

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2022-1**

A Lawyer’s Duty with Respect to Potentially Impaired Members of the Bar

ISSUE: Lawyer impairments—related to substance abuse, aging, mental health, and otherwise—are not infrequent in Alaska and elsewhere. This Opinion examines what a lawyer must do under the Alaska Rules of Professional Conduct (“ARPC”) when they observe that another lawyer might be impaired.

SHORT ANSWER: Having an impairment is not, in and of itself, a violation of the ARPC. However, lawyers with an impairment may fail to satisfy various professional responsibilities under the ethics rules, including competence (ARPC 1.1), diligence (ARPC 1.3), and others. Lawyers who observe such impairments should confer with Bar Counsel about appropriate next steps. Resources like the Alaska Bar Association Lawyers’ Assistance Committee are also helpful for obtaining confidential assistance and referrals.¹ Beyond those best practices, under ARPC 8.3 lawyers have an affirmative duty to report a lawyer who has committed a violation of the ARPC that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer, unless the information is protected by a duty of confidentiality under ARPC 8.3(c). ARPC 5.1 provides additional requirements for lawyers in a firm setting, and for other lawyers with managerial or supervisory roles.

Lawyers working with one another—whether under ARPC 5.1, a resource like the Lawyers’ Assistance Committee, or otherwise—may help address impairment issues more rapidly and effectively than the ARPC 8.3 disciplinary process. At base, Rules 5.1 and 8.3 are designed to protect the public and the reputation of the legal profession, and should be understood with this purpose in mind.

RULES: 5.1, 8.3.

FACT SCENARIOS

Fact Scenario 1—Aging: Lawyer Adrian, a septuagenarian solo practitioner, has had difficulty with the court’s new e-filing requirements, and is also missing various filing deadlines and court hearings. Opposing counsel, Blair, noticed that Adrian appeared to be falling asleep during a hearing at which Adrian did appear—albeit late. And, in the process of settlement negotiations, weeks went by after Blair sent an offer detailed in an encrypted email attachment. Blair emailed Adrian to ask for an update, and Adrian replied that he had not yet consulted his client because he could not open the attachment. Another lawyer, Casey—who has known Adrian for a long time—is concerned because Adrian is taking on frivolous workers compensation

¹ See <https://alaskabar.org/sections-committees/lawyers-assistance-committee/>.

and personal injury cases—areas of practice that are unfamiliar to Adrian. When she asks Adrian why, Adrian says he cannot pass up these cases because they will bring in some much-needed income. Adrian says he has no retirement savings and cannot afford not to take a case, even if completely meritless, for a \$500 retainer or possible recovery on a contingency fee. What should Blair and Casey do under the ARPCs based on their observations?

Conclusion 1: Under ARPC 8.3(a) (Reporting Professional Misconduct), Blair and Casey are required to report Adrian’s behavior to Bar Counsel. Adrian’s conduct appears to violate ARPC 1.1 (Competence), ARPC 1.3 (Diligence), and ARPC 1.4 (Communication). ARPC 8.3(a) provides that if the lawyer knows of a violation—either a single violation or, as here, collectively troubling violations—of the ARPCs that raise a substantial question as to the other lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, then they are obligated to make a report to Bar Counsel. Contacting Bar Counsel in this situation does not necessarily mean the reporting lawyer will be the grievant in a discipline case against the other lawyer. A lawyer who is concerned about another lawyer should contact Bar Counsel to find out if what they know rises to the level of imposing a duty to report under ARPC 8.3.

Fact Scenario 2—Substance Abuse: Lawyer Robin receives a call from a client who works with Robin’s law partner, Pat, complaining that the client has had a lot of difficulty reaching Pat, and that Pat has recently appeared completely disheveled. The client says that Pat has exhibited erratic behavior over the past few months like pacing around a conference room for an hour when Pat met with the client, not making eye contact, and showing up with a 10 inch high stack of seemingly disorganized papers. Robin knows that Pat was not prepared for recent court proceedings and in general appears to be struggling to keep up with his work. Robin has noticed that Pat has been drinking much more alcohol than he used to at social gatherings, and recently even at the office at his desk during the workday. What should Robin do under the ARPCs based on this information?

