DISCIPLINARY AND DISCLOSURE ISSUES FOR THE IMPAIRED ATTORNEY

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Sarah Patel Pacheco is a shareholder with the law firm of Crain, Caton & James, P.C., in Houston, Texas, where she generally limits her practice to litigation, administration and tax issues relating to estate, trust, guardianship and related fiduciary appointments. She was elected its President in 2008. She received her Doctor of Jurisprudence in May 1993 from Southern Methodist University, School of Law, Dallas, Texas, and received her undergraduate degree in accounting in May of 1990 from the University of Texas at Arlington. She is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization.

She served on the State Bar of Texas Legal Specialization Estate Planning and Probate Exam Commission from 2004-2010, including as its Chair her last term. In 2011, she was appointed to the State Bar of Texas Pattern Jury Charge Oversight Committee. She has served as the course director for the State Bar of Texas 2003 and 2011 Building Block of Wills, Trusts and Estate Planning Courses, 2005 Nuts and Bolts of Wills, Trusts and Estate Planning Course, the 2006 Advanced Estate Planning and Probate Course, the 2011 Advanced Guardianship and Elder Law Course and the 2013 Annual Advanced Estate Planning Strategies Course. In addition, she has served on numerous additional CLE planning committees. She is a frequent author and speaker for various state and local professional organizations. She was awarded the Standing Ovation Award for 2011 by the staff of TexBarCLE.

She is a co-author of the West Publishing's Texas Probate Practice Guide and West Publishing's Texas Wills, Trusts and Estate Planning Practice Guide. And, she is the Editor of the Second and Third Editions of the State Bar of Texas' Guardianship Manual.

She remains active in various local and state legal organizations including: Houston Bar Association, Probate, Trust & Estates Section; Chair 2009-2010: CLE Committee; Co-Chair 2008-2009, Institutes Subcommittee Co-Chair 2006-2007, and member 2005-2007, 2011: Judicial Polls Committee; 2008-2010: Houston Bar Foundation, Fellow (elected 2004): Houston Young Lawyers Association; Fellow (2000) & Co-Chair of Elder Law Committee (1998-2003): Texas Young Lawyers Association; Needs of Senior Citizens Committee (1999-2003): Generation-X Estate Planning Forum; Member (1999-present): Women Attorneys in Tax and Probate; Vice President, Programs (2000-2001), C.L.E. Officer (1999-2000), Disabilities & Elder Law Attorneys; Member, American Bar Association: Real Property, Probate and Trust Law and Litigation Sections; Member (1993-present).

She has been consistently been selected as a Texas Super Lawyer and a Texas Rising Star by Texas Monthly, as a Top Lawyer in Houston, as one of the Best Lawyers Under 40 by H Texas Magazine, and as a Top Lawyer in Houston by Houston Magazine. She has also been selected as One of the Top 50 Female Texas Super Lawyers and One as the Top 100 Houston Super Lawyers by Texas Monthly Magazine. She has also been named as one of The Best Lawyers in America in the practice areas of Trusts and Estates annually since 2006 and Litigation – Trusts & Estates annually since 2012.

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ACKNOWLEDGMENTS/HONORS

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Texas Lawyer – "*The GoTo Guide*" 2007, for Legal Malpractice in Texas
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I. INTRODUCTION

With an aging lawyer population, mental impairment issues are likely to increase in the near future. The law surrounding disciplinary and disclosure requirements for aging-lawyer impairment is currently somewhat uncharted territory with little guidance available, but that is likely to change as the problem becomes more pronounced.

II. THE PROBLEM

As the baby boom generation ages, Texas faces an unprecedented demographic shift in the practice of law. With an aging lawyer population, a greater number of attorneys are practicing well past typical retirement age. In 2014, there are approximately 7,081 attorneys that are classified in the State Bar membership as being over 70 years of age. *See* 2014 STATE BAR OF TEXAS TASK FORCE ON AGING LAWYER ISSUES REPORT 3-18-2014. With a growing number of older attorneys continuing to practice law, it is inevitable that there will be an increase in the instances of attorneys continuing to practice law while suffering from an age-related mental impairment.

III. THE CURRENT STATE OF THE RULES AND LAW

Currently, very little guidance exists in the Texas disciplinary rules (and their comments) and case law regarding when disclosures must be made of a mental impairment, or at what point an impairment is sufficient to warrant a disciplinary action.

However, the problem has been recognized, and this year a State Bar of Texas Task Force on Aging Lawyer Issues issued a report highlighting some of the pending problems and suggesting possible solutions. *See* 2014 STATE BAR OF TEXAS TASK FORCE ON AGING LAWYER ISSUES REPORT 3-18-2014.

With recognition of the problem, and as more cases of age-related impairment come to light, it is likely that more guidance concerning disciplinary and disclosure issues will become available.

This paper and the corresponding panel discussion will touch on the existing relevant Texas disciplinary rules and case law concerning mental impairment, impairment-related disclosure obligations for affected attorneys and others, and potential disciplinary actions if impairment leads to a risk of harm to a client or the public. In an attempt to gain clarity on the issue of age-related mental impairments, a discussion of other impairment-related authorities is also included.

IV. THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

The Texas Disciplinary Rules of Professional Conduct define the standards of proper conduct for attorneys practicing in Texas for purposes of professional discipline. While the rules themselves are "imperatives" (cast in the terms shall and shall not) and prescribe the minimum level of professional conduct to which lawyers must adhere, the comments are merely "permissive." TEX. DISCIPLINARY RULES PROF'L CONDUCT, Preamble, ¶ 10.

A. Relevant Definitions

1. Fitness

"Fitness," as defined in the Texas Disciplinary Rules of Professional Conduct ("TDRPC"), means "those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct." *See* Terminology to TEX. DISCIPLINARY RULES PROF'L CONDUCT R. The definition elaborates that "[n]ormally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations." *See* Terminology to TEX. DISCIPLINARY RULES PROF'L CONDUCT R.

