

How to address attorney misconduct

DENTONS

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Given the demands and stresses of practicing law, substance abuse and depression are unfortunately an all-too-common occurrence among attorneys. When an attorney is impaired by disease or personal matters, it can be very uncomfortable for other attorneys at a law practice to decide how to handle the situation, especially when there is serious misconduct such as theft or other dishonest actions. In addition, sometimes management at a law firm is the last to know when there has been a serious ethical breach by an attorney (irrespective of impairment)—but other attorneys or staff were aware of the issue much earlier.

These situations are difficult to address as they may involve long-time colleagues and friends. However, the actions of one attorney can create both professional and ethical risks for an entire law practice. Under certain circumstances, other attorneys at the law firm may have an obligation to report misconduct or may be subject to claims for negligent supervision or collusion if appropriate actions are not taken.

Rather than ignore the problem, law firms can adopt protocols or guidelines that are aimed at ensuring that an impaired attorney gets needed help while minimizing the associated risks for the firm. The key for these protocols is to ensure that they are consistently followed, as ad hoc procedures are not always effective when dealing with a serious risk to the firm that may involve heightened emotions.

These protocols can take into account a wide range of considerations, including:

1. Ethical duties, such as those set forth in bar rules;
2. Potentially applicable criminal and civil laws (including workplace rules prohibiting discrimination and harassment);
3. An attorney's professional duties, a breach of which may lead to malpractice or other types of exposure; and
4. Duties to colleagues created by business relationships, including duties set forth in partnership agreements.

With those issues in mind, the following are some tips for creating appropriate protocols.

Establish reporting procedures

Most firms facing this issue will consider the creation of a confidential reporting system. Without such a system, law firm leadership may be the last to know of a problem that is common knowledge among others at the firm.

The best systems result in overreporting, not underreporting. The person or persons charged with screening reports (perhaps, someone in the firm's general counsel office) should be able to distinguish reports meriting further investigation from reports relating to general workplace discontent.

To create a culture where attorneys and employees feel comfortable reporting issues, the system must be easy to use and reliably confidential. Systems that no one knows about are little more than window dressing and are ineffective in identifying and resolving problems.

Likewise, systems that are not confidential are ineffective because those people with the most knowledge of wrongdoing also have the most to lose—namely, their jobs or their relationships. Reliable assurances should exist to protect the identity of individuals who report potential problems.

In addition, law firms should strive to respond to every report so that individuals understand that the firm takes such reports seriously. Some responses may consist of nothing more than an acknowledgement of receipt and confirmation that any issues identified will be addressed. Other responses might require more follow-up, including a confidential investigation.

Adopt guidelines for when to report

Law practices that impose an affirmative responsibility of disclosure on attorneys and employees have the greatest ability to identify issues sooner, quickly address problems, and mitigate exposures more effectively. Accordingly, law firms may want to consider implementing a policy addressed at incentivizing attorneys and employees to report issues of concern. For example, the firm's reporting policy could state as follows: Any person working for or with the firm should promptly report any incident, matter, or concern to the firm, utilizing the firm's confidential reporting system. This includes any incident, matter or concern arising out of any misconduct of anyone associated with the firm, failure to comply with any ethical or professional duty to anyone including clients, courts or others, violations of any court orders, rules, regulations or laws, inappropriate behavior in the workplace, or any other conduct that might reflect poorly on the firm.

Although such a policy may seem strict, it can help create a culture of compliance and supervision. Judges, juries, government entities, and clients all understand and appreciate efforts to assure compliance within a law practice.

Evaluate and investigate reports

Law firms can also consider implementing procedures for after a report is received. For example, the first step may involve a preliminary evaluation that could include, among other steps, recording the time and date the report was received, acknowledging receipt of the report, and conducting an initial review to determine whether further action or investigation is warranted. If the report merits no further action, then the appointed reviewing attorney should note as much and consider the matter closed.

If further action is necessary, the next step is to triage the report according to its nature, e.g., personnel, ethics, malpractice, financial, etc. Regardless of the designation, an attorney charged with compliance issues can create a separate file for each issue.

report the issue if required

While many issues may be resolved internally with appropriate corrective action, certain situations may require reporting. For example, if the issue involves potential legal malpractice, most law firms will communicate the facts to the affected client or clients as well as provide notice to the legal malpractice insurer.

Ethical violations may involve different reporting obligations. Many states have adopted some form of ABA Model Rule 8.3, "Reporting Professional Misconduct," which requires an attorney with knowledge of professional misconduct by another attorney to inform the appropriate professional authority.

However, California and a minority of other states have no such reporting requirement. Rule 1-120 of the California Rules of Professional Conduct does state that an attorney "shall not knowingly assist in, solicit, or induce any violation

of these rules or the State Bar Act," but there is no requirement under the rules that an attorney report the misconduct of another attorney.

Nonetheless, regardless of whether there are reporting requirements, adopting protocols for handling attorney misconduct can help defuse difficult situations and mitigate the risks for law firms.

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