Model Rule 1.16(a)(2): Where Wellness Meets Withdrawal

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Introduction

The "wellness" challenges lawyers face today have been increasingly well-documented, and the organized bar both nationally and locally has responded with a heightened focus on providing a range of resources to confront them.[1] One provision of the ABA Model Rules of Professional Conduct, however, has long addressed lawyer impairment issues: Rule 1.16(a)(2), which requires withdrawal when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client".[2] Although plain on its face, the Rule is considerably more nuanced in application and is almost invariably painted against the backdrop of very difficult personal circumstances for the lawyers involved.[3]

This article examines three facets of Rule 1.16(a)(2). First, its history is briefly outlined for context. Second, its application is surveyed in both the regulatory and civil litigation contexts. Finally, the practical import for law firm risk management is discussed.

Historical Context

Unlike some other provisions of the ABA Model Rules, Rule 1.16(a)(2) does not trace its lineage to the Canons of Professional Ethics. Although Canon 44 addressed withdrawal, it did not include a requirement analogous to Rule 1.16(a)(2).[4]

Rather, this precept was first introduced as a regulation with DR 2-110(B)(3) in the ABA Model Code of Professional Responsibility in 1969. It required withdrawal if a lawyer's "mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively."[5] This requirement paralleled the simultaneous introduction of rules addressing competency and neglect specifically, DR 6-101(A)(1) and DR 6-101(A)(3).[6] Commentators have long noted the relationship between withdrawal, competency and, depending on the circumstances, neglect in the Model Code formulation and the duty of diligence under Model Rule 1.3.[7]

In developing what would become Model Rule 1.16(a)(2), the Kutak Commission[8] proposed a reformulation that was substantially similar to its Model Code counterpart, DR 2-110(B)(3): "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . (2) the lawyer's physical or mental condition materially impairs the

lawyer's ability to represent the client[.]"[9] That phraseology was adopted by the House of Delegates in 1983 and remains the same today.[10]

Neither the original comments proposed by the Kutak Commission nor those ultimately adopted by the House of Delegates discussed Model Rule 1.16(a)(2) or defined the term "impairs."[11] That, too, remains the same today. Knowledgeable commentators have pointed to the likely reason: the rule is "virtually self-explanatory."[12] There is nothing in the rule suggesting that the term "impairs" has any meaning beyond its dictionary definition.[13] As discussed in the next section, however, the rule has been applied in a wide variety of situations and includes a degree of nuance no doubt influenced by the difficult personal circumstances that are almost always present in the application of the Rule.

Application of the Rule

The Iowa Supreme Court observed within the past decade: "There is very little case law interpreting this rule (*e.g.*, Iowa's version of Model Rule 1.16(a)(2)) or its predecessor, DR 2-110(B)(3)."[14] Nonetheless, the rule and its forerunner under the Model Code have been applied in both regulatory and civil settings.[15] Although the focus with both has been on withdrawal, the rule has also been applied when work should have been declined.[16]

In the regulatory setting, the Rule, in keeping with its text, has been applied to both physical and mental conditions.[17] Substance use—whether alone or in combination with other circumstances—is often reflected in the decisional law surrounding the rule.[18] Professional "burn out" has also been cited when the result of such a condition is inability to manage client work.[19] When discipline under state variants of Rule 1.16(a)(2) is imposed, it is almost invariably coupled with other charges, most frequently violations of Rules 1.1, Competence, and 1.3, Diligence.[20] Depending on the circumstances, other charges—such as the failure to communicate, misrepresentation of the status of work or trust account violations—may also be involved.[21] The regulatory discipline imposed varies widely. Situations involving treatment and the prospect of successful return to practice are often included conditions on probation or reinstatement.[22] By contrast, situations that have spiraled out of control and lack the reasonable probability of a successful return to practice have resulted in disbarment.[23]

In the civil litigation context, the Rule has been cited primarily in cases involving sanctions[24], legal malpractice[25], motions for continuance or withdrawal[26] and procedural motions attempting to redress errors that have occurred due to the underlying physical or mental conditions involved.[27] In these settings, the Rule is usually cited as an ethical duty that the lawyer involved should have followed rather than a decision the lawyer should have made regarding continuing as counsel.[28]

Risk Management Lessons

The case law interpreting Rule 1.16(a)(2) suggests three broad risk management lessons for lawyers and their law firms.