Conclusion 2: Robin has obligations under ARPC 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) and ARPC 8.3(a) (Reporting Professional Misconduct) to report Pat’s behavior.² Pat’s behavior appears to violate ARPC 1.1 (Competence), ARPC 1.3 (Diligence), and ARPC 1.4 (Communication); reporting is required under ARPC 8.3(a) because these violations raise a substantial question as to Pat’s fitness as a lawyer. As Pat’s law partner, Robin also has an obligation under ARPC 5.1 to take reasonable remedial action, if possible, to ensure that any harm to the client is mitigated, and to ensure that systems are in place within Robin and Pat’s

² As this scenario demonstrates, obligations under Rules 5.1 and 8.3 are not mutually exclusive.

firm to prevent future harm (see more on the requirements of ARPC 5.1 in Fact Scenario 3).³

Fact Scenario 3—Firm Settings: Lawyer Edwin is a named partner with a large book of business at a local firm, and has been prescribed anti-depressants to help him cope with a death in his family. Lawyer Frances is a junior associate at the firm who is working with Edwin on a litigation matter. Frances has observed that Edwin does not seem to retain much detail about the facts of the case, has confused the names of the other parties on occasion, and has missed some minor deadlines. Edwin has insisted that he remain primarily responsible for communicating with the client, which is a long-term client of Edwin's. One week ago Edwin received a copy of a scheduling order and a favorable settlement proposal from the opposing counsel, but he has not forwarded them to the client for review despite two reminders from Frances. When Frances offered to forward the information, Edwin specifically directed her not to do so, but gave no assurance that he would or would have anyone else do so. Now, opposing counsel's requested response date is only two days away. Opposing counsel has made clear that this is the final settlement offer before trial. What should Frances and the firm do?

Conclusion 3: Under ARPC 5.1 the firm must make reasonable efforts to have measures in place that ensure that its lawyers comply with the Rules of Professional Conduct. This can include measures whereby junior lawyers can make confidential reports to a designated partner or special committee. ARPC Rule 1.4 is at issue here since it requires lawyers to keep clients reasonably informed about the status of a matter undertaken on a client's behalf. Frances should utilize any internal reporting systems at the firm, and in turn, the firm must take appropriate remedial action to ensure its lawyers' compliance with the ARPC. Such remedial action could include confronting Edwin about the situation, ensuring that he provides the case update to the client, and implementing internal measures to ensure that Edwin's communications with clients are monitored by others at the firm going forward for a certain period of time.

Note that Edwin's behavior does not yet rise to a level that mandates formal reporting under ARPC 8.3(a). Even though Edwin has missed some minor deadlines and should have been more prompt with client communication, not all violations of the ARPCs require reporting under ARPC 8.3; only violations that raise a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer require reporting.

³ If Robin was aware of Pat's substance abuse issues earlier—before Pat violated any Rules of Professional Conduct and prejudiced any clients—Robin could have sought assistance from resources like the Lawyers' Assistance Committee or by reaching out to Bar Counsel for advice, in hopes that such resources could work with Pat to address his apparent substance abuse issues.

DISCUSSION

Multiple rules are potentially implicated when a lawyer faces a substance dependency issue or well-being impairment. The Preamble to the ARPC states that “[c]ompliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.” Some or all of these avenues may be required if a lawyer’s impairment is affecting their compliance with the ARPCs.

This Ethics Opinion discusses (I) the ARPCs most likely to be implicated when a lawyer is impaired, (II) who has an obligation to act when they work with an impaired lawyer, and (III) when knowledge of an impairment requires reporting, and to whom. Numerous other jurisdictions have issued opinions on similar topics.⁴

At the outset, we note that an impairment is not, in and of itself, a violation of the Rules of Professional Conduct. Attorneys should not speculate about another’s condition, but rather, should focus on objective factors that have caused, or appear reasonably likely to cause, violations of the Rules, and how to proceed from there.