B. Relevant Rules

1. Rule 1.03

Although Rule 1.03 does not explicitly consider an attorney's impairment, it is sufficiently broad to potentially create disclosure obligations. Section (b) of Rule 1.03—Communication—states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03(b).

The comments to the rule dictate that the "guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03 cmt. 2. The comments specifically state that a lawyer "may not . . . withhold information to serve the lawyer's own interest or convenience." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03 cmt. 4.

2. Rule 1.15

Rule 1.15—Declining or Terminating Representation—states in relevant part that "[a] lawyer shall decline to represent a client or, where representation has commenced, shall withdraw . . . from the representation of a client, if . . . the lawyer's physical, mental or psychological condition materially

impairs the lawyer's fitness to represent the client." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(a)(2).

As a result, lawyer impairment by itself does not violate the TDRPC; instead, the threshold issues are whether the impaired lawyer's fitness to represent clients is "materially impair[ed]," and whether the impaired attorney actually declines or terminates representation as a result of the impairment. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(a)(2).

3. Rule 5.01

Rule 5.01—Responsibilities of a Partner or Supervisory Lawyer—imposes a duty on certain lawyers to take remedial action to avoid or mitigate the consequences of another lawyer's violation of the disciplinary rules. The rule states that:

> A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:
>
> (a) The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved; or
>
> (b) The lawyer is a partner in the law firm in which the other lawyer practices, is the general counsel of a government agency's legal department in which the other lawyer is employed, or has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer's violation of these rules knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.

TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.01.

The comments to Rule 5.01 make clear that "[t]he duty imposed upon the partner or other authoritative lawyer by Rule 5.01(b) is to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's known violation." *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.01 cmt. 4. "Thus, neither Rule 5.01(a) nor Rule 5.01(b) visits vicarious disciplinary liability upon the lawyer in a position of authority. Rather, the lawyer in such authoritative position is exposed to discipline only for his or her own knowing actions or failures to act." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.01 cmt. 5.

4. Rule 8.03

Texas lawyers are required to report known professional misconduct of other lawyers and judges in certain situations. Rule 8.03—Reporting Professional Misconduct—states that:

> (a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable 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.
>
> (b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
>
> (c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by chemical dependency on alcohol or drugs ***or by mental illness*** may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).
>
> (d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information:
>
> (1) by Rule 1.05 or
>
> (2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03 (emphasis added).

A lawyer who is aware of an impairment is not required under the TDRPC to report it if the lawyer is not aware of any violation of the rules. *See, generally,* TEX. RULES DISCIPLINARY P. 8.03.

The comments to the rule acknowledge that a requirement that a lawyer report every violation would prove to be unenforceable. *See* TEX. RULES DISCIPLINARY P. 8.03, cmt. 2. Therefore, the comments make clear that a lawyer is only required to report a substantial violation of the rules. TEX. RULES DISCIPLINARY P. 8.03 cmt. 2. "The term substantial refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." TEX. RULES DISCIPLINARY P. 8.03 cmt. 2. Accordingly, "[a] measure of judgment is, therefore,

required in complying with the provisions of [Rule 8.03]." TEX. RULES DISCIPLINARY P. 8.03 cmt. 2.

Additionally, the duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose past professional conduct is in question. TEX. RULES DISCIPLINARY P. 8.03 cmt. 3.

If information relating to the representation of one's own client would be disclosed in the course of making the report to the appropriate authority, then a lawyer need not make a report. *See* TEX. RULES DISCIPLINARY P. 8.03 cmt. 3. However, in that situation "a lawyer should encourage a client to consent to disclosure where prosecution of the violation would not substantially prejudice the client's interests. TEX. RULES DISCIPLINARY P. 8.03 cmt. 3.

V. THE TEXAS RULES OF DISCIPLINARY PROCEDURE

The Texas Rules of Disciplinary Procedure ("TRDP") provide the mechanism by which grievances are processed, investigated, and prosecuted.

A. Relevant Definitions

1. Disability

As defined by the TRDP, "Disability" means "any physical, mental, or emotional condition that, with or without a substantive rule violation, results in the attorney's inability to practice law, provide client services, complete contracts of employment, or otherwise carry out his or her professional responsibilities to clients, courts, the profession, or the public." TEX. RULES DISCIPLINARY P. 1.06(I).

2. Sanction

"Sanction" as defined by the TRDP can include disbarment, resignation in lieu of discipline, suspension, probation, and reprimands. TEX. RULES DISCIPLINARY P. 1.06(Z). Importantly in this context, however, "Sanction" can also include an "Indefinite Disability suspension." *See* TEX. RULES DISCIPLINARY P. 1.06(Z)(3).

3. Just Cause

"Just Cause" means "such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a sanction be imposed, ***or suffers from a Disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation.*** TEX. RULES DISCIPLINARY P. 1.06(U) (emphasis added).

B. Brief Overview Of The Disciplinary Process

The filing of a grievance with the Office of Chief Disciplinary Counsel initiates the disciplinary process. The Chief Disciplinary Counsel then reviews every grievance to determine whether the grievance should be classified as an inquiry or a complaint. TEX. RULES DISCIPLINARY P. 2.10. The Chief Disciplinary Counsel will classify the grievance as an "inquiry" where, even if true, the allegations against the attorney do not allege professional misconduct or a disability. TEX. RULES DISCIPLINARY P. 1.06(S). If the grievance is classified as an inquiry, it is dismissed. TEX. RULES DISCIPLINARY P. 2.10. On the other hand, the grievance is classified as a "complaint" if it alleges professional misconduct or a disability. TEX. RULES DISCIPLINARY P. 1.06(G). If the grievance is determined to allege professional misconduct or a disability, then the attorney is requested to respond to the allegations and the Chief Disciplinary Counsel's office investigates the complaint to determine whether there is just cause to believe that misconduct has occurred or that the attorney suffers from a disability. TEX. RULES DISCIPLINARY P. 1.06(U), 2.10, 2.12.

