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The Impaired Lawyer: *A Modern Conundrum*

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This article discusses the legal and ethical issues caused by an impaired lawyer using hypothetical attorneys Alan Able, Erica Tate, Bobby Baker and Chris Cook at the fictional firm of Shepard Engram & Manning.

Alvin Able was for many years a top performer at Shepard Engram & Manning, a 100-lawyer firm. Able works in the litigation department; his associate and right-hand person is Erica Tate, who has worked for him for many years. He always used to meet deadlines, be on time for meetings, and otherwise be an excellent lawyer. But since Able had rotator cuff surgery six months ago, his behavior has changed. He has lost weight; sometimes arrives at the office very late; seems sleepy at times during the day; blows off meetings and deadlines; dresses sloppily and sweats a lot. Tate is particularly concerned because she heard Able tell a client whose deadlines were missed that "everything is fine" and that the case is in good shape, when she knows the judge has already dismissed the case. What should she do? What must she do? And what about the department head, Bobby Baker? What are his obligations?

Lawyers can be impaired for different reasons including alcoholism, drug addiction, mental health issues, or age. Collectively, we will refer to these with the abbreviation "ADM." If left untreated, these afflictions can damage or destroy careers, negatively impact families, and even be health and life-threatening. But attorneys are not the only ones at risk: their impairment can harm clients and create malpractice liability for their law firm. All of this is well-known. What is less well-known is that the lawyers working at the impaired lawyer's firm—Tate and Baker in our hypothetical—also face their own ethical and practical obstacles. This article is written from their perspectives, to show how important it is for lawyers to recognize the "Alan Ables" in their midsts and find ways to help them within the context of the Rules of Professional Conduct (the "Rules"). We will use the Model Rules ("MRs") as the touchstone here, recognizing that relevant Rules may differ slightly among the various states.

Recognizing an Impairment

What are signs of an impairment? Some widely recognized signs of a drug or alcohol impairment are: [1]

- Weight loss
- Sleeplessness at night/Drowsiness in office
- Sudden and intense sweats
- Hand tremors
- Inattention to deadlines
- Poor personal hygiene
- Isolation from family and friends
- Financial difficulties
- Change in habits following injury or surgery

[1] Alta Mira, *Characteristics and Symptoms of Drug Addictions* (2020), https://www.altamirarecovery.com/drug-addiction/characteristics-symptoms-drug-addictions/.

While any one of these might not be enough to sound the alarm, a combination certainly will. Similar signs may reflect mental impairment or age-related impairment, though we should also include forgetfulness, reality distortion, paranoia, manic episodes and increased rigidity.[2]

Relevant Ethics Rules

Model Rule 8.3

Any lawyer who, like Tate, observes these signs of impairment in a fellow lawyer and who also becomes aware that the potentially impaired lawyer may have violated one or more Rules must decide whether she is obligated to report that lawyer pursuant to MR 8.3(a), which states:

> 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.[3]

This Rule—which many call "the rat rule"—is not lightly invoked. While a lawyer always has the option to report another lawyer that they *believe* may have violated a disciplinary rule, reporting becomes *mandatory* only if certain requirements are met.

First, the reporting lawyer (Tate) must "know" that Able has violated a Rule. Under MR 1.0(f), knowledge "denotes actual knowledge of the fact in question."[4] Mere suspicion or even reasonable belief is not enough, though "a person's knowledge may be inferred from circumstances."[5]

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[2] *10 Symptoms of Dementia*, Facty, https://facty.com/conditions/dementia/10-symptoms-of-dementia/?style=quick&utm_source=adwords&adid=357921654130&ad_group_id=79147232784&utm_medium=c-search&utm_term=signs%20of%20dementia&utm_campaign=FH-USA---Search---Dementia-Signs---Desktop&gclid=EAIaIQobChMIwsa0jt-q7QIVlr7ICh004AD7EAAYAiAAEgI8gvD_BwE (last updated Apr. 8, 2020).

[3] Model Rules of Prof'l Conduct 8.3(a) (2020).

[4] Model Rules of Prof'l Conduct 1.0(f) (2020).