⁴ See, e.g., Va. State Bar Ethics Op. 1887 (2017), available at <https://www.vacle.org/opinions/1887.htm> (concerning impairment of lawyer over whom no one has supervisory authority); Va. State Bar Ethics Op. 1886 (2016), available at <https://www.vacle.org/opinions/1886.htm> (concerning impairment of firm lawyer); N.C. State Bar Ethics Op. 2013-8 (2014), available at <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-8/> (concerning mental impairment of firm lawyer); Ky. Bar Ass’n Ethics Op. KBA E-430 (2010), available at [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics Opinions \(Part 2\) / kba_e-430.pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics%20Opinions%20(Part%202)/kba_e-430.pdf) (considering host of questions related to impairment issues); N.Y. Bar Ass’n Ethics Op. 822 (2008), available at <https://nysba.org/ethics-opinion-822/> (concerning whether filing a report with a lawyer assistance program satisfies violation reporting requirement); ABA Formal Ethics Op. 03-429 (2003); S.C. Bar Ethics Op. 02-13 (2002), available at <https://www.sbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-02-13/> (concerning medical condition that renders attorney unable to practice with competence); Phila. Bar Ass’n Ethics Op. 2000-12 (2000), available at <https://www.philadelphiabar.org/page/EthicsOpinion2000-12?appNum=1> (concerning aging impairments and dissolving firm); Utah State Bar Ethics Op. 98-12 (1998), available at <https://www.utahbar.org/wp-content/uploads/2017/12/1998-12.pdf> (concerning use of controlled substances); W.V. State Bar Ethics Op. 92-04 (1992), available at <http://www.wvdc.org/pdf/lei/Chronologic/LEI-92-04.pdf> (concerning alcoholism and misappropriation of client funds).

I. ARPCs potentially implicated by lawyer impairment.

The following is a non-exhaustive list of the ARPCs that might be implicated by a lawyer practicing with an impairment.

- **ARPC 1.1: Competence.** Requires “competent representation,” including maintaining professional skills by keeping abreast of legal and technology changes.
- **ARPC 1.3: Diligent Representation.** Requires that a lawyer act with reasonable diligence and promptness when representing a client. Impaired lawyers may not be able to provide diligent and prompt representation. The Comments indicate that sole practitioners’ future inability to assist clients may require that they prepare a plan to address that eventuality.
- **ARPC 1.4: Communications with Clients.** Requires regular and prompt client communication. Under ARPC 5.1, lawyers in a “firm” may be required to communicate with a client about services performed by an impaired lawyer.
- **ARPC 1.6: Duty of Confidentiality.** Prohibits revealing most client confidences and secrets without consent. The rule covers direct statements—which a lawyer might not be aware of if impaired—and the need to safeguard papers and devices with client information, which may not be feasible if facing diminished capacity.
- **ARPC 1.16(a): Declining or Terminating Representation.** Requires a lawyer to forgo or end representation when a “physical or mental condition materially impairs” the representation. The Comments discuss “competent[]” and “prompt[]” representation to completion.
- **ARPC 5.1 and 5.2: Responsibilities of Partners and Subordinate Lawyers.** *See Section II, which addresses who has an obligation to act when they observe an impaired lawyer with whom they have a work relationship.*
- **ARPC 5.3: Responsibilities Regarding Nonlawyers.** Lawyers with direct supervisory authority over nonlawyers are usually responsible for the nonlawyer’s conduct. There is a risk of violation if a nonlawyer is impaired, or if an impaired lawyer cannot ensure that nonlawyer’s conduct meets the lawyer’s professional duties.
- **ARPC 8.3 and 8.4: Misconduct & Reporting.** *See Section III, which goes beyond the requirements of ARPC 5.1 and 5.2 and addresses what lawyers can and should do when they observe another lawyer with an impairment, regardless of firm relationships or supervisory capacity.*

Again, this list is non-exhaustive. A lawyer’s ability to comply with other rules—such as ARPC 1.15 (Safekeeping Property), ARPC 3.1 (Meritorious Claims and Contentions), ARPC 3.2 (Expediting Litigation), and ARPC 3.3 (Candor Toward the Tribunal)—might be clouded if facing an impairment.

