

## ETHICS BOARD OPINION

08-01

**CAVEAT:** THE FOLLOWING OPINION OF THE ETHICS BOARD OF THE NATIONAL FEDERATION OF PARALEGAL ASSOCIATIONS, INC. (NFPA) IS ADVISORY ONLY AND SHOULD NOT BE CONSTRUED AS BINDING ON ANY REVIEWING AUTHORITY AND MUST BE INTERPRETED IN CONJUNCTION WITH THE APPLICABLE STATE'S SUPREME COURT RULES AND OPINIONS GOVERNING THE PROFESSIONAL CONDUCT OF MEMBERS OF THE LEGAL COMMUNITY. IT CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOSE TO GIVE IT.

**QUESTION:** What are a paralegal's obligations and responsibilities when an attorney becomes impaired due to age or disability?

**FACTS:** A paralegal works for an attorney who is advanced in years. It becomes increasingly clear that the lawyer has begun to show the effects of that age, forgetting items on the calendar, becoming disoriented when traveling what should be known routes, recalling having performed work when it isn't complete.

**OPINION:** Under the published NFPA ethical considerations as they exist, a paralegal has no special responsibility or obligation in the situation as presented. However, general tenets of ethics in combination with the ABA Model Rules and NFPA's Model Code of Ethics and Professional Responsibility may provide guidance as to whether the behavior should be reported to an appropriate authority. Depending on the degree of impairment demonstrated by the particular actions of the attorney, the paralegal may be under an ethical obligation to report the behavior of the attorney to the appropriate authority.

**DISCUSSION:** The inquiry starts with a determination of the degree to which the attorney may be unable to provide competent, diligent legal representation. The facts as presented indicate behavior that, while they may be signs of diminishing capacity, could not be called 'misconduct' or even incompetence. If, however, the behavior came to include acts such as failing to appear at scheduled court hearings, missing deadlines, and forgetting to meet with clients, such would clearly draw into question the attorney's fitness to practice law. A closer examination may very well reveal that the attorney's behavior has prejudiced a client's case. Consequently, the attorney would have breached the ethical duty to provide competent, diligent representation, as required by the ABA Model Rules of Professional Conduct. The rules relevant here provide as follows:

ABA Model Rule 1.1 Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ABA Model Rule 1.3 Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

The ethical duties imposed by those rules do not, of course, apply to paralegals. The ethical obligations imposed by NFPA upon their members similarly demand competency. See, NFPA EC-1.1. At the same time, the code also requires members to report ethical violations and other misconduct to proper authority. In NFPA's code, Ethical Consideration (EC) 1.3(d) states,

A paralegal shall advise the proper authority of non-confidential knowledge of any action of another legal professional that clearly demonstrates fraud, deceit, dishonesty, or misrepresentation. The authority to whom the report is made shall depend on the nature and circumstances of the possible misconduct, (e.g., ethics committees of law firms, corporations and/or paralegal associations, local or state bar associations, local prosecutors, administrative agencies, etc.). Failure to report such knowledge is in itself misconduct and shall be treated as such under these rules.

The duty to report in 1.3(d) is limited to the four categories of fraud, deceit, dishonesty, or misrepresentation, and would not apply to a situation in which there was an absence of intent to commit dishonest behavior. The fact that the NFPA may have defined "misconduct" more broadly elsewhere in the code does not allow us to broaden the scope of 1.3(d). Further, EC 1.3(c) provides that if a paralegal's fitness to practice is compromised by physical or mental illness, resulting in an act of misconduct, then the paralegal may avoid sanction if the circumstances so merit. NFPA's ethical codes, therefore would require reporting only serious breaches of ethical behavior. They also favor consideration of mental or physical impairment in determining if sanctions are appropriate.

The present situation does not involve a paralegal's behavior, however. Here, the concern surrounds the lack of competence or diligence of an attorney. The ABA's rules create an obligation for an attorney to report breaches of professional conduct that may include behavior brought about by an impairment due to age. The ABA rule relevant here states,

**Rule 8.3 Reporting Professional Misconduct.**

(a) A lawyer having knowledge 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.

If the impairment means that competent representation is not being given, then Rule 8.3 would require an attorney to report the situation to "the appropriate professional authority." It is true that a paralegal is not held to the same obligation under the rules set forth in NFPA's published ethical considerations. Under those considerations, a paralegal has no duty to report the behavior, even should it become worse, to the point of raising "a substantial question" as to the lawyer's fitness to practice law. Moreover, the facts presented here have not reached that point. That could be the end of our inquiry.

However, the writer seeks an answer to a more general question: what should a paralegal do if an attorney exhibits signs of advancing age that call into question their ability to competently practice law and represent clients? General tenets of ethics would say that if a client is being subjected to incompetent representation because of the mental or physical condition of the lawyer, then it should be brought to the attention of someone, or some organization, that can correct the situation.