[5] *Id.*

Second, there has to have been an actual Rule violation, as opposed to conduct the reporting lawyer thinks is impermissible but is not.[6]

Third, the Rule violation has to "raise[] a substantial question as to the potentially impaired lawyer's honesty, trustworthiness and fitness to practice law."[7] The term "substantial" refers "to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."[8] So not just any Rule violation will do. Moreover, there has to be a link between that violation and, in our case, Able's potential impairment—an issue which adversely reflects on his "fitness" to practice.[9]

Fourth, the report must be made to "the appropriate professional authority," which, according to the MRs, means "the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances."[10] In some jurisdictions, such as New York, the report may also be made to a relevant tribunal who has authority to act, such as the court presiding over a litigated matter.[11]

Fifth, neither Tate nor any other firm lawyer is obligated to report information "otherwise protected by Rule 1.6"—in other words, if the information falls within attorney-client confidentiality.[12] "Rule 8.3(c) makes the duty to report subordinate to the duty of confidentiality set forth in Rule 1.6."[13] Thus, before reporting, Tate would have to obtain the affected client's consent and will not be obligated to report absent

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[6] *See* Kan. Ethics Op. 14-01 (2014) (no obligation to report lawyer's forgetfulness if no rule violation ensues).

[7] Model Rules of Prof'l Conduct 8.3(a) (2020).

[8] Model Rules of Prof'l Conduct 8.3 cmt. 3 (2020).

[9] *See, e.g.*, Colo. Ethics Op. 124 (2012) (substantial question regarding materially impaired lawyer's fitness arises if he fails or refuses to cease representing clients); Utah Ethics Op. 98-12 (1998) (lawyer's possession of unlawful controlled substance must be reported if it raises "substantial question" about honesty, trustworthiness and fitness).

[10] Model Rules of Prof'l Conduct 8.3 cmt. 3.

[11] N.Y. RULES OF PROF'L CONDUCT R. 8.3(a) (must report "to a tribunal or other authority empowered to investigate or act upon such violation").

[12] Model Rules of Prof'l Conduct 8.3(c) (2020).

[13] Ellen J. Bennet & Helen W. Gunnarsson, eds, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 701 (ABA, 9th ed. 2019) (hereafter Annotated Model Rules).

that consent.[14] Obtaining that consent requires the reporting lawyer to disclose the misconduct (though perhaps not the lawyer's impairment) to the client.[15] To obtain consent, however, the reporting lawyer must also inform the client that the information is protected by confidentiality and about the risks and benefits of disclosure.

Sixth, there is one additional exception: Tate would not be obligated to report if the impairment is resolved or if Able is in treatment.[16]

Model Rule 5.1(a)

An associate working for an impaired partner may have enough information to meet the MR 8.3(a) reporting requirements, as Tate does in our example, but often does not have the full picture, or may simply hesitate before acting on their own in such a serious situation, especially if client confidences are involved. For that reason, we often advise subordinate lawyers to elevate the matter to a supervisor like Baker. This relieves the subordinate lawyer of some ethical risk. Although a subordinate lawyer is "bound by the Rules of Professional Conduct," he or she "does not violate [the Rules] if [he or she] acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[17] Accordingly, if whether to report an impaired lawyer is a close question—which is not the case for Tate—the subordinate lawyer may rely on a supervisor's determination about how to proceed.

As department head, Baker has independent ethical responsibilities in addition to those in MR 8.3(a) for dealing with impaired lawyers. For example, MR 5.1 "imposes a duty upon partners, lawyers with comparable managerial authority, and lawyers who directly supervise other lawyers to oversee the conduct of lawyers within their firms or organizations."[18] This means they have to make "reasonable efforts to ensure that the

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[14] *See, e.g.*, ABA Formal Ethics Op. 08-453 (2008) (firm's general counsel's knowledge of a constituent lawyer's misconduct may be information relating to the representation of the firm's client, requiring that client's consent before reporting).

[15] *See* discussion of Rule 1.4 below.

[16] *Id.*; *see also* Va. State Bar 1886 (2016) (same exception unless violation involved dishonesty or stealing).

[17] Model Rules of Prof'l Conduct 5.2(a) and (b) (2020).

[18] Annotated Model Rules at 499.

other lawyer[s in the firm] conform[] to the Rules of Professional Conduct."[19] If Baker is in a high enough position at the firm, MR 5.1(b) makes him responsible for the conduct of both subordinate lawyer Tate (does she have to report?) and impaired lawyer Able (should he be allowed to continue representing clients? Is further inquiry required?).