II. Law firm and supervisory relationships give rise to an obligation to act regarding impaired or potentially impaired lawyers.

ARPC 5.1 and 5.2 govern who has an obligation to act when they work with or observe an impaired lawyer in a firm or supervisory setting. Notably, ARPC 9.1(e) defines “firm” or “law firm” to broadly include any “lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law. It also denotes lawyers employed in a legal services organization or in the legal department of a corporation or other organization.” As a result, ARPC 5.1 and 5.2 are not limited to private law firms in a traditional sense.

A. Lawyers with managerial responsibility within a “firm” have a general obligation to ensure measures are in place to confirm compliance with the Rules.

ARPC 5.1(a) provides that “[a] partner in a law firm, and a lawyer who individually or together with other lawyers has comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”⁵ The measures required depend on the firm’s size, structure, and the nature of its practice. The Comments to ARPC 5.1 explain that, “[i]n a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can confidentially refer ethical problems directly to a designated senior partner or special committee.” This obligation requires that a firm’s systems ensure compliance by *all* lawyers at the firm—including partners and managers—not just subordinate or supervised attorneys. Failure to have such a system in place may subject all partners in a firm to potential discipline. *See* Section II.C, *infra*.

⁵ As noted in the Comments, ARPC 5.1(a) applies to “members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law,” as well as “lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.”

B. Lawyers with supervisory authority have specific responsibilities with respect to lawyers whom they supervise.

ARPC 5.1(b) provides that “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” A lawyer may be deemed to have supervisory authority over an attorney not within the same “firm,” for example, a contract attorney hired by a lawyer to assist with a matter. *See* ABA Formal Ethics Op. 08-451 n.2 (2008) (“A contrary interpretation would lead to the anomalous result that lawyers who outsource have a lower standard of care when supervising outsourced lawyers than they have with respect to lawyers within their own firm.”).

When a supervisor knows a subordinate may be impaired, reasonable measures to ensure compliance with the ethics rules may include confronting the lawyer, forcefully urging the lawyer to seek help, limiting or modifying the lawyer’s workload, providing additional project-specific supervision or collaboration with other attorneys within the firm, or preventing the lawyer from rendering legal services to firm clients. ABA Formal Ethics Op. 03-429 (2003). A supervising attorney who is impaired may run afoul of ARPC 5.1(b) if they are unable to make the “reasonable efforts” required by the Rule to ensure compliance by their subordinates.

C. Lawyers with managerial or supervisory roles may be responsible for the ethical violations of an impaired lawyer.

Taken together, ARPC 5.1(a)-(c) provide that an observing lawyer is responsible for the ethical violations of an impaired lawyer if the observing lawyer has managerial or supervisory authority over the other lawyer under ARPC 5.1(a) or 5.1(b), *and* “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.” ARPC 5.1(c).

D. Subordinate lawyers have independent—though limited—obligations in the setting of a “firm.”

Subordinate lawyers are bound by the Rules of Professional Conduct, even when they “act[] at the direction of another person,” including a supervising attorney. However, ARPC 5.2(b) provides that a subordinate lawyer does not violate the Rules if the subordinate lawyer “acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” Thus, a subordinate attorney may be deemed to violate the ARPCs if they undertake a course of action based on the direction of an impaired lawyer if that direction is unreasonable under the Rules.

III. When knowledge of an impairment requires reporting, and to whom.

Lawyers who encounter other lawyers who are potentially impaired may have either an option or obligation to address the issue, depending on circumstance.