The paralegal often occupies the best position to observe the lawyer's behavior. They may find that although not required or obligated to do so under the rules, the behavior they have witnessed demonstrates an unacceptable degree of incompetence. The next question would be to whom should the paralegal report?

Considerations of loyalty and respect would place a priority on speaking with the attorney directly about the concerns. If possible, frank and open discussion with the attorney could go a long way. We recognize however, that in some situations, the paralegal is not the best person to approach the attorney directly.

In cases of fraud, deceit, dishonesty, or misrepresentation, the NFPA code leaves it up to the individual paralegal to decide. EC-1.3 states, "The authority to whom the report is made shall depend on the nature and circumstances of the possible misconduct, (e.g., ethics committees of law firms, corporations and/or paralegal associations, local or state bar associations, local prosecutors, administrative agencies, etc.)."

Absent anyone with in the office, an "appropriate professional authority" to some would mean the disciplinary committees of the state bar authorities. To others, resorting to disciplinary authorities is too harsh for an unintentional and most likely unpleasant condition for the attorney.

Unlike cases of theft, misappropriation or dishonesty, an attorney's impairment should give cause for compassion, and help, not necessarily discipline. Some states such as Massachusetts and Ohio require a legal professional to report only to the disciplinary authority and to no other.

See, respectively, [www.mass.gov/obcbbo/misconduct.htm](http://www.mass.gov/obcbbo/misconduct.htm)

<http://www.mass.gov/obcbbo/misconduct.htm> , and

[www.sconet.state.oh.us/Atty-Svcs/ProfConduct/proposal/rule\\_updates\\_102805/rule\\_8\\_3.pdf](http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/proposal/rule_updates_102805/rule_8_3.pdf)

[http://www.sconet.state.oh.us/Atty-](http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/proposal/rule_updates_102805/rule_8_3.pdf)

[Svcs/ProfConduct/proposal/rule\\_updates\\_102805/rule\\_8\\_3.pdf](http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/proposal/rule_updates_102805/rule_8_3.pdf) .

In other states such as Utah and Mississippi, legal professionals there report to an "appropriate professional authority", leaving much to discretion. For instance, an official comment to Mississippi's version of Rule 8.3 observes,

A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency *unless some other agency, such as a peer review agency, is more appropriate in the circumstances.* (Italics supplied).

Recent attention to mental health issues among professionals has created lawyer assistance programs. In 1988, the ABA created the Commission on Impaired Attorneys to assist with the problems of alcoholism. expanding it to include a wide range of mental health problems such as stress, depression and compulsive gambling in 1996. As its primary function, the Commission's educates the legal community on the impairments facing lawyers and how to respond confidentially. The commission also provides technical resources to state and local lawyer assistance programs and outreach to lawyers and their families. Now, every state has a lawyer assistance programs or committees.[1]

[http://mailcenter.comcast.net/wm/toolbar/notheme.html#\\_ftn1](http://mailcenter.comcast.net/wm/toolbar/notheme.html#_ftn1)> Certainly a humane rule would read that reporting to an assistance program could constitute an "appropriate professional authority" under ABA Model Rule 8.3. The legal professional would have to check the applicable rules in their state.

Advancing age, like other impairments, is measured in degrees. It can also be coupled with an illness that compromises a person's abilities. There must be a balancing between compassion for the elderly attorney, and the real need to protect clients from incompetent representation.

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[1] <[http://mailcenter.comcast.net/wm/toolbar/notheme.html#\\_ftnref1](http://mailcenter.comcast.net/wm/toolbar/notheme.html#_ftnref1)> The Virginia State Bar's lawyer assistance program has listed "Signs of Lawyer Impairment" (See, <http://www.vsb.org/publications/valawyer/feb01/news.pdf>)

Attendance:

- Arriving late/leaving early
- Returns late or fails to return from lunch
- Fails to keep scheduled appointments
- Fails to appear at depositions or court hearings
- Frequent days off and unexplained absences

Job Performance:

- Pattern of missed deadlines
- Neglects processing of mail or timely return of calls
- Decline in productivity
- Decline in overall quality of work
- Overreacts to criticism; shifts blame to others
- Deteriorating relationships with colleagues and staff
- Decline in performance throughout the day
- Client complaints about performance/accessibility/communication
- Co-mingles or borrows clients, trust funds
- Smelling of alcohol or appearing under the influence in office and during court appearances

Personal Behavior:

Deterioration/neglect of personal appearance, health, hygiene

Loss of control at social gatherings, even where professional decorum is expected

Distorts truth; is dishonest

Manages finances poorly; fails to make tax filings and payments on time

Arrested for DUI, drunkenness in public, possession of illegal drug

Withdrawal from friends and associates

Pattern of family crises; marital infidelity

Pattern of unpredictable emotional reactions or mood swings.