

1 *This discussion draft was prepared in response to a request for guidance regarding withdrawal*
2 *based on material impairment. It is being circulated to invite comments from stakeholders prior*
3 *to completion of work by the Committee on Professional Ethics. **This draft has not been***
4 ***approved by the Washington State Bar Association and should not be considered to reflect***
5 ***guidance from the Washington State Bar Association.***

6 **AO2026XX**

7 **Withdrawal Based on Material Impairment**

8 **RPC(s):** 1.1, 1.3, 1.4, 1.16, 5.1,

9 **I. Introduction**

10 This Advisory Opinion addresses what Rules of Professional Conduct (RPC) are implicated
11 when a lawyer is suffering from physical or mental condition(s) that materially impair their
12 ability to effectively represent their client(s). Pursuant to RPC 1.16(a)(2), a lawyer shall not
13 agree to represent a client, or must move to withdraw from representing a client, if “the lawyer’s
14 physical or mental condition materially impairs the lawyer’s ability to represent the client.”

15 This is far from a straightforward issue. Whether a lawyer’s ability to represent their client is
16 impaired is often a deeply personal and sensitive question; this question may require an
17 examination of—and even a conversation about—the most private issues an individual can face
18 (e.g., addiction, cognitive decline, deaths in the family, divorce, mental health crises, severe
19 health complications, trauma, etc.). To make matters more complicated, the ethical rules place
20 the burden on the lawyer with the condition to determine whether they are impaired, which is a
21 decision often impacted by the very condition at issue. Thus, while the ethical rules themselves
22 are straightforward, this is an issue requiring immense personal reflection and deep compassion
23 for fellow attorneys.

24 It is important to note that many lawyers who have physical or mental conditions provide
25 outstanding legal advocacy. In fact, the mere presence of a physical or mental condition does not
26 indicate that the lawyer’s ability to represent their client is impaired in any way. [n.1]

27 This opinion will address what RPCs a lawyer must consider when determining whether they
28 have a physical or mental condition that requires withdrawal, the active steps an attorney must
29 take if they have such a physical or mental condition, and the proactive steps attorneys can take
30 to potentially avoid these ethical landmines.

31 **II. Analysis**

32 **A. A “material impairment” requiring withdrawal exists where it prevents the**
33 **attorney from providing competent or diligent representation to their clients.**

34 RPC 1.16(a)(2) requires a lawyer to withdraw if “the lawyer’s physical or mental condition
35 materially impairs the lawyer’s ability to represent the client.” [n.2] RPC 1.16 mirrors its ABA

36 counterpart. [n.3] There is nothing in the rule, its comments, nor the comments of its ABA
37 counterpart that defines what constitutes a material impairment. [n.4] Further, as recognized by
38 several courts, there has been scant case law in the past decade interpreting RPC 1.16(a)(2) or its
39 counterparts in other states. [n.5] Thus, what constitutes a “material impairment” is best
40 understood in the context of the other RPCs.

41 RPCs 1.1, 1.3, and 1.4 lay out the basic standards a lawyer must provide each of their clients.
42 [n.6] If a lawyer’s physical or mental condition materially impairs their ability to meet any of the
43 standards laid out in these rules, then a “material impairment” exists that requires the lawyer to
44 act to avoid violating their ethical duties. The lawyer’s impairing condition, even if acute, is not a
45 defense to the ethical violations that may follow should the lawyer fail to act to avoid violating
46 their ethical duties. [n. 7]

47 A physical or mental condition that requires withdrawal can come in many different forms.
48 Often, the condition may be due to a serious physical ailment, [n.8] but these conditions may
49 also be due to mental illness, [n.9] addiction, or even “burn out.” [n.10] Likewise, while some
50 conditions may cause permanent impairment, this rule also encompasses conditions that cause
51 temporary impairment. [n.11] Thus, RPC 1.16’s phrase “physical or mental condition” should be
52 viewed broadly, and the focus should be on whether the condition “materially impairs” the
53 attorney’s ability to represent the client.

54 **B. Attorneys facing a physical or mental condition that materially impairs their**
55 **ability to represent their client(s) must inform their client(s) and either seek an agreed**
56 **solution or move to withdraw.**

57 An attorney who is suffering from a mental or physical condition that will materially impair their
58 ability to represent their client has a duty to inform their clients that they may not be able to
59 continue providing competent representation. [n.12] Depending on the potential impairment, it is
60 possible that the client may accept the limitation and agree to a lesser form of ongoing
61 representation. [n.13] For example, an attorney who must undergo surgery that will render them
62 unavailable for two months may consult with their client who then agrees to delay their cause of
63 action until the attorney has sufficiently recovered and is able to provide competent
64 representation. Alternatively, a client may agree to allow substitute counsel to cover a case while
65 a lawyer goes on any type of leave, including, for example, bereavement leave. If an agreement
66 cannot be found, an attorney must move to withdraw from the case if their condition materially
67 impairs their ability to represent the client.

