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SAVE THE DATE

ALL IN-PERSON NCBA EVENTS ARE POSTPONED UNTIL FURTHER NOTICE.

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NCBA Member Benefit - I.D. Card Photo

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS AT THE BAR ASSOCIATION

Thursday, May 7, 2020 at 12:45 PM

Thursday, June 4, 2020 at 12:45 PM

NCBA Stands Strong in Time of Uncertainty

By Richard D. Collins



As President of the Nassau County Bar Association, first and foremost, I would like to extend my most heartfelt good wishes to all NCBA members and your families during this difficult time. I hadn't planned on being a "wartime president" in the final months of a peaceful and enjoyable term, but the Coronavirus clearly had other plans. This is a challenging period for so many of us, especially those in small firms as well as others, but together we will make it through. Please know that I am here to help in any way that I can. I am dedicated to helping NCBA weather this storm so that this association and its members are strong when the skies clear.

Our number one priority is the health of our Bar staff, Members, and the public. Following the guidance of the U.S. Centers for Disease Control and the recommendations from New York State and Nassau County authorities, we have made adjustments that have impacted member services and events now and in the upcoming weeks. In response, I would like to share the ways that the NCBA will continue to serve you during this time of uncertainty.



Domus Temporarily Closed

Domus is temporarily closed to Bar staff, Members, and outside visitors. Academy programs, Committee meetings and events scheduled through April 1 have been postponed or will take place electronically or by phone. I want to thank those committee chairs who have scheduled these "remote" meetings to keep their members informed

and educated. As we continue to monitor and reassess the COVID-19 situation, we will make necessary changes as developments occur and communicate them to you.

Furthermore, the Bar staff has transitioned to a remote-work environment. Rest assured the NCBA is committed to serving

See NCBA STANDS STRONG, Page 4

For NCBA Members Notice of Nassau County Bar Association Annual Meeting

May 12, 2020 • 7:00 PM

Domus
15th & West Streets
Mineola, NY 11501

Proxy statement can be found on the insert in this issue of the *Nassau Lawyer*. The Annual meeting will confirm the election of NCBA officers, directors, Nominating Committee members, and Nassau Academy of Law officers.

A complete set of the By-Laws, including the proposed amendments, can be found on the Nassau County Bar Association website at www.nassaubar.org.



NCBA Hector Herrera to Receive 2020 President's Award

Each year, the NCBA President's Award is given to an individual whose extraordinary efforts have helped to further the goals of the Nassau County Bar Association. The NCBA is proud to announce that Hector Herrera, Building Manager of the NCBA for over 25 years, will receive the 2020 President's Award at the 121st Annual Dinner Dance Gala from NCBA President Richard D. Collins. The NCBA would like to thank Hector for his years of service and dedication to Domus, its members, and staff.

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Business NEWS

The Impaired Attorney and Obligations of Law Firms

Your partner is frequently late for appointments, depositions or court appearances, and her absences are mounting. Increasingly, she fails to timely return telephone and email messages. Occasionally, she returns from lunch and you detect the odor of alcohol on her breath. She may be socially isolated and asking others to cover for her. You meet with her and review her files. She promises to improve. A few weeks later, her concerning behaviors reoccur.

What are your obligations? What must you do and what should you do?

Relevant Provisions of the New York Rules of Professional Conduct

Mandatory reporting requirements are set forth in Rule 8.3(a) of the New York Rules of Professional Conduct (“RPC”). The Rule provides as follows:

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 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

There are two specific carve-outs set forth in RPC 8.3(c). The first is for actual knowledge obtained confidentially, for example, during the course of representing the attorney. The second protects “information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.” This exception is required by the confidentiality provisions set forth in Judiciary Law § 499, which protects all communications with a lawyer assistance program (“LAP”) coextensively with the attorney-client privilege. The provision is also designed to encourage an attorney’s participation in a LAP for treatment and assistance.¹

Reporting is mandatory under RPC 8.3(a) where the following requirements are met: (1) actual knowledge of a violation of a RPC; (2) by another lawyer; (3) raising a substantial question; and (4) the substantial question concerns the “lawyer’s honesty, trustworthiness or fitness as a lawyer.”

In our hypothetical, there is no actual knowledge of a violation of a RPC, although danger lurks. Mere suspicion or a belief without actual knowledge does not require a report.