Once a determination of just cause is made, the attorney is notified of the determination and given the election between having the proceeding continue before an Evidentiary Panel or in district court. TEX. RULES DISCIPLINARY P. 2.14, 2.15.

C. The Disciplinary Process As It Specifically Relates To An Attorney With A Disability

The disciplinary process, as described above, is somewhat different if a determination is made that the attorney is suffering from a disability.

1. Disability Suspension Is Mandatory

The TRDP unequivocally state that "[a]ny person licensed to practice law in the State of Texas ***shall*** be suspended for an indefinite period upon a finding that the attorney is suffering from a Disability." TEX. RULES DISCIPLINARY P. 12.01 (emphasis added).

2. Disability Proceedings Are Referred To BODA

The disciplinary procedures are identical through the initial stage, and if no disability is alleged or suspected the grievance will be dismissed as an inquiry. However, once the grievance is classified as a complaint, if during its just cause investigation of the complaint the Chief Disciplinary Counsel "reasonably believes based upon investigation" that the attorney is suffering from a disability to such an extent that either (a) the attorney's continued practice of law poses a substantial threat of irreparable harm to a client or to prospective clients; or (b) the attorney is so impaired as to be unable to meaningfully participate in the preparation of a defense to the grievance, then the Chief Disciplinary Counsel "***shall***" refer the complaint to the Board of Disciplinary Appeals ("BODA"). *See* TEX. RULES DISCIPLINARY P. 2.14(C).

Likewise, if a just cause determination is made the Evidentiary Panel will conduct evidentiary hearings,

and will refer the complaint to BODA if it finds professional misconduct occurred but also believes that the attorney suffers from a disability. *See* TEX. RULES DISCIPLINARY P. 2.17(P)(2).

The rules do not specifically provide district courts the ability to refer a complaint to BODA if a disability is suspected. *See, generally*, TEX. RULES DISCIPLINARY P. 3.01–3.16.

3. Available Sanctions/Disability Cannot Be Considered In Mitigation

In proceedings before an Evidentiary Panel, the rules specifically state that an indefinite disability suspension is not an available sanction for an Evidentiary Panel to impose on an attorney. TEX. RULES DISCIPLINARY P. 2.18. The rule also specifically states that if the Evidentiary Panel is imposing sanctions on the attorney, the attorney's disability may not be considered in mitigation unless the attorney "demonstrates that he or she is successfully pursuing in good faith a program of recovery or appropriate course of treatment." TEX. RULES DISCIPLINARY P. 2.18.

If the complaint is instead being adjudicated by a trial court, and the trial court finds that the attorney's conduct does constitute professional misconduct, the court shall determine the appropriate sanction or sanctions to be imposed. TEX. RULES DISCIPLINARY P. 3.09. However, as with the Evidentiary Panel, the district court does not have indefinite disability suspension as an available sanction. TEX. RULES DISCIPLINARY P. 3.10. The attorney's disability likewise cannot be considered in mitigation unless the same standard stated above is met. TEX. RULES DISCIPLINARY P. 3.10.

These rules would only appear to apply in two situations, the first of which is where an attorney commits professional misconduct while suffering from a disability, but the attorney's disability is not such that the attorney's continued practice of law poses a substantial threat of irreparable harm to the client or prospective clients, and the attorney is not so impaired as to be unable to meaningfully participate in the preparation of a defense. *See* TEX. RULES DISCIPLINARY P. 2.14(C). That is because if the attorney's impairment poses a substantial threat of irreparable harm or prevents the attorney from meaningfully participating in the preparation of his defense, the Chief Disciplinary Counsel "***shall***" refer the complaint to BODA. *See* TEX. RULES DISCIPLINARY P. 2.14(C). The second situation is, as discussed below, where BODA has conducted a disability inquiry, found that no disability existed, and returned the complaint to the disciplinary process. TEX. RULES DISCIPLINARY P. 12.03.

4. The BODA Disability Suspension Process

BODA has exclusive original jurisdiction to suspend indefinitely an attorney who is suffering from a disability. *See, generally,* TEX. RULES DISCIPLINARY P. 2.14(C), 7.08; TEX. RULES DISCIPLINARY P. PART XII. However, the disability suspension appears to be seldom used—from June 1, 2013, to May 31, 2014, there were no disability suspension cases decided by BODA. *See* REPORT 2014 OF THE BOARD OF DISCIPLINARY APPEALS (available at www.txboda.org).

If either the Chief Disciplinary Counsel or the Evidentiary Panel believe that an attorney is suffering from a disability, they immediately forward the complaint to BODA. TEX. RULES DISCIPLINARY P. 12.02. BODA then forwards the complaint to a District Disability Committee, which is comprised of one attorney; one doctor of medicine or mental health care provider holding a doctorate degree, trained in the area of Disability; and one member of the public who does not have any interest, directly or indirectly, in the practice of law other than as a consumer. TEX. RULES DISCIPLINARY P. 12.02. BODA may appoint an attorney to represent the interests of the disabled attorney. TEX. RULES DISCIPLINARY P. 12.02.

A proceeding before the District Disability Committee is *de novo*, and the Commission for Lawyer Discipline (or other party asserting that the attorney is suffering from a disability) has the burden of establishing by a preponderance of the evidence that the attorney suffers from a disability. TEX. RULES DISCIPLINARY P. 12.03. The attorney is given the opportunity to appear before, and present evidence to, the District Disability Committee. TEX. RULES DISCIPLINARY P. 12.03.

