for variations in

firm size, number of offices and practice fields, RPC 5.1(a) is intentionally both broad and general:

> "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority 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."[7]

RPC 5.1(b), in turn, addresses the responsibilities of a direct supervisor—regardless of the lawyer's position within the firm involved:

> "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."

Similarly, the Idaho Supreme Court in *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 527, 248 P.3d 1256,1262 (2011), emphasized that a law firm is responsible for any malpractice committed by its lawyers:

> "Idaho's corporate code applies here and it is clear that a corporation is liable for the negligent or wrongful act of employees acting on behalf of the corporation."

Although neither of these regulatory or corporate codes address lawyer impairment specifically, both make clear that client work must be undertaken competently and within the standard of care. RPC 1.1 defines the former:

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[8]

Case law defines the latter:

> "As a matter of law, an attorney owes his client a duty to use and exercise reasonable care, skill, discretion, and judgment in the representation."[9]

The comments to RPC 5.1 counsel that firms should take proactive steps that reasonably anticipate common risks and that they cannot "turn a blind eye" when problems arise.

For its part, Comment 2 gives examples of proactive steps firms should generally take to address common risks: "Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

And Comment 3 notes the reality that problems may occur and cannot simply be ignored: "In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules."

Although these are comments to a regulatory rule, then-Justice Jim Jones, in his concurring opinion in a legal malpractice case, acknowledged the practical relationship between the regulatory rules and the standard of care: "The contours of an Idaho lawyer's duty of care are generally spelled out in the Idaho Rules of Professional Conduct[.]"[10]

Given better documentation of lawyer impairment issues and the more robust resources now available for law firms in this area, firms will likely be

increasingly expected to implement policies and procedures for identifying and assisting firm lawyers to both prevent and mitigate impairment-related issues. The comments to RPC 5.1 suggest that such policies and procedures may be tailored to a firm's particular circumstances, with Comment 3 observing: "In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice . . . [while] [i]n a large firm . . ., more elaborate measures may be necessary."

In sum, the increasing recognition of the problem of impairment within the legal profession means that law firms should incorporate protocols appropriate for firm size and practice into their risk management plans. With the increasing recognition of the problem has also come the availability of resources for firms of all sizes from national organizations such as the ABA and local ones such as the Idaho Lawyers Assistance Program. Malpractice carriers are also another source of practical tools. Just as law firms cannot ignore conflict checks or cyber security risks, they need to frankly acknowledge and address the issue of lawyer impairment.

Reporting

RPC 8.3(a) states a lawyer's duty to report professional misconduct:

> "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct 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."

Comment 3 to RPC 8.3 outlines the contours of the reporting requirement:

> "If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule 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. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct."

The ABA in Formal Opinion 03-429 (2003) wrestled with the interplay between addressing impairment issues internally and reporting under ABA Model Rule 8.3—on which Idaho's variant is based. In what can be a gray area, the opinion offers prudent and practical guidance.

Formal Opinion 03-429 divides the duty to report—*or not*—into three broad categories. First, the opinion counsels that there is no duty to report if the impairment has not resulted in a violation of the professional rules. The opinion puts it this way: "[I]f the firm reasonably believes that it has succeeded in preventing the lawyer's impairment from causing a violation of a duty to the client by supplying the necessary support and supervision, there would be no duty to report under Rule 8.3(e)."[11] For example, if a firm lawyer raised—or was confronted with—an issue that had the potential to impair the lawyer's representation of a client but no harm to the client resulted, then there would be no duty to report. Even if there is no duty to report, however, the firm should still

take whatever remedial steps are appropriate to assist the lawyer and to protect any clients affected.