Additionally, the hypothetical does not yet raise a substantial question regarding her honesty, trustworthiness or fitness as a lawyer. Professor Simon writes that “if another lawyer is an alcoholic or manic-depressive whose personal life seems to be in disarray, Rule 8.3(a) does not require a report unless the alcoholism or depression has led to a violation [of] the Rules of Professional Conduct.... Alcoholism, for example, is troubling, but by itself it is not a violation of the Rules of Professional Conduct. Alcoholism may lead to violations ..., but simply drinking too much or too often is not a violation.”²

Change the hypothetical—the attorney is neglecting matters entrusted to her, and failing to return calls and emails from clients and others. Your required response may well be different. These behaviors may involve violations of, *inter alia*, RPC 1.1 (general competence), RPC 1.3(b) (neglect of a matter) and/or RPC 1.4(a)(4) (compliance with client requests for information). Two questions arise: (1) does her conduct now raise a substantial question about her “honesty, trustworthiness or fitness as a lawyer?” and (2) how do you fulfill your supervisory or managerial responsibilities under RPC 5.1?

Regarding the duty to report under RPC 8.3(a), there is no easy answer but the likely answer depends upon the extent of the neglect. The threshold for punishable neglect is difficult to ascertain. Professor Simon cites two cases in which federal courts imposed discipline on attorneys for repeatedly neglecting matters and violating court orders.³ Otherwise, he notes that “[i]f a lawyer’s neglect has brought the client to the brink of a disaster, the lawyer has probably violated Rule [1.3(b)] even if the lawyer ultimately rectifies the situation ...”⁴

RPC 5.1(a) requires law firms to “make reasonable efforts to ensure that all lawyers conform to these Rules.” In turn, RPC 5.1(b) imposes upon managerial and supervising attorneys the responsibility to use “reasonable efforts” to ensure compliance with the Rules. RPC 5.1(c) requires a law firm to “ensure that the work of partners and associates is adequately supervised, as appropriate.” As a result, an attorney cannot ignore a suspected or known impairment of another lawyer in the firm.

ABA Formal Opinion 03-429, entitled “Obligations with Respect to Mentally Impaired Lawyer in the Firm,” addresses many of these issues. It notes that the “paramount obligation is to take steps to protect its clients.” At a minimum, the firm should determine the extent of the impairment, conduct a thorough file review and, if necessary, remove the attorney from responsibilities until recovered from the impairment.⁵

Change the hypothetical one more time, and consider your obligations where the impaired attorney is not associated with your firm, but is an adversary in litigation. Importantly, RPC 8.3(a) is not concerned with whether the subject lawyer is within or outside your firm. Reporting is mandatory if the elements of the Rule are satisfied.

When reporting is mandatory, RPC 8.3(a) requires that the report be made “to a tribunal or other authority empowered to investigate or act upon such violation.” Typically, a required report is made to a Grievance Committee. In litigation, the report can be made instead to the court where the litigation is pending. In extreme cases involving actual knowledge of criminal activity, such as theft from an escrow account, the report can be made to the office of a prosecutor with jurisdiction to investigate the matter.

RPC 8.3(a) is only concerned with the misconduct of “another lawyer.” Therefore, there is no self-reporting requirement. Nevertheless, RPC 1.16(b)(2) requires withdrawal from representation when “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.” Further, representation of a client during a period of impairment may violate the general rule of competence set forth in RPC 1.1.

The filing of a report pursuant to RPC 8.3(a) enjoys an absolute privilege, protecting the reporting attorney from defamation or malicious prosecution claims.⁶ Additionally, the Court of Appeals held that a retaliatory discharge of an attorney who reported the misconduct of another attorney in the firm pursuant to the substantially similar provision of the former Code of Professional Responsibility (DR 1-103[A]) was actionable.⁷

The Role of Lawyer Assistance Programs

Regardless of whether the mandatory reporting requirements of RPC 8.3(a) are triggered, a referral to a LAP is advised and



Mark E. Goidell

encouraged. Whether the subject attorney is a partner, employee or colleague in our industry, no lawyer should suffer with alcoholism, substance abuse, or mental illness without treatment. No law firm should risk discipline or liability by failing to take action when an attorney becomes impaired.⁸

The pervasiveness of alcoholism, addiction, and mental illness in the legal profession is well documented. The most recent and comprehensive study of alcohol-

ism in the legal profession found that over 20 percent qualify as problem drinkers, and that at least 28 percent of us struggle with some level of depression, anxiety, or stress.⁹ The study reached no conclusions about the prevalence of cognitive impairments or substance abuse disorders among attorneys.¹⁰

Recognizing the need for action, the ABA commissioned a Task Force to recommend appropriate changes with all stakeholders in the profession. The ABA Task Force Report made several suggestions to meet this health crisis, including those for law firms dealing with impaired attorneys.¹¹

The Nassau County Bar Association and the New York State Bar Association, both of which have professionally staffed LAPs, published a Model Policy for law firms.¹² The ABA Task Force Report expressly endorsed our Model Policy.¹³ Long Island law firms are employers that are subject to the New York State Human Rights Law (Executive Law § 290 *et seq.*), and may be subject to the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*).¹⁴ The Model Policy provides firms with tools to comply with the law and the RPC while simultaneously protecting and assisting our most valuable assets—our attorneys.