If the District Disability Committee finds no disability, then the complaint is returned to the Chief Disciplinary Counsel and the disciplinary process continues from wherever it left off. TEX. RULES DISCIPLINARY P. 12.03. If, however, the District Disability Committee finds that the attorney is suffering from a disability, then the Committee certifies its finding to BODA, and BODA immediately enters an order suspending the attorney indefinitely. TEX. RULES DISCIPLINARY P. 12.03, 12.04. Only the order of indefinite suspension is made public; the rest of the proceedings are sealed and must remain confidential. TEX. RULES DISCIPLINARY P. 12.04.

5. Statutes Of Limitations

Any statute of limitations applying to a disciplinary matter is tolled during the period that an attorney is suspended on a disability suspension. TEX. RULES DISCIPLINARY P. 12.05.

6. Reinstatement After Disability Suspension

An attorney who has been indefinitely suspended due to a disability may have the suspension terminated by filing a verified petition with BODA or a district court. TEX. RULES DISCIPLINARY P. 12.06. The petition must attach, among other things, an affidavit from a mental health care provider regarding the attorney's current condition. TEX. RULES DISCIPLINARY P. 12.06.

The burden of proof is on the attorney to prove by a preponderance of the evidence that the reasons for suspension no longer exist, and that termination of the suspension would be without danger to the public. TEX. RULES DISCIPLINARY P. 12.06. Either BODA or the district court, as the case may be, may order that the attorney be examined by one or more health care providers trained in the area for which the attorney was suspended. TEX. RULES DISCIPLINARY P. 12.06. If the attorney meets the burden of proof, then BODA or the district court shall order a termination of the suspension, unless the attorney has been suspended for two or more years, in which case the attorney may be required to retake the State Bar exam. TEX. RULES DISCIPLINARY P. 12.06.

From a practical standpoint, the reinstatement provisions are unlikely to come into play in the situation where an attorney is suffering from an age-related mental impairment. Unless there are advances in medicine that make it possible to halt and reverse dementia, it is not likely feasible for an attorney to demonstrate that the reasons for suspension no longer exist.

VI. DUTY TO REPORT OR DISCLOSE IMPAIRMENT

Age-related mental impairment can be difficult to accurately diagnose even for doctors, much less an attorney's partners and colleagues. This section will attempt to shed some light on when an attorney must report a violation or disclose if they believe another attorney is suffering from a mental disability.

A. Texas Ethics Opinions

There are no Texas ethics opinions directly on the issue of impairment disclosure obligations, but some insight can be gleaned from more general opinions.

1. Ethics Opinion 520

The question presented in the opinion was whether Rule 8.03 of the TDRPC requires a lawyer to report suspected misconduct by another lawyer, when the first lawyer lacks solid proof. TEX. COMM. ON PROF'L ETHICS, Op. 520 (1997).

As discussed above, Rule 8.03 requires a lawyer who has knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness as a lawyer to report the other lawyer to the appropriate disciplinary authority. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03. In analyzing the rule, the ethics opinion notes that the rule is not intended to limit the actual or suspected violations that a lawyer may report, but rather only defines what violations a lawyer must report. TEX. COMM. ON PROF'L ETHICS, Op. 520 (1997). "[L]awyers are instructed to use their best judgment in complying with the reporting requirements of the rule." TEX. COMM. ON PROF'L ETHICS, Op. 520 (1997). Somewhat contradicting the comment to the rule that "a lawyer should not fail to report an apparent disciplinary violation merely because he or she cannot determine its existence or scope with absolute certainty," the opinion concludes the discussion:

> The text of Rule 8.03(a), however, requires that a lawyer have knowledge (rather than suspicion) that another lawyer has committed a violation of the applicable rules before informing the appropriate disciplinary authority. A report of misconduct must therefore be based upon objective facts that are likely to have evidentiary support.

TEX. COMM. ON PROF'L ETHICS, Op. 520 (1997). The opinion notes, but does not discuss, that a lawyer who knows or suspects that another lawyer is impaired by mental illness may report that lawyer to an approved peer assistance program instead of a disciplinary authority.

Based on the opinion, it can reasonably be inferred that an attorney is not required to report an impaired attorney to the disciplinary authorities unless the attorney has actual knowledge—not just a mere suspicion—that the impaired attorney has committed a violation of the rules. TEX. COMM. ON PROF'L ETHICS, Op. 520 (1997).

2. Ethics Opinion 523

The question presented in Ethics Opinion 523 was:

> What obligations does an associate in a law firm have under the Texas Disciplinary Rules of Professional Conduct when he discovers that another attorney in his law firm clearly gave negligent legal advice to a client for whom the associate has personally performed legal services? Is the associate obligated to inform the State Bar disciplinary authorities?

TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997).

Although the opinion does not involve mental impairment, some guidance can possibly be obtained if

the opinion is applied to a situation involving an attorney's deteriorating competence rather than an instance of isolated negligence.

The facts of the opinion were as follows: during the course of performing legal work for a client, a recently employed associate in a law firm discovered that within the past year and prior to the associate's employment, another attorney in the law firm clearly gave incorrect and negligent tax advice to the client, which if discovered in an audit by the IRS would result in adverse tax consequences to the client. TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997). The attorney who provided the negligent services had not informed the client. TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997). The associate notified the shareholders of the law firm of the negligence and resigned from the firm; upon resigning, the associate demanded that the shareholders inform the client of the negligence, take remedial action, and provide the associate with proof of such actions. TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997). The associate warned that if no proof of corrective action was provided to him, he would be obligated to notify the affected client and file a grievance against the lawyer performing the negligent work. TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997). The law firm assured the associate that unspecified remedial action would be taken, but gave no indication or assurance that the negligence would be communicated to the client. TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997). Additionally, the firm informed the former associate that no written proof would be supplied to him regarding any such communication to the client because, in the shareholders' view, such communication would violate the law firm's duty of confidentiality to the client. TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997). The associate was told not to contact the client. TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997).