68 It is worth noting that while an attorney must inform the client and ultimately “withdraw from
69 representation when a physical or mental condition materially impairs their ability to represent
70 the client, there is no obligation for counsel to disclose the details of that condition to the client.”
71 [n.14] Attorneys do not lose their privacy when they declare their oaths as attorneys. But
72 attorneys cannot hide behind this shield of privacy as an excuse to not inform their client of their
73 inability to provide competent and diligent representation.

74 **C. Supervising attorneys and partners have a duty to ensure the attorneys under**
75 **their control do not continue to work when facing a mental or physical condition that**
76 **materially impairs their ability to represent their client.**

77 Under RPC 5.1, partners, managers, and supervisory lawyers, must “make reasonable efforts” to
78 ensure the lawyers under their control conform with the RPCs, including RPC 1.16(a)(2). [n.15]
79 This is understandably tricky when it comes to determining whether an employee’s mental or
80 physical condition is causing them to be “materially impaired” in the context of RPC 1.16(a)(2).
81 Should a supervisory lawyer learn that a lawyer under their authority has a physical or mental
82 condition that materially impairs that lawyer’s ability to represent their client, the supervisor
83 must act to either (a) hopefully avoid any negative consequences to the client, or (b) take
84 reasonable remedial action to minimize those negative consequences. Thus, a partner or
85 supervisory lawyer, for example, may not turn a blind eye if a lawyer under their control is
86 suffering from drug addiction, cognitive decline, or some other mental or physical health crisis
87 simply because such a conversation would be uncomfortable or potentially hurt that attorney’s
88 feelings. [n. 16] Our duties to our clients must supersede the rules of polite decorum.

89 **D. Attorneys should take proactive steps to mitigate the risk that a physical or**
90 **mental condition may cause them to violate the RPCs.**

91 In our lifetimes, most of us will face a personal hardship (whether physical or mental) that will
92 prevent us from being our best selves. Some of us will face a hardship so severe that it
93 temporarily or permanently impairs our ability to provide competent and diligent representation
94 to our client(s). While impossible to predict, it is our duty as attorneys to remain diligent and
95 take proactive steps to prevent these inevitable hardships from negatively impacting our clients.
96 [n. 17] This section aims to point out those of us with the greatest risk and to suggest practical
97 steps we can take to remain aware of our own limitations.

98 In speaking of his film, *Cast Away*, film maker Robert Zemeckis stated, “We don’t function well
99 as human beings when we’re in isolation.” [n. 18] The same is true here. We are at risk when we
100 are alone. Attorneys in government agencies or larger firms have the benefit not only of
101 colleagues who can cover their cases when they are facing a physical or mental hardship causing
102 material impairment, but also colleagues and supervisors who hopefully look out for them to
103 help determine when a specific impairment or condition is simply too big to manage. Many
104 violations of this rule involve solo practitioners not because they are less ethical, but because
105 they lack the combination of peer review and internal support seen in larger agencies. [n.19]

106 So, what can lawyers do to mitigate their risk? Most importantly, they can stay connected to their
107 peers and ensure they have a stable support network—people who can tell them if/when a
108 physical or mental condition is impairing their work. Second, attorneys can reach out for
109 assistance from the WSBA Wellness committee. [n. 20] Third, attorneys can develop a set of
110 trusted attorneys to whom they can refer work in times of difficulty to ensure clients will not be
111 stranded without representation. Fourth, attorneys can lean into their ethical duty to keep their

112 clients informed of any potential impairment. Lastly, a lawyer facing such a dilemma should act
113 promptly rather than delay and hope the material impairment abates or subsides. Not only will
114 delay cause further harm to the client, but the courts are less likely to allow withdrawal late in a
115 case or on the eve of trial. [n.21] If a lawyer is forced to withdraw late in a case that causes
116 potential prejudice to their client, they should be sure to thoroughly document their condition and
117 get leave from the Court. [n.22]

118 III. Conclusion:

119 Determining whether a hardship or condition will cause material impairment is an extremely
120 difficult and deeply personal task. It requires deