

Daily Journal

www.dailyjournal.com

FRIDAY, MARCH 5, 2021

PERSPECTIVE

Ethics opinions offer advice; some practical, some challenging

By Jessica L. Beckwith
and Brian Slome

California's State Bar's Standing Committee on Professional Responsibility and Conduct intends to issue two advisory opinions addressing challenges common to lawyers working in law firms, and illuminated by the COVID-19 pandemic.

Proposed Opinion 14-0001 explores the ethical obligations both supervisory and subordinate lawyers have when dealing with colleague impairment. COPRAC interprets California's Rules of Professional Conduct to require lawyers take affirmative steps ensuring clients are protected. The opinion proposes making all lawyers, including subordinate lawyers, responsible for monitoring their colleague's wellbeing and taking steps to ensure they are mentally equipped to handle the rigors of practice. Proposed Opinion 17-0003 provides guidance on handling potential client intake. It describes proper questioning, urges effective ethical screening, and advance conflict waivers to avoid disqualification and loss of business.

Proposed Opinion 14-0001: Colleague Impairment

In 2016, the American Bar Association's Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation published the results of national research on substance abuse and other mental health concerns among lawyers. The study confirmed that lawyers suffer from stress, anxiety and depression at rates exceeding their counterparts in the general population. Lawyers experience

problematic drinking that is harmful or consistent with alcohol use disorders at a rate much higher than other populations.

The report prompted several advisory committees to issue opinions examining ethical duties

COPRAC's opinion is daunting in scope and creates the type of obligation few associates are equipped to handle. Most lawyers have no formal training on addiction or mental health.

surrounding lawyer incapacity. Most notably, the District of Columbia Legal Ethics Committee in Formal Opinion 377 discussed the ethical duties of lawyers to take appropriate measures when they believe another lawyer in the same law firm is suffering from a significant impairment posing a risk to clients.

The committee began its analysis by explaining that addressing impairment will allow those suffering to "seek and obtain assistance and treatment. This purpose should not be forgotten as lawyers, firms and agencies seek to comply with the ethical mandates discussed herein." The committee advised law firms to create a culture encouraging reporting within the organization, including by subordinate lawyers.

The committee examined the role of subordinate lawyers who see signs of incapacity in a supervisor: "(1) even when acting at the direction of another, a subordinate lawyer should not take actions that would ratify the misconduct of an impaired lawyer, and (2) if reporting is

mandatory under Rule 8.3, then a subordinate lawyer's duties may be discharged only by a report to the Office of Disciplinary Counsel, as discussed below. Rule 5.3 imposes upon lawyers an obligation to ensure that

non-lawyers employed by or otherwise associated with lawyers engage in conduct that is compatible with the professional obligations of the lawyers."

COPRAC analyzes the ethical issues surrounding impairment differently. It begins from the proposition that impaired attorneys are not excused from their ethical duties due to impairment. COPRAC identifies a litany of rule violations stemming from lawyer impairment. It concludes that impairment can create a personal conflict of interest prohibiting a lawyer from continued representation and which may, in some instances, bar the impaired lawyer's firm from representing affected clients.

Subordinate lawyers, according to COPRAC, are obligated to ignore instructions from impaired superiors if it means protecting a client's interests or otherwise complying with ethical rules. Subordinate lawyers must take affirmative remedial steps to protect clients. It is not sufficient for a subordinate to report concerns to managers at the firm. Instead, a subordinate lawyer must ensure that

his concerns are addressed. COPRAC, therefore, imposes a heavy burden on young and/or inexperienced associates to not only determine whether superiors are competent, but to also take affirmative remedial action.

COPRAC's opinion is daunting in scope and creates the type of obligation few associates are equipped to handle. Most lawyers have no formal training on addiction or mental health. Further, with COVID-19 and the widespread practice of working from home, it is more challenging to identify signs of impairment in a colleague and diagnose the severity of the situation. The opinion lacks compassionate advice and fails to consider the realities of associate life in many law firms.

Proposed Opinion 17-0003: Potential Client Obligations

Proposed Opinion 17-0003 is straightforward offers practical advice. It describes hypothetical situations involving lawyers interviewing prospective clients. In each situation, COPRAC reminds lawyers they owe a "prospective client the same duty of confidentiality owed to an existing or former client pursuant to rule 1.6 and 1.9 even though no lawyer-client relationship thereafter ensues."

COPRAC cautions lawyers who receive material confidential information from a prospective client that they are forbidden from accepting representation materially adverse to the prospective client in the same or a substantially related matter absent informed written consent. The prohibition is imputed to other members of the law firm unless the interviewing lawyer took reasonable measures to

obtain only information reasonably necessary to determine whether to represent the existing client and the law firm promptly undertook screening.

COPRAC interprets information “reasonably necessary to determine whether to represent the prospective client” as information necessary to check conflicts as well as information about the merits to permit a preliminary judgment that the prospective client’s position is not frivolous. It may include information about the prospective client to determine whether accepting the representation will be a good business decision.

If the lawyer obtained only information reasonably necessary to determine whether to take the case then only that lawyer will be barred from representing adverse interests (as long as the law firm erects a timely ethical screen barring that lawyer’s participation in the matter and barring that lawyer from sharing in any portion of the fee.) The prospective client must also be given written notice of the screening procedures.

Alternatively, a law firm can secure a waiver of the prohibition against accepting a representation that is materially adverse to a prospective client resulting from the receipt of material confidential information. A prospective client may give advance informed written consent to the law firm acting adversely to the prospective client in the same matter or substantially related matters. The validity of the advance consent will turn on “the extent to which the client reasonably understands the material risks that the consent entails.”

The opinion is most notable for its discussion about ethical concerns lawyers face when learning that a potential client intends to sue a present client of the lawyer’s firm. The lawyer’s duty of loyalty and desire to disclose facts to its current client, conflict with his duty of confidentiality to the prospective client. The duty of confidentiality overrides the lawyer’s duty of loyalty to his current client such that information obtained from the prospective client may not be disclosed.

Ethics opinions are meant to give real-world guidance. Proposed Opinion 17-0003 provides lawyers with best practices for interviewing potential clients without compromising duties to current clients. Proposed Opinion 14-0001, by contrast, imposes an onerous and impossible burden on young and/or inexperienced lawyers

to act as mental health professionals in recognizing impairment in colleagues and then take steps with severe consequences. Lawyer impairment is no doubt an important issue. But, COPRAC’s most recent opinion seems to expand the ethical rules in a direction they were not necessarily intended to go. ■

Jessica L. Beckwith and Brian Slome are partners at *Lewis Brisbois Bisgaard & Smith LLP* who represent lawyers in legal malpractice matters as well as with lawyer ethics matters including State Bar disciplinary proceedings.