In discussing whether the associate attorney and the shareholders in the law firm who have knowledge of the negligent legal services were obligated to inform the affected client, the opinion notes that:

> Although there is no rule directly addressing this issue, Rule 1.03(b) provides that a lawyer shall communicate with a client to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 8.04(a)(3) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Under Texas law, the relationship between an attorney and client is a fiduciary relationship that obligates an attorney to "render a full and fair disclosure of facts material to the client's representation." (*Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988)). It is a relationship that has been described as requiring "absolute and perfect candor, openness and honesty, and the absence of any concealment or deception." (*Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App.—Corpus Christi 1991)). ***The foregoing rules require that if a lawyer clearly knows that negligent legal advice has been given to a client by another lawyer in the law firm, the lawyer is obligated to take appropriate action to ensure that the client is informed so that remedial action can be taken.***

TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997) (emphasis added). Accordingly, the opinion notes that each shareholder of the law firm has a responsibility to disclose based on Rule 5.01(b) (providing that a partner in a firm violates the rules if "with knowledge of the other lawyer's violation of these rules [the partner] knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.") TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997).

Regarding the disclosure duties of the former associate, the opinion concludes that if the law firm's shareholders "refuse, within a reasonable time, to provide to the former associate written assurances that the client in fact has been told of the negligence, then the associate would be obligated to inform the client about the specific negligent legal services." TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997).

However, regarding the question of whether the former associate was obligated to report the negligent conduct to the disciplinary authorities, the opinion flatly states that "[t]he answer is 'no.'" TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997). The opinion based its answer on Rule 8.03(a), which, as discussed previously, applies only to "conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03(a). "A mistake or isolated incident of negligent legal services does not satisfy that standard." TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997).

Several key points from this opinion can be potentially translated to a situation involving a mentally-impaired lawyer's diminishing competence. First, attorneys in a law firm—both partners and associates—have a duty to inform a client of negligent legal work performed or advice given by an impaired attorney. *See* TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997) ("if a lawyer clearly knows that negligent legal advice has been given to a client by another lawyer in the law firm, the lawyer is obligated to take appropriate action to ensure that the client is informed so that remedial action can be taken."). This is in addition to the requirement set out in Rule 5.01(b) that

partners of a firm must "take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation," or themselves be in violation of the rules. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.01.

Additionally, the attorneys need only report the impaired attorney to the disciplinary authorities if the impaired attorney's conduct raises a substantial question as to the impaired attorney's fitness as a lawyer. *See* TEX. COMM. ON PROF'L ETHICS, Op. 523 (1997); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03(a). This appears to be a more challenging and subjective test: on one end of the spectrum, a single mistake or isolated incident of an attorney suspected of being impaired "does not satisfy [the] standard" in Rule 8.03(a); on the other end of the spectrum, an attorney's clear mental impairment, if unable to be mitigated, would undeniably require reporting, as it would raise a substantial question as to the impaired attorney's fitness. (Remember, fitness is defined as "those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct." *See* Terminology to TEX. DISCIPLINARY RULES PROF'L CONDUCT R.).

As explained by the rules, a good indicator of an attorney's lack of fitness due to a mental impairment would be that attorney's "persistent inability to discharge, or unreliability in carrying out, significant obligations." *See* Terminology to TEX. DISCIPLINARY RULES PROF'L CONDUCT R.

B. ABA Formal Opinions

There are two ethics opinions issued by the American Bar Association which may also provide some guidance as to an attorney's ethical responsibilities regarding a mentally impaired attorney. Although the opinions apply the Model Rules of Professional Conduct, the Texas rules are based on the Model Rules, and the opinions are therefore somewhat instructive.

1. ABA Formal Opinion 03-429

Opinion 03-429 covers some of the same ground as Texas Ethics Opinion 523, but, unlike the Texas opinion, deals directly with mental impairment issues.

The opinion explores three sets of obligations arising under the Model Rules of Professional Conduct with respect to mentally impaired lawyers: (1) the obligations of partners in a law firm or a lawyer supervising another lawyer to take steps designed to prevent lawyers in the firm who may be impaired from violating the rules; (2) the duty of a lawyer who knows that another lawyer in the same firm has, due to mental impairment, failed to represent a client in the manner required by the rules to inform the appropriate disciplinary authority or to communicate knowledge of such violations to clients or prospective clients of the impaired lawyer; and (3) the obligations of lawyers in the firm when an impaired lawyer leaves the firm. ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), pp. 1–2.

The opinion begins its discussion by noting that

> Impaired lawyers have the same obligations under the Model Rules as other lawyers. Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation. . . . The matter of a lawyer's impairment is most directly addressed under the Model Rules of Professional Conduct under Rule 1.16, [essentially equivalent to Rule 1.15 of the TDRPC, identified above] which specifically prohibits a lawyer from undertaking or continuing to represent a client if the lawyer's mental impairment materially impairs the ability to represent the client. Unfortunately, the lawyer who suffers from an impairment may be unaware of, or in denial of, the fact that the impairment has affected his ability to represent clients. When the impaired lawyer is unable or unwilling to deal with the consequences of his impairment, the firm's partners and the impaired lawyer's supervisors have an obligation to take steps to assure the impaired lawyer's compliance with the Model Rules.

ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), pp. 2–3. The opinion then addresses the three sets of obligations:

a. Obligations To Adopt Measures To Prevent Impaired Lawyers In The Firm From Violating The Rules

This portion of the opinion attempts to clarify the responsibility of a firm to institute procedures designed to assure compliance with the rules. The conclusion reached is that if the firm has made reasonable efforts to institute such procedures, then "neither the partners in the firm nor the lawyer with direct supervisory authority are responsible for the impaired lawyer's violation of the rules unless they knew of the conduct at a time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action." ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), p. 4.