There is also an oft-overlooked remediation obligation under MR 5.1(c)(2). That Rule would make Baker responsible for Able's Rules violation if Baker (a) had managerial authority in the law firm or direct authority over Able; and (b) "[knew] of the conduct at a time when its consequences [could] be avoided or mitigated but fail[ed] to take reasonable remedial action."[20] What "remedial action" is "reasonable" in a given situation will depend on the facts. Comment 5 to MR 5.1 states that "[a]ppropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct,"[21] which could require Baker to intervene in the client relationship[22] or even take action in a court proceeding to repair the damage.[23]

Model Rule 1.4

Also important is MR 1.4, which imposes two relevant obligations: 1) to "keep the client reasonably informed about the status of the matter;" and 2) "to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[24] As applied to Able's situation, this means that both Tate and Baker have an obligation to tell the client about his impairment and any damage Able caused the client so that he or she can make informed decisions. For example, the client must be told if Able misses a deadline, if Able goes into in-patient rehab and temporarily cannot handle the client's case, and if Able steals the client's

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[19] Model Rules of Prof'l Conduct 5.1(b) (2020).

[20] Model Rules of Prof'l Conduct 5.1(c)(2).

[21] Model Rules of Prof'l Conduct 5.1 cmt. 5 (2020).

[22] *See, e.g.*, Whelan's Case, 619 A.2d 571 (N.H. 1992) (supervisors need to get client's informed consent where subordinate lawyer left himself a substantial gift).

[23] *See, e.g.*, In re Kline, 311 P.2d 321 (Kan. 2013) (supervisors must take steps to correct improper filing of sealed documents as exhibits to publicly filed brief).

[24] Model Rules of Prof'l Conduct 1.4(a)(3)–(b).

money out of the firm escrow account.[25] In this case, Able is obligated to informed the client that his or her case has been dismissed and that Able did not accurately convey the status of the case to the client., but if he cannot or will not make that disclosure, other firm lawyers must fill the gap and make sure the communication takes place.[26]

ABA Formal Op. 03-429 (2003)

All of these ethical obligations put enormous pressure not just on the impaired lawyer, but on the impaired lawyer's colleagues and supervisors. The ABA Standing Committee on Ethics and Professional Responsibility addressed this in ABA Formal Op. 03-429 (2003). The Committee, in addition to reminding supervisors about their obligations under MR 1.4 and 8.3, interpreted MR 5.1 broadly as requiring a lawyer with direct supervisory authority over an impaired lawyer to take steps to provide "reasonable assurances that the impairment will not result in a violation of the Rules."[27] Crucially, this includes confronting the lawyer about the impairment and insisting that the lawyer get appropriate treatment or other assistance.

Confronting an Impaired Lawyer

Confronting a long-time colleague like Able about a potential impairment is never easy. Lawyers supremely confident before judges and juries may suddenly become filled with self-doubt. "Who am I to decide if a lawyer is impaired? I'm not a doctor. And what is the right thing to say? I don't want to send this person off the deep-end by doing the wrong thing."

Fortunately, help is available. Most large bar associations, including the ABA and many state and local bars, have Lawyer Assistance Programs (LAP) that can provide invaluable assistance to impaired lawyers, their law firms, and their families. As the issue of lawyer impairment has come out of the shadows in recent years—particularly with regard to lawyer aging and mental illness—LAPs have become more ubiquitous while broadening the scope of the services they provide; they no longer limit themselves

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[25] *See, e.g.*, N.C. Ethics Op. 2015-4 (2015) (lawyer must promptly notify the client of an error that materially prejudiced client's interest).

[26] *See* Virginia State Bar Op. 1886 (2016) (applying MR 1.4 requirements to situations involving impaired lawyers).

[27] ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 03-429 (2003).

to drug and alcohol treatment. New York alone has 17 local bar-sponsored LAPs in addition to the New York State Bar Association program.

A LAP provides many options that can help Able's law firm confront him about his problem. From the outset, a firm representative can speak to LAP personnel to determine whether the symptoms Tate and Baker are observing reflect an impairment at all, and what sort of impairment it might be. LAP personnel can help determine, for example, whether an impairment might be drug or alcohol related or may involve mental illness. These are often hard to tell apart and require different treatment regimens. LAP personnel can also discuss the various services they offer and how to convince Able to take advantage of them.

This initial step is crucial. Lawyers and law firms should not confront potentially impaired colleagues without first obtaining a professional opinion, however informal, that an impairment may exist and what it might be. Of course, LAPs are not the only source of this information; mental health and substance abuse treatment professionals can also help. A mistake or misunderstanding on this score can have a devastating impact on the targeted lawyer's relationship with the firm.