First, although disciplinary sanctions involving the Rule primarily involve solo practitioners, this issue affects all types of practices. The tilt on the disciplinary side toward solos likely results from a combination of the lack of peer review and readily available internal firm support.[29] A common pattern in disciplinary cases involves a solo practitioner who develops a serious condition but attempts to continue with an ongoing matter without telling anyone or associating additional or replacement counsel. In a larger firm, withdrawal is often avoided when a firm member becomes ill—provided the firm has sufficient depth on its "bench"—by having another lawyer or team within the firm with similar

knowledge and experience handle the matter in the absence of the ill lawyer. However, this solution presumes adequate internal peer review and support. Even with sufficient peer review and support, these can be very difficult conversations within a firm.[30] Nonetheless, both due to supervisory duties within firms under state variants of Model Rules 5.1 and 5.2[31] and the firm's potential civil liability to its clients, they are conversations that must take place.

Second, clients cannot be ignored. A serious illness that impacts the continuing availability of chosen counsel to handle a matter fits squarely within the realm of case events warranting consultation with the client under the "communication rule"—Model Rule 1.4.[32] ABA Formal Opinion 03-429 (2003), addresses lawyer impairment issues arising within law firms[33] and suggests that a balance can be struck between the client's need to be consulted and and privacy concerns of the lawyer involved. The opinion counsels, however, that the client must be consulted in these circumstances when the lawyer involved is the principal handling attorney on the matter.[34]

Third, if a firm lawyer is in the disciplinary system due to an illness or similar condition resulting in a charge under state counterparts of Rule 1.16(a)(2), case law suggests that a cooperative approach with the regulatory authority and a proactive treatment plan will yield the best result.[35] Although illness and similar conditions can be a mitigating factor in lawyer discipline under Standard 9.32 of the Standards for Imposing Lawyer Sanctions,[36] disciplinary violations in this area often occur in multiple matters the lawyer is handling, triggering the aggravating factor "pattern of misconduct" in Standard 9.22(c).[37] Therefore, a cooperative approach involving meaningful treatment can be critical in providing a path for the lawyer's eventual return to practice.[38] By contrast, not having a realistic treatment plan or simply acceding to one and then not following it can be recipes for severe discipline.[39]

Summing Up

Rule 1.16(a)(2) informs lawyers and their firms when they must withdraw—or decline work—when physical or mental conditions prevent them from handling the matter concerned with the requisite competence. In the disciplinary context, it is usually coupled with other charges that reflect the unfortunate results that can and do occur when lawyers in this situation continue working on client matters despite their inability to handle matters adequately.

In a disciplinary case based on the Rule 1.16(a)(2)'s Model Code predecessor, a highly capable lawyer lost the ability to manage his successful practice due to a severe condition the lawyer did not acknowledge until it had overwhelmed him. Former Justice Edwin Peterson of the Oregon Supreme Court observed in his concurrence: "Over the years I have seen a host of intelligent, capable lawyers get into trouble because of their inability to recognize and resolve problems such as faced . . . [the lawyer] . . . in this case."[40] Justice Peterson made his observation nearly 40 years ago. Evidence suggests the pressures lawyers face today have not abated. The heightened focus on lawyer wellness, however, may encourage lawyers facing significant conditions to seek out available resources and, when necessary, transition out of matters in keeping with Rule 1.16(a)(2) during their recoveries.

Endnotes

1. *See generally* Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10, No. 1 J. Addict. Med. 46 (2016); Report of the ABA Working Group to Advance Well-Being in the Legal Profession to the ABA House of Delegates, https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_2018_hod_midyear_105.pdf (Feb. 2018); ABA Commission on Lawyer Assistance Programs, https://www.americanbar.org/groups/lawyer_assistance/ (last visited Apr. 24, 2020); ABA Profile of the Legal Profession 58-60 (2019), *available at* https://www.americanbar.

org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf.

2. Other areas of lawyer regulation have also long addressed impairment issues, including the mitigating factors listed in Standard 9.32 of the ABA Standards for Imposing Lawyer Sanctions and disability inactive status under Rule 23 of the ABA Model Rules for Lawyer Disciplinary Enforcement. *See generally* Judith M. Rush, *Disbarment of Impaired Lawyers: Making the Sanction Fit the Crime*, 37 Wm. Mitchell L. Rev. 916 (2011) (discussing lawyer impairment issues as a mitigating factor in regulatory discipline); Arthur F. Greenbaum, *Lawyer Transfers to Disability Inactive Status—A Comprehensive Guide*, 2016 J. Legal Prof. 1 (2016) (examining impairment issues within the context of disability inactive status).