In reaching that conclusion, the opinion states that "there is no explicit requirement under the Model Rules that a lawyer prevent another lawyer who is impaired from violating the Model Rules," but cites to Model Rule 5.1 which requires law firms and supervising lawyers to make reasonable efforts to ensure that the firm's lawyers fulfill the requirements

of the rules. ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), pp. 3–4.

Importantly, the Texas rules do impose a requirement upon certain lawyers to prevent impaired lawyers from violating the rules. The corresponding Texas rule, Rule 5.01, states in subsection (a) that a lawyer shall be subject to discipline because of another lawyer's violation of the rules if: (a) the lawyer is a partner or supervising lawyer; and (b) that lawyer "orders, encourages, or ***knowingly permits*** the conduct involved." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.01(a).

However, that distinction aside, the ABA opinion likely reached the same conclusion that one would reach under the Texas rules in concluding that neither a partner nor a supervising attorney would be liable for an impaired attorney's violation of the rules "unless they knew of the conduct at a time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action." ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), p. 4. This conclusion meets the requirements of TDRPC Rule 5.01(a), in that knowingly permitting is merely a restated way of saying that an attorney "failed to take reasonable remedial action." *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 5.01(a); ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), p. 4.

b. Obligations When An Impaired Lawyer In The Firm Has Violated The Rules

This portion of the opinion is essentially a combination of Texas Ethics Opinions 520 and 523, analyzing the equivalent Model Rules to Texas Rules 8.03 and 1.03.

The opinion notes that "if the firm is able to eliminate the risk of future violations of the duties of competence and diligence . . . through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation" to a disciplinary authority. ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), p. 5. Although this seems like a sound standard that would prevent any harm to clients or the public, it may not be an acceptable standard to follow in Texas. Texas Rule 8.03 requires a lawyer with knowledge of another lawyer's violation to report that violation to either a disciplinary authority or an approved peer assistance program if the violation raises a "substantial question" as to the impaired lawyer's "fitness as a lawyer." *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03. The Texas rules do not provide an exception to reporting a violation if the firm will provide oversight and prevent future violations (this is already required under Rule 5.01)—rather, the only exception is if the violation does not raise a substantial question as to the lawyer's fitness to practice. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03(a).

The ABA opinion also considers a situation where the matter in which the impaired lawyer committed a violation is still pending. ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), p. 5. Reinforcing the conclusion reached in Texas Ethics Opinion 523 requiring disclosure to the client, the ABA opinion states that "the firm may not simply remove the impaired lawyer and select a new lawyer to handle the matter. Under Rule 1.4(b) [the equivalent of Texas Rule 1.03], there may be a responsibility to discuss with the client the circumstances surrounding the change of responsibility." ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), p. 5. The opinion goes on, however, to provide some sage advice: "In discussions with the client, the lawyer must act with candor and avoid material omissions, but to the extent possible, should be conscious of the privacy rights of the impaired lawyer." ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), pp. 5–6.

c. Obligations When An Impaired Lawyer No Longer Is In The Firm

In much the same vein as above, and in line with Texas Rule 1.03, the opinion states that if the "impaired lawyer resigns or is removed from the firm, clients of the firm may be faced with the decision whether to continue to use the firm or shift their relationship to the departed lawyer. Rule 1.4 requires the firm to advise existing clients of the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel. In doing so, the firm must be careful to limit any statements made to ones for which there is a reasonable factual foundation." ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), p. 6. Because the relevant portion of Model Rule 1.4 is essentially identical to Texas Rule 1.03, this is probably good advice to follow in Texas as well.

In a situation where the possibly impaired attorney has already left the firm and the clients have gone with the attorney, the opinion concludes that "[t]he firm has no obligation . . . to inform former clients who have already shifted their relationship to the departed lawyer that it believes the departed lawyer is impaired and consequently is unable to personally handle their matters competently." ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-429 (2003), p. 6. Note, however, that the firm's attorneys might still have an obligation to report the impaired attorney to a disciplinary authority or peer assistance program if they had knowledge of a violation committed by the impaired lawyer that raised a

substantial question as to the impaired lawyer's fitness to continue practicing law. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03(a).

2. ABA Formal Opinion 03-431

Opinion 03-431 deals with an attorney's duty to report rule violations by another attorney who may suffer from disability or impairment. While Opinion 03-429 dealt with disclosure obligations regarding an impaired attorney in a firm setting, Opinion 03-431 examines the disclosure obligations of a lawyer who acquires knowledge that another lawyer, not in his firm, suffers from a mental condition that materially impairs the subject lawyer's ability to represent a client. *See* ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-431 (2003), p. 1.

The opinion analyzes the situation under Model Rules 8.3 and 1.16—the Model Rules' equivalents to Texas Rules 1.15 and 8.03. The opinion advises that

> Under Rule 8.3(a), a lawyer with knowledge that another lawyer's conduct has violated the Model Rules in a way that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" must inform the appropriate professional authority. Although not all violations of the Model Rules are reportable events under Rule 8.3, as they may not raise a substantial question about a lawyer's fitness to practice law, ***a lawyer's failure to withdraw from representation while suffering from a condition materially impairing her ability to practice,*** as required by Rule 1.16(a)(2), ***ordinarily would raise a substantial question requiring reporting under Rule 8.3.***

ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-431 (2003), p. 2 (emphasis added). Interestingly, the opinion notes that, because Model Rule 8.3 (like Texas Rule 8.03) requires actual knowledge, "the duty to report the violation caused by the mental impairment of another lawyer will likely arise only in very limited situations." ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-431 (2003), p. 2 n.4.

Additionally, the opinion suggests that "[i]n deciding whether an apparently impaired lawyer's conduct raises a substantial question of her fitness to practice, a lawyer might consider consulting with a psychiatrist, clinical psychologist, or other mental health care professional about the significance of the conduct observed or of information the lawyer has learned from third parties. He might consider contacting an established lawyer assistance program. In addition, the lawyer also might consider speaking to the affected lawyer herself about his concerns." ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-431 (2003), pp. 3–4.

