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**Delicate Subject:
Helping Colleagues in Need**

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Over 40 years ago, the Oregon Supreme Court issued an opinion in a disciplinary case involving a successful lawyer who developed what the Court described in the terminology of the time as “burnout.” The lawyer was handling an appeal but was unable to complete the work and gradually stopped responding to the client and others involved. Chief Justice Peterson in a concurrence agreed with the discipline imposed but empathized with the attorney. He wrote: “The court’s opinion should be required reading for every lawyer, for almost every practicing lawyer becomes involved in situations which create pressures and stresses akin to those which are present in this case.” He continued: “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. . . . The lawyer in that situation often is incapable or unwilling to face the problem . . . and has lost the ability to discuss the problem with anyone[.]” (I have intentionally withheld the lawyer’s name. The case is at 292 Or. 806 (1982).)

Both statistical studies and anecdotal evidence suggest that the pressures lawyers face today have not abated since Chief Justice Peterson’s observations over 40 years ago. The ABA Commission on Lawyer Assistance Programs has

compiled extensive statistics. The Oregon Disciplinary Reporter, in turn, includes recent examples of lawyers who struggled with problems similar to the lawyer in our opening illustration. Some of the Oregon lawyers had psychological conditions. Others had substance abuse problems. Still others had illnesses that prevented them from continuing to handle client work. Although the specifics varied, a common disciplinary thread was RPC 1.16(a)(2), which requires a lawyer to withdraw when “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client[.]” When client harm resulted, it is not difficult to image that malpractice claims also followed.

In this column, we’ll discuss two questions that law firms confront when a firm lawyer is struggling. First, we’ll examine where firms can turn for resources. Second, we’ll survey the delicate question of whether firms have an obligation to report the lawyer involved and what they can and should tell their clients.

In focusing on lawyers in private practice, we shouldn’t overlook that the same pressures can overwhelm lawyers in corporate or governmental practice but the organizational dynamics are somewhat different in those settings. Similarly, while focusing on firms, OSB Formal Opinion 2005-129 (rev. 2018) suggests that solos have plans in place for trusted colleagues to offer assistance if a solo has a serious health problem that impacts the ability to practice.

Resources

The resources a lawyer may need will understandably vary with the circumstances. In many situations, however, the Oregon Attorney Assistance Program can be a key starting point. OAAP offers help to both lawyers in need and others who are trying to obtain help for a lawyer. The OAAP website—www.oaap.org—offers a comprehensive description of the services available and contact information. Because the OAAP is funded by the Professional Liability Fund, most services are free. Consultations with the OAAP are confidential under both ORS 9.568 and RPC 8.3(c)(3).

Firms should also look inward in the sense of ensuring they have a trusting environment that allows firm lawyers and staff to disclose issues. What was always a good idea has become even more important to overall law firm risk management in the wake of the Covid-19 pandemic with lawyers and staff now more commonly working in “hybrid” or “remote” arrangements outside the old “brick and mortar” office routine of daily personal interaction.

Reporting and Telling Clients

RPC 8.3(a) generally requires a lawyer to report another lawyer to the Bar when the lawyer knows that the other lawyer “has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the

lawyer's . . . fitness as a lawyer[.]” If a condition compromised a firm lawyer’s competence under RPC 1.1 and the lawyer refused to withdraw under RPC 1.16(a)(2), then the duty to report might be triggered if an exception to the reporting rule does not otherwise apply. OSB Formal Opinion 2005-95 (rev. 2014) discusses both the reporting rule and the exceptions. In many situations, however, reporting may not be required if, for example, a lawyer reveals a condition before clients are put at risk and the firm provides appropriate alternate staffing for the matters concerned while the lawyer steps back from practice to receive necessary help.

A serious illness that impacts the ability of the client’s chosen lawyer to continue on a matter, in turn, typically falls within the material events that must be discussed with the client under the “communication” rule—RPC 1.4. ABA Formal Opinion 03-429 (2003) addresses lawyer impairment arising within law firms and suggests that a practical balance can usually be struck between the client’s need to be consulted and the privacy concerns of the lawyer involved. At the same time, Formal Opinion 03-429 and ABA Formal Opinion 481 (2018) counsel that if a material error has occurred as a result of the lawyer’s condition, the client must be informed of the error and the firm will need a conflict waiver to continue.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.