If the impairment has not yet led to professional misconduct, the observing lawyer should utilize resources like the Lawyers' Assistance Committee to facilitate potential assistance or referrals to address the impairment. Reports to the Lawyers' Assistance Committee can be made anonymously and the source of the referral will be kept confidential from the potentially impaired lawyer.

If the impairment has led to suspected professional misconduct, then the observing lawyer has an obligation to determine whether the circumstances warrant a report to Bar Counsel under ARPC 8.3 (as outlined below). A referral to the Lawyers' Assistance Committee is also still encouraged.

ARPC 8.3(a) states that “[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 disciplinary authority unless the lawyer reasonably believes that the misconduct has been or will otherwise be reported” by someone else. In many instances, a call to Bar Counsel will suffice as “inform[ing] the appropriate disciplinary authority”; Bar Counsel can advise if it is necessary to file a formal grievance, which would initiate an investigation to determine if disciplinary measures are warranted.⁶

As a corollary to this, ARPC 8.3(c) does not require disclosure of information learned “while participating in an approved lawyers’ or judges’ assistance program,” or information that is otherwise protected by ARPC 1.6 (Confidentiality).⁷ The

⁶ When in doubt, lawyers should call Bar Counsel for advice on how to proceed. Generally, unless a lawyer specifies that they would like to file a formal grievance, a call to Bar Counsel will not be considered as initiating a grievance under the Alaska Bar Association Rules of Disciplinary Enforcement. A call informing Bar Counsel of an issue—when the caller identifies the lawyer and the issue—may satisfy the obligation under ARPC 8.3 without requiring that the lawyer file a formal grievance. In some circumstances, the Bar may inform the caller that a grievance is necessary, but ARPC 8.3 only requires the lawyer to “inform” the appropriate disciplinary authority.

⁷ For example, a lawyer representing another lawyer whose professional conduct is in question is bound by ARPC 1.6 to protect the lawyer-client’s confidences and secrets and is neither required nor allowed to make a report under 8.3(a). The

commentary to ARPC 8.3(c) explains that this exception is important to encourage lawyers to seek treatment without hesitation. It also notes that not having this exception—which allows lawyers to seek treatment confidentially and allows other lawyers to facilitate lawyers’ or judges’ assistance programs—could result in additional harm to the professional careers of lawyers and to the welfare of their clients and the public.

Evidence of impairment may present in many different forms. It may consist of repeated forgetfulness and inattention regarding deadlines, correspondence, or filing requirements, or could, in some severe cases, consist of a single, sufficiently abhorrent act or failing. The Comments to ARPC 8.3 caution that “an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.” Oftentimes, based on reports from other lawyers—which can be anonymous—Bar Counsel will reach out to the lawyer in question to see if the situation can be addressed and discussed privately, professionally, and without the need to resort to more formal disciplinary proceedings.

Judgment and discretion are required when applying ARPC 8.3 in these situations, especially given the subjective nature of the word “substantial.” The Comments to ARPC 8.3 note that “[t]he term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” This Opinion should not be read to suggest that a lawyer violates ARPC 8.3 if they do not report every violation of the ARPCs related to an impairment about which they “know[.]” Rather, a failure to report a “know[n]” violation of an ARPC is itself a violation of Rule 8.3 only when the underlying violation concerns wrongdoing that rises to the level of that which “a self-regulating profession must vigorously endeavor to prevent.” ARPC 8.3 Cmt.

“Know[ledge]” of a rule violation is itself a complex issue, since at times it might be unclear whether another lawyer has actually violated a rule. Whenever an attorney is concerned about another lawyer’s potential impairment and possible ARPC violations, the concerned attorney should talk to Bar Counsel—even without revealing the name of the attorney causing concern—to discuss at greater length the terms at issue in the ARPCs and their application.

Approved by the Alaska Bar Association Ethics Committee on February 3, 2022.

Adopted by the Board of Governors on May 5, 2022.

Comments to ARPC 8.3 confirm that “[t]he duty to report misconduct is subordinate to the duty of confidentiality set forth in Rule 1.6.”