Second, the opinion concludes that there is no duty to report if the condition that has caused impairment has resolved. The opinion uses the following example: "[I]f partners in the firm and the supervising lawyer reasonably believe that the previously impaired lawyer has resolved a short-term psychiatric problem that made the lawyer unable to represent clients competently and diligently, there is nothing to report."[12] The logic in this scenario is that the lawyer has regained the requisite fitness to practice law moving forward. Although this may alleviate the need to report the lawyer to a regulatory authority, the firm would still have a duty under the "communication rule"—RPC 1.4—to inform current clients impacted by any material errors the lawyer made during the transitory period of impairment. Another ABA opinion—Formal Opinion 481 (2018)—addresses this duty in considerable detail. Depending on the circumstances, Formal Opinion 03-429 suggests the firm may also have a duty to monitor the lawyer's work for at least a reasonable period going forward to assure that the impairment has not reoccurred.

Third, the opinion finds that if a lawyer's impairment renders the lawyer unable to competently represent clients but the lawyer insists on doing so anyway, the firm must report.[13] In this situation, the opinion concludes that the firm cannot simply replace the lawyer without telling the clients affected—

although it suggests there is a balance to be struck between informing clients and respecting the privacy of the lawyer involved. The opinion suggests in this regard: "In discussions with the client, the lawyer must act with candor and avoid material omissions, but to the extent possible, should be conscious of the privacy rights of the impaired lawyer.[14] The opinion also finds that, again depending on the circumstances, management and supervisory lawyers may have an obligation to take appropriate steps to mitigate the consequences.

Formal Opinion 03-429 strikes a balance between helping impaired lawyers and protecting clients. The opinion offers firms practical guidance in navigating what is always a difficult situation.

Summing Up

With the increasing recognition of impairment issues within the legal profession and the corresponding availability of resources to address them, law firms should incorporate protocols for dealing with impairment issues appropriate for firm size and practice into their risk management plans.

ABOUT THE AUTHOR

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[1] *See, e.g.*, Patrick R. Krill, Ryan Johnson and Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10, No. 1 J. Addict. Med. 46 (2016); Christine Simmons, *Law Firms Face Malpractice Risk Over Substance Abuse, Poor Mental Health*, *available at* www.propertycasualty360.com, Dec. 4, 2018.

[2] *See, e.g.,* ABA Working Group to Advance Well-Being in the Legal Profession, Report 105 to the 2018 Mid-Year Meeting of the House of Delegates (Feb. 2018); Idaho Lawyer Assistance Program, *available at* https://isb.idaho.gov/member-services/programs-resources/lap/.

[3] *See, e.g., Matter of Tway*, 123 Idaho 59, 62, 844 P.2d 688, 691 (1992) (personal and emotional problems led to issues underlying imposition of lawyer discipline); *National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 540 F. Supp.2d 900 (S.D. Ohio 2007) (legal malpractice claim painted against backdrop of lawyer impairment issues).

[4] Although this article focuses on supervision of lawyers, law firms are also generally responsible for supervising non-lawyer employees. *See generally Matter of Jenkins*, 120 Idaho 379, 816 P.2d 335 (1991) (discussing regulatory responsibility for non-lawyers under RPC 5.3); *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 248 P.3d 1256 (2011) (discussing malpractice liability for law firm employees).

[5] ABA Formal Opinion 03-431 (2003) addresses issues surrounding the duty to report a non-firm lawyer's impairment.

[6] *Black's Law Dictionary* (11th ed. 2019), for example, defines "impairment" as: "The quality, state, or condition of being damaged, weakened, or diminished; a condition in which part of a person's mind or body is damaged or does not work well[.]"

[7] Idaho RPC 5.1 is patterned on ABA Model Rule 5.1.

[8] RPC 1.3 addresses the related concept of "diligence."

[9] *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 4, 981 P.2d 236, 239 (1999).

[10] *Bishop v. Owens*, 152 Idaho 616, 622, 272 P.3d 1247, 1253 (2012)

[11] ABA Formal Op. 03-429, *supra*, at 7.

[12] *Id*. at 5.

[13] *Id*.

[14] *Id*. at 5-6.