What if the impaired attorney assures that there is no problem, or that the problem has been resolved? "Care must be taken when acting on the affected lawyer's denials or assertions that the problem has been resolved. It is the knowledge of the impaired conduct that provides the basis for the lawyer's obligations under Rule 8.3; the affected lawyer's denials alone do not make the lawyer's knowledge non-reportable under Rule 8.3" ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-431 (2003), p. 4.

The opinion also advises that if the impaired attorney is practicing within a firm, the lawyer should consider speaking with the firm's partners or supervising lawyers. ABA COMM. ON PROF'L ETHICS & GRIEVANCES, Formal Op. 03-431 (2003), p. 4.

C. Texas Case Law

Because mental impairment issues may often go unrecognized, and because impaired attorneys likely seek to avoid public litigation when the impairment leads to a problem, there does not appear to be any case law dealing directly with issues concerning an attorney's mental impairment. In fact, there is very little case law dealing with any type of attorney impairment issue. This section will attempt to provide guidance as to whether any potential civil liability exists where a plaintiff has alleged that attorneys had knowledge of an attorney's impairment and failed to disclose that knowledge to the client. It will also discuss potential discovery issues related to attorneys' mental health records.

1. Beck v. Law Offices of Edwin J. (Ted) Terry

In the case of *Beck v. Law Offices of Edwin J. (Ted) Terry*, Beck brought an action against attorneys who had represented him in an underlying divorce action. 284 S.W.3d 416, 420 (Tex. App.—Austin 2009, no pet.). A central issue in the divorce litigation concerned the characterization of assets and stock of three Texas corporations that were wholly owned, directly or indirectly, by Beck. *Id.* at 421. The value of assets that Beck held through the three corporations greatly exceeded the value of assets that Mr. Beck, Ms. Beck, or both held in their own names. *Id.*

Beck initially retained a different firm to represent him, but eventually hired the late Edwin J. (Ted) Terry to represent him. *Id.* Terry practiced in a sole proprietorship, and had two associate attorneys working for him at the time. *Id.*

After the divorce was final, Beck (along with his corporations, but for simplicity collectively referred to herein as "Beck") sued the law firm, Terry, and Terry's associate attorneys, claiming that they advised or permitted him to include his corporations' stock and

assets in the property division under the Mediated Settlement Agreement, causing injury to the corporations. *Id.* at 421, 424.

Both in the district court and on appeal, Beck attempted to rely primarily upon factual allegations that Terry suffered from alcoholism and substance abuse while he was representing Beck in the divorce action. *Id.* at 424. Specifically, Beck alleged that Terry's alcohol and substance abuse addictions caused or contributed to the attorneys' failure to exercise a reasonable standard of care when providing legal services. *Id.* Beck further alleged that the associate attorneys working for Terry at the time knew of Terry's alcohol and substance abuse problems, and failed to disclose those problems to Beck, thereby violating their duties of ordinary care, fiduciary duties, and the DTPA. *Id.*

The attorney defendants moved for traditional summary judgment on several grounds, one of which was that Beck's breach of fiduciary duty and DTPA claims were simply an attempt to improperly "fracture" a professional negligence claim into other causes of action. *Id.* at 424–25. The trial court granted summary judgment on the breach of fiduciary duty and DTPA claims, and the case proceeded to trial on the negligence claim. *Id.* at 425.

At trial, the trial court excluded all evidence of Terry's alleged alcohol or drug use. *Id.* The jury found that the attorney defendants were not negligent, the trial court rendered final judgment that Beck take nothing, and Beck appealed. *Id.*

In analyzing whether summary judgment was proper on the breach of fiduciary duty and DTPA claims, the court of appeals noted that "Texas courts, including this Court, have recognized that a complaint that a lawyer 'misrepresented' his competence to provide legal services or 'failed to disclose' his incompetence implicates only the lawyer's duty of ordinary care and is not independently actionable as a fiduciary duty, DTPA, or other tort claim." *Id.* at 431. "This is because the complaint ultimately goes to the adequacy of the lawyer's legal representation." *Id.* at 432.

The court stated that Beck's complaint that Terry and his associates failed to disclose Terry's alcohol and substance abuse addictions "concerns a type of antecedent act or condition that potentially impacts a lawyer's competence or capacity to provide legal services." *Id.* However, the court went on to note that, "[a]lthough appellants emphasize the sensational nature of their allegations about alcohol or drug use, their complaint is analogous to an assertion that a lawyer was afflicted by any of the myriad, more innocuous physiological factors that might adversely impact a lawyer's practice performance on a given day—e.g., illness, sleep deprivation, emotions, or simply a lack of innate intelligence or ability—or, for that matter, by such non-physiological practice impediments as a malfunctioning office printer or absent secretary." *Id.*

The court concluded that summary judgment was proper on the breach of fiduciary duty and DTPA claims:

> We hold that appellees met their summary-judgment burden to establishing their entitlement to judgment as a matter of law that appellants' complaint regarding Terry's undisclosed "alcohol and substance abuse additions" sound solely in negligence. We also conclude that appellants did not raise a fact issue to defeat appellees' entitlement to summary judgment on this issue. In response to appellees' motion, appellants presented summary-judgment evidence—chiefly, deposition testimony from Terry's ex-wife, Kim Terry—going to whether Terry, in fact, had a problem with alcohol or drug use during the period in which he had represented Beck. Appellants also presented an affidavit from Beck in which he averred that the Terry Defendants never disclosed to him that Terry had an alcohol or substance-abuse problem, and that Beck would have fired the firm had he known of the problem. Appellees do not quarrel that this evidence raises a fact issue as to the existence of an undisclosed alcohol and substance-abuse problem that would have led Beck to terminate the representation—facts that we are required to presume for summary-judgment purposes anyway—but urge that it adds nothing to the legal analysis of whether appellants' complaint about the problem sounds in negligence or breach of fiduciary duty. We agree with appellees.