3. *See also* Restatement (Third) of the Law Governing Lawyers §32(2)(b) (2000) (discussing the same concept in identical terms).

4. Canon 44 cast withdrawal in general terms: "The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause." Canon 44 is reprinted in the ABA Compendium of Professional Responsibility Rules and Standards 436 (2019).

5. *Id.* at 251.

6. *See generally* Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 Ark. L. Rev. 1, 15 (1970) (the chair of the committee that developed the Model Code notes that it introduced specific regulations addressing competency and neglect).

7. *See* Charles W. Wolfram, Modern Legal Ethics 552 (1986) ("The rule is one that reinforces the competence requirements and complements the needs of courts and other legal agencies for expedition."); Geoffrey C. Hazard, W. William Hodes & Peter R. Jarvis, The Law of Lawyering 21-7 (4th ed. 2016) ("Rule 1.16(a)(2) recognizes that a lawyer who is too ill to represent clients properly is at least temporarily unfit to enter into or continue a client-lawyer relationship. Such a lawyer by definition could not provide the competent or diligent representation required by Rules 1.1 and 1.3.").

8. In 1977, the American Bar Association created the Commission on Evaluation of Professional Standards to undertake a comprehensive rethinking of the ethical premises and problems of the legal profession. The Commission was chaired by Robert J. Kutak, until his death in early 1983. What became known as the Kutak Commission studied and drafted proposals for six years. Ultimately, the Kutak Commission produced the Model Rules of Professional Conduct under the leadership of Robert W. Meserve. The Model Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983. *See generally* A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013, vii, x-xi (2013).

9. *Id.* at 366.

10. *Id.* at 365-81.

11. *Id.*

12. The Law of Lawyering, *supra* note 7, at 21-7.

13. *See* Black's Law Dictionary (11th ed. 2019) (definitions of "impair" and "impairment").

14. Iowa Supreme Court Att'y Disciplinary Board v. Cunningham, 812 N.W.2d 541, 548 (Iowa 2012).

15. For simplicity, the examples in this section are drawn from both the respective Model Rule and the Model Code provisions and are referred to collectively as "the Rule."

16. *See, e.g.*, Mulkey v. Meridian Oil, Inc., 143 F.R.D. 257, 260 (W.D. Okla. 1992) (citing the Oklahoma version of the Rule in criticizing lawyers who continued to advertise for new clients despite serious physical and emotional conditions suffered by the two lawyers handling the matter concerned).

17. *See, e.g.*, State ex rel. Oklahoma Bar Ass'n v. Southern (*Southern*), 15 P.3d 1 (Okla. 2000) (physical illness); Cincinnati Bar Association v. Brown, 678 N.E.2d 513 (Ohio 1997) (mental condition).

18. *See, e.g.*, *In re* Biggs, 864 P.2d 1310 (Or. 1994); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991).

19. *See, e.g.*, *In re* Loew, 642 P.2d 1171 (Or. 1982); *see also In re* Loew, 661 P.2d 922 (Or. 1983); *In re* Loew, 676 P.2d 294 (Or. 1984).

20. *See, e.g.*, *Cincinnati Bar Association,* 678 N.E.2d 513.

21. *See, e.g.*, People v. Mendus, 360 P.3d 1049 (Colo. 2015) (including a charge the Colorado RPC 1.4 for failing to keep the client concerned informed); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991) (included pattern of

misrepresenting status of work and trust account violations).

22. *See, e.g.*, *Southern,* 15 P.3d 1 (probation with conditions); *Heilbrunn,* 814 P.2d 819 (conditions on reinstatement).

23. *See, e.g.*, *Biggs*, 864 P.2d 1310 (lawyer who abandoned practice disbarred); Attorney Grievance Comm'n of Maryland v. Wallace, 793 A.2d 535 (Md. 2002) (lawyer disbarred for multiple diligence and related violations and failed to respond to subsequent disciplinary proceedings).

24. *See, e.g.*, Mulkey v. Meridian Oil, Inc., 143 F.R.D. 257 (physical and emotional issues triggered violations of scheduling order and resulted in show cause order on sanctions).