Among other things, the Model Policy expresses a law firm’s commitment to the well-being of its attorneys and provides the opportunity for treatment and assistance of impaired attorneys. Typically, referrals are made to the LAP, which then directs the attorney to an appropriate provider for care and treatment. The LAP then provides monitoring services, sometimes formalized in a Return to Work Agreement, to support the attorney and maximize the potential for recovery. Communications with LAPs are and forever remain strictly confidential pursuant to Judiciary Law § 499 and RPC 8.3(c).

LAPs are critical to the ongoing effort to enhance attorney well-being and treat suffering attorneys with confidentiality, competence and care. The Nassau County Bar Association LAP works with individual attorneys and law firms to help attorneys recover from alcoholism, substance abuse, and mental health issues. The LAP also works with the Committee on Character and Fitness and the Grievance Committee for the Tenth Judicial District. For attorneys who are the subject of disciplinary complaints or proceedings, there is a statewide rule authorizing a diversion

program for attorneys requiring assistance.¹⁵ LAPs work with attorneys who seek to take advantage of the diversion program.

Conclusion

RPC 8.3(a) imposes a legal obligation upon lawyers to report actually known misconduct which violates the Rules of Professional Conduct and “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer.” Failure to comply with the Rule constitutes grounds for discipline and may expose the lawyer’s firm to liability. Frequently, attorneys become aware of these and less serious matters that may not trigger the mandatory reporting provisions of RPC 8.3(a) but which may arise from a suspected concern about alcohol abuse, substance abuse, or other mental health issue. LAPs exist to effectively assist such attorneys while protecting them from public exposure. The services of LAP are free. Please let our LAP know if it can be of assistance.

Mark E. Goidell is a litigation attorney in Garden City. He is a member and former Chair of the Lawyer Assistance Committee of the Nassau County Bar Association, and is a former Director of the Nassau County Bar Association.

1. See RPC 8.3, Comment [5].

2. Roy D. Simon, Jr., *Simon’s New York Rules of Professional Conduct Annotated*, § 8.3:2 (May 2019).

3. *Id.* at § 1.3:5, citing *In re Castillo*, 645 Fed.Appx. 41 (2d Cir. 2016) and *In re Gluck*, 114 F.Supp.3d 57 (E.D.N.Y. 2016).

4. *Id.* at § 1.3:6.

5. As discussed below, appropriate supervisory steps may include a referral to a LAP and the implementation of the Model Policy promulgated by both the New York State Bar Association and Nassau County Bar Association.

6. *Sinrod v. Stone*, 20 A.D.3d 560, 562 (2d Dept. 2005) (“The Supreme Court correctly concluded that the claims challenging the complaints of misconduct filed with the Grievance Committee by the defendant were absolutely privileged.”); *Fowler v. Leahey & Johnson, P.C.*, 272 A.D.2d 240, 241 (1st Dept. 2000) (“Contrary to plaintiff’s contentions, complaints to the Departmental Disciplinary Committee (DDC) may not be used as grounds for claims of malicious prosecution.”).

7. *Wieder v. Skala*, 80 N.Y.2d 628, 638 (1992).

8. In early February 2020, the Dentons law firm in Calgary, Canada was sued by its client for, among other things, permitting an impaired attorney to handle client matters. See <https://www.cbc.ca/news/canada/edmonton/edmonton-lawyer-drunk-driving-lawsuit-1.5452118>.

9. P. R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Med. 46 (2016).

10. Earlier studies have concluded that substance abuse is more widespread in the legal profession than in the general population. See Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 Creighton L. Rev. 265, 266 (1997).

11. ABA National Task Force on Lawyer Well-Being (2017) (“Task Force Report”), pp. 31-34.

12. The Model Policy is available at https://www.nassaubar.org/UserFiles/Model_Policy.pdf.

13. Task Force Report, p. 32.

14. See, e.g., *Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18 (1st Dept. 2014); *Lyons v. Legal Aid Society*, 68 F.3d 1512 (2d Cir. 1995).

15. 22 NYCRR § 1240.11.

Become an Nassau County Bar Association Member

The NCBA enjoys a membership of nearly 5,000 attorneys, judges, law students, paralegals, and legal administrators. It is the leading source for legal information and services for the legal profession and the local community in Nassau County.

NCBA membership includes unlimited FREE live Academy CLE programs, 12 FREE CLE credits on CD or DVD, 16 FREE credits during Bridge-the-Gap Weekend, multiple networking events each Bar year, the option to join over 50 substantive committees, community volunteer opportunities, a 24-hour confidential helpline for attorneys, judges, law students, and their family members in need, among numerous additional benefits.

To join the Nassau County Bar Association, apply online at www.nassaubar.org or contact the NCBA Membership Office at (516) 747-4070. We look forward to welcoming you as a member!