Once the firm decides that Able is indeed impaired, it must confront him. There is no one way to do this, and it may have to be done several times, in several different ways, before Able seeks out the treatment he needs. Generally, the first confrontation would involve a meeting between Able and someone at the firm he trusts—in our hypothetical this could be Able's long-time partner, Chris Cook—who can raise the firm's concerns after some coaching from LAP personnel. Through Cook, the firm should offer Able treatment options, and even a medical leave. The goal is not to be punitive; whether stemming from drug or alcohol abuse or mental illness, the problem is *an illness* and has to be approached in that light.

In the initial meeting, Cook may want to avoid bringing in a supervisor like Baker or the firm's General Counsel. Able may well be in denial, and having people present who will make him feel his job is threatened may actually drive him away from seeking help. What is most important is that Cook deliver a clear message that the firm is concerned and is willing to help.

It is crucial to remember that the intervening lawyer's message may not sink in the first few times it is delivered, in which case it may become necessary to include someone from the LAP and/or firm management in a subsequent meeting to make clear the seriousness of the situation. Sometimes even family members are asked to participate. As more people are added, it becomes increasingly difficult—though, sadly, not impossible—for Able to continue denying the problem and to refuse treatment. But if

he does, the firm must take steps to protect itself, including removing him from client matters, imposing an involuntary medical leave, or even, if all else fails, termination.

The Protections the LAP Provides

These threats are the stick, but there is also a carrot. Participating in the LAP provides real advantages for Able, particularly if, as is the case here, he may be faced with a disciplinary complaint. Some of these advantages are set forth in the Model Rules themselves. For example, MR 8.3(c) says that information "gained by a lawyer or judge while participating in an approved lawyer assistance program" is not subject to mandatory reporting. Thus, a lawyer who serves as a sponsor to a substance-abusing colleague in a LAP does not have to report what she learns, even if it is not otherwise privileged.

The LAP is most valuable in the context of a disciplinary proceeding. Many, if not most, states have diversion programs for those who raise impairment issues as a defense to, or in mitigation of, a claimed disciplinary violation. For example, in New York, where each of New York's four Appellate Divisions oversees the disciplinary process in its locality, the court may either *sua sponte* or on application place the lawyer in a diversion program. This discretionary decision will be based on the nature of the misconduct; whether the lawyer was impaired when the misconduct took place; and whether the diversion "is in the public interest."[28] Though it is not guaranteed, successful completion of the program can, and often does, result in dismissal of the charges. The case for dismissal becomes stronger if the lawyer entered the LAP before any misconduct was reported, showing that the lawyer acknowledged the problem and took steps to resolve it on their own, rather than being "forced" to do so because of a disciplinary complaint.

Everything that happens in the LAP is confidential. Moreover, LAP personnel can run interference for Able with the disciplinary authorities, letting them know of his good faith efforts to resolve his problem and ensure that the public will be protected from future harm. Every disciplinary prosecutor will be thrilled to get this type of assurance.

Compare this to what can happen if Able does not take advantage of the LAP (or any other kind of treatment) and the disciplinary prosecutors find out about the problem. Again using New York as an example—and to our knowledge the vast

[28] 22 N.Y.C.R.R. § 1240.11(a).

majority of states have similar rules—the disciplinary prosecutors may at any time in the disciplinary proceeding apply for an interim suspension order for any "condition which renders the Respondent incapacitated from practicing law."[29] This will often be accompanied by a request for an independent medical examination. This intrusive process can result in a suspension long before the disciplinary complaint is adjudicated. And while an interim suspension request is generally subject to the court's discretion, suspension can be mandatory if the lawyer is subject to an involuntary commitment order or is otherwise declared incompetent by a court.[30]

Conclusion

As can be seen from our hypothetical, a colleague's impairment—whether from drugs, alcohol, mental illness or aging—is a fraught issue for lawyers and law firms. Able's impairment requires Tate, Baker and Cook to understand their own ethical obligations and malpractice risks, while remaining sensitive to the need to help Able to resolve the problem. In trying to confront the problem, they should take advantage of treatment professionals and/or any available LAP. If they do not—or if they fail to act at all—they put their law firm and themselves at risk.

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[29] 22 N.Y.C.R.R. § 1240.14(b).

[30] *Id.* § 1240.14(a).