25. *See, e.g.*, National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 540 F. Supp.2d 900 (S.D. Ohio 2007) (plaintiff asserted its lawyer in underlying insurance defense matter had substance abuse problems that affected performance).

26.*See, e.g.*, Sterling Sav. Bank v. Fairfield (*Fairfield*), No. 39907, 2013 WL 5988958 at *2 (Idaho App. Aug. 20, 2013) (unpublished) (continuance); Northwestern Mutual Life Insurance Company v. Ulanowski, No. 11-35, 2012 WL 13028742 (D. Minn. Mar. 5, 2012) (unpublished) (withdrawal).

27. *See, e.g.*, Mead v. Shulkin, 29 Vet. App. 159 (2017) (seeking to excuse untimely filing of attorney fee petition); United States v. Real Property Commonly Known as 5535 Myers Lake Road, Belmont, Michigan, County of Kent, Cannon Township (*Real Property*), No. 1:91-CV-293, 1991 WL 239980 (W.D. Mich. Sept. 23, 1991) (unpublished) (motion to set aside default judgment).

28. *See, e.g.*, *Fairfield,* 2013 WL 5988958 at *2 ("[I]t is incumbent upon the attorney to move to withdraw from representation so that another attorney can take his place and protect the client's interests. *See* Idaho Rule of Prof. Conduct R. 1.16(a)(2)."); *Real Property,* 1991 WL 239980 at *3 n.1 ("When Attorney . . . knew he was unable to meet the deadline because of his mental condition, he should have withdrawn from the case or associated himself with someone able to meet the deadline. Mich. Rules of Prof. Conduct R. 1.16(a)(2) and 1.1.").

29. "The sole practitioner sometimes has no ear to bend, no ready assistance and no sympathetic counsel." *In re* Lowe*,* 642 P.2d 1171, 1174 (Or. 1982) (Peterson, J., concurring).

30. Cutler v. Klara, Whicher & Mishne, 473 N.W.2d 178 (Iowa 1991), for example, involved a law firm partner who committed suicide after being removed internally from his workload due to a severe illness.

31. *See* Model Rules of Prof'l Conduct R. 5.1 & 5.2 (2019) (supervisory duties over law firm lawyers); *see also* Model Rules of Prof'l Conduct R. 5.3 (2019) (supervisory duties for law firm staff).

32. Model Rules of Prof'l Conduct R. 1.4(a)(3) requires a lawyer to "keep the client reasonably informed about the status of the matter[.]" Model Rules of Prof'l Conduct R. 1.4(b), in turn, requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

33. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431 (2003) (addressing reporting responsibilities under Model Rule 8.3 for lawyers outside the reporter's law firm).

34. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 481 (2018) (discussing the duties owed to clients if a material error has occurred).

35. *See, e.g.*, *In re* Bosket, 32 D.B. Rptr. 41, 45 (Or. 2018) ("[Lawyer] cooperated fully in the Bar's investigation of his conduct and the resolution of this formal proceeding."); Iowa Supreme Court Att'y Disciplinary Bd. v. Kingery (*Kingery*), 871 N.W.2d 109, 123 (Iowa 2015) ("[Lawyer's] detoxification, outpatient treatment, and subsequent efforts to cultivate a support system and abstain from alcohol are important and commendable.").

36. *See* ABA Standards for Imposing Lawyer Sanctions 9.32(c) (personal and emotional problems), (h) (physical disability) & (i) (mental disability or chemical dependency).

37. *See, e.g.*, *Kingery*, 871 N.W.2d at 122 ("Additionally, the sheer number of clients affected by . . . [the lawyer's] . . . conduct—more than a dozen—is an aggravating factor.").

38. *Id.* ("[T]he most significant mitigating factor is . . . [the lawyer's] . . . robust rehabilitative efforts[.]"

39. *See, e.g.*, *In re* Murrow*,* 336 P.3d 859, 869-70 (Kan. 2014) (lawyer suspended for a year due, in part, to his failure to propose treatment plan); Disciplinary Counsel v. Wickerham, 970 N.E.2d 932, 935 (Ohio 2012) (lawyer who did not fulfill required treatment plan disbarred).

40. *In re* Loew, 642 P.2d 1171, 1176 (Or. 1982) (Peterson, J., concurring).