Id. at 434–35. The court similarly dismissed Beck's DTPA claims. *Id.* at 439.

Based on the precedent set in *Beck*, a claim against an impaired attorney or another attorney for failing to disclose the disability to a client would sound only in negligence. *See id.* at 434–35, 39.

Note that the court in *Beck* did not discuss or even mention an attorney's duty to report another attorney's violation raising a substantial question as to their fitness to practice law under Rule 8.03. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03. Nor did the court note an attorney's duty under Rule 1.15 to withdraw from representation if the lawyer's physical, mental or psychological condition materially impairs the lawyer's fitness to represent the client. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15(a)(2). This is consistent with the pronouncement in the TDRPC that the rules "do not undertake to define standards of civil liability of lawyers for professional conduct." TEX. DISCIPLINARY RULES PROF'L

CONDUCT R., Preamble, ¶ 15. "***Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached***." TEX. DISCIPLINARY RULES PROF'L CONDUCT R., Preamble, ¶ 15.

2. R.K. v. Ramirez

In a suit against an attorney for negligence committed due to the attorney's impairment, are the attorney's medical and mental health records discoverable? Possibly.

In *R.K. v. Ramirez*, the Cadenas sued several physicians and a hospital, alleging that their son's cerebral palsy, spastic quadriplegia, and mental retardation were the result of medical malpractice. 887 S.W.2d 836, 838–39 (Tex. 1994). R.K. was one of the physicians who provided prenatal care for Mrs. Cadena and delivered her son. *Id.* at 838.

In preparation for trial, the Cadenas sought discovery of records concerning R.K.'s treatment for a medical, mental, or emotional condition. *Id.* at 839. R.K. moved for a protective order, asserting the physician-patient and mental health information privileges. *Id.* Following an *in camera* inspection, the trial court denied the motion and ordered R.K. to turn over all documents to the Cadenas, and to sign a release authorizing the Cadenas' attorney to obtain any other records or information about R.K. in the possession of his physician, a clinic, and a hospital. *Id.* R.K. sought mandamus relief, and the court of appeals granted the writ and ruled that the trial court abused its discretion by breaching R.K.'s privileges. *Id.*

Specifically, the court of appeals held that the pleadings did not support the conclusion that the Cadenas had placed R.K.'s medical condition in issue, stating that "[a] general allegation of negligence does not bring into issue the medical condition of [R.K.]. Without pleadings to indicate that [R.K.'s] condition was a basis of the claim, there was nothing before the trial court to support its ruling." *Id.* The Cadenas amended their petition to specifically allege that (1) R.K.'s medical and emotional problems affected his ability to care for Mrs. Cadena, and (2) the clinic and hospital's selection of such an "unfit and incompetent" person proximately caused the Cadenas' damages. *Id.* R.K. reasserted the privileges, and the trial court again ordered the records produced. *Id.* R.K. then sought writ of mandamus from the Texas Supreme Court. *Id.*

In analyzing whether the privilege should protect production of the records, the Texas Supreme Court stated that

> Communications and records should not be subject to discovery if the patient's condition is merely an evidentiary or intermediate issue of fact, rather than an "ultimate" issue for a claim or defense, or if the condition is merely tangential to a claim rather than "central" to it. The scope of the exception should be tied in a meaningful way to the legal consequences of the claim or defense. This is accomplished, we believe, by requiring that the patient's condition, to be a "part" of a claim or defense, must itself be a fact to which the substantive law assigns significance. . . . As a general rule, a mental condition will be a "part" of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself. In other words, information communicated to a doctor or psychotherapist may be relevant to the merits of an action, but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to a party's claim or defense.

Id. at 842–43. Applying that standard, the court concluded:

> The Cadenas have alleged that R.K.'s medical and mental condition caused or contributed to his alleged malpractice, and that the hospital and the clinic knew or should have known of the condition and because of that condition should have supervised him better or not selected him at all. After reviewing the pleadings, we agree with the trial court that the information sought by the Cadenas is relevant to the condition of R.K. that is at issue, and that a jury determination that the condition exists is of legal significance to the Cadenas' negligence claims.

Id. at 843–44.

Applying this case to the attorney-impairment context, it is foreseeable that a court could order production of an attorney's medical and mental health records where the plaintiff has pleaded that the attorney's "medical and mental condition caused or contributed to his alleged malpractice, and that the [attorney's law firm] knew or should have known of the condition and because of that condition should have supervised [the attorney] better or not selected him at all." *See id.*; *see also M.A.W. v. Hall*, 921 S.W.2d 911, 915 (Tex. App.—Houston [14th Dist.] 1996, no writ) (where plaintiffs alleged that physician may have been under influence of alcohol or drugs at time of treatment, psychiatric records were discoverable to the extent they dealt with substance abuse, but remained privileged as to any other issue); *S.A.B. v. Schattman*, 838 S.W.2d 290 (Tex. App.—Fort Worth 1992, no writ) (holding that plaintiffs in malpractice suit against doctor were entitled to doctor's records regarding her treatment for drug addiction).

VII. CONCLUSION

Attorneys and firms should be mindful of the duty to disclose known violations of the disciplinary rules that raise a substantial question as to a lawyer's fitness to practice law—but remember, the report may be made to an approved peer assistance program such as the Texas Lawyers' Assistance Program. If an attorney's impairment has resulted in negligent legal advice provided to a client, then a firm has an obligation to attempt to mitigate the consequences and to inform the client. Impaired attorneys also have a duty to withdraw from representation if their disability materially impairs their fitness to represent the client.