VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 30th day of August, 2017.

On June 28, 2017 came the Virginia State Bar, by Doris Henderson Causey, its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, ¶ 10-4, and filed a Petition requesting consideration of Legal Ethics Opinion No. 1887.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1887 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 1887

Proposed LEO 1887 — Duties when a lawyer over whom no one has supervisory authority is impaired.

QUESTIONS PRESENTED

1. Is there a duty to report a lawyer who continues to represent clients while suffering from an impairment?

2. What other options are available, instead of or in addition to filing a bar complaint?

HYPOTHETICAL

Legal Ethics Opinion 1886 (approved by the Supreme Court of Virginia, December 15, 2016) addressed the duties of supervisory lawyers in a firm to take preemptive action when a lawyer in the firm is suffering from an impairment that might affect her ability to represent clients. Supervisory lawyers are in a unique situation because of their duties under Rule 5.1 to take steps to ensure that other lawyers in the firm are complying with their ethical duties, which naturally raises the question of whether lawyers who are not in a supervisory capacity have any duty to act when they become aware of another lawyer's impairment. These situations most often

arise when the potentially-impaired lawyer is either a solo practitioner or the sole managing partner/owner of a firm that employs associates but no other partners.

In one hypothetical scenario, a solo practitioner practices primarily criminal defense; he has been practicing in the same community for decades and is well-respected within the legal community. Recently, judges, prosecutors, and other lawyers have noticed that his representation of his clients is not up to his previous standards, but he still appears to be competent – he sometimes comes across as scattered and disorganized but is still able to manage a court proceeding appropriately.

A different scenario involves a lawyer who is the sole owner and managing partner of a law firm that employs associates and nonlawyer assistants. After a car accident, she becomes increasingly moody and forgetful, sometimes lashing out at the other employees of the firm or opposing counsel when they have to correct her or remind her of something. The associates are aware of a number of near-misses where the partner would have missed a significant deadline if someone else in the firm had not intervened to remind her, and they have also noticed that she overlooks important, and obvious, issues in conversations with clients and with members of the firm. Based on their interactions with her, the associates believe the managing partner is not able to competently and diligently represent clients on her own. She is also not receptive to any help or input from the associates, and no one in the firm has any authority to require her to accept oversight or assistance since she is the sole partner.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

The applicable Rules of Professional Conduct ("RPCs") are Rules 1.16(a)(2) and 8.3(a) and (d). Rule 1.16(a)(2) provides that, "Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if...the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client[.]"

Relevant sections of Rule 8.3 provide that:

> (a) A lawyer having reliable information 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 to practice law shall inform the appropriate professional authority.
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> * * *

(d) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge who is a member of an approved lawyer's assistance program, or who is a trained intervenor or volunteer for such a program or committee, or who is otherwise cooperating in a particular assistance effort, when such information is obtained for the purposes of fulfilling the recognized objectives of the program.

ANALYSIS

Other than a lawyer who is a partner or in a supervisory role in a law firm, lawyers do not have a duty to proactively address the impairment of other lawyers. *See* Rule 5.1 and LEO 1886. The Rules of Professional Conduct only require action when the reporting lawyer has reliable information that the impaired lawyer has committed a violation of the Rules that raises a *substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law.* [Emphasis added] Rule 8.3(a). Certainly, not every violation of the RPCs meets that standard, and a lawyer's impairment, on its own, does not necessarily violate the RPCs at all. In a specific instance where other lawyers believe that a lawyer is impaired, there might not be specific misconduct that the lawyers know about and that is subject to Rule 8.3(a). This scenario is presented by the first hypothetical, above, where other lawyers believe that the solo lawyer's cognitive abilities are visibly declining but have not seen any evidence of any specific misconduct by the lawyer.

Rule 1.16(a)(2) (requiring a lawyer to withdraw/decline representation if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client") is violated in many cases where an impaired lawyer continues representing clients, and that rule violation will often trigger a reporting duty under Rule 8.3(a) since a "material impairment" in a lawyer's ability to represent the client almost by definition raises a substantial question as to the lawyer's fitness to practice law. Again, in a situation like the first hypothetical in this opinion, there may be cases where a lawyer believes it is clear that another lawyer is mildly impaired, and that clients are at risk in the future if no action is taken, although there is no evidence that the lawyer's ability to represent clients is *currently* compromised. In these situations, the lawyers have no *duty* to take any action to address the solo lawyer's impairment.

In the second hypothetical, where associates of an impaired lawyer have reliable information that the impaired lawyer is currently materially impaired in her ability to represent clients, and is continuing to represent those clients in violation of Rule 1.16(a)(2), Rule 8.3(a)

requires them to report the impaired lawyer's conduct to the Bar. The duty to report is subject to the associates' duty of confidentiality to clients of the firm under Rule 8.3(d), but in many cases a report may be accomplished without disclosing information that would be embarrassing or detrimental to the firm's clients. The associates may also choose to seek guidance from Lawyers Helping Lawyers* or another lawyer assistance program to try to convince the impaired partner to seek treatment to manage her impairment or transition out of the practice of law without awaiting the conclusion of the disciplinary process. As LEO 1886 emphasized, reporting a lawyer's impairment to both the Bar and to LHL is important, and each report serves different purposes. Neither report removes the need for the other; together they can address both the misconduct that has already occurred and the underlying situation that contributed to the misconduct.

As North Carolina concluded in 2013 Formal Ethics Opinion 8:

> as a matter of professional responsibility, attendant to the duties to seek to improve the legal profession and to protect the interests of the public that are articulated in the Preamble to the Rules of Professional Conduct, the lawyers in the community are encouraged to assist the potentially impaired lawyer to find treatment or to transition from the practice of law. A mental health professional, the LAP [lawyer assistance program], or another lawyer assistance program can be consulted for advice and assistance.

Accordingly, regardless of whether a bar complaint is warranted, a lawyer who is concerned about another lawyer's possible impairment could also encourage the impaired lawyer to contact LHL, or contact LHL herself, for guidance on how best to address the situation.

A Copy,

Teste: Patricia L Harrington

Clerk

*Lawyers Helping Lawyers ("LHL") is an independent, non-disciplinary and non-profit organization that has been assisting legal professionals and their families since 1985 to deal with depression, addiction, and cognitive impairment. LHL is not affiliated with the Virginia State Bar and does not share information with anyone except and unless the participating lawyer expressly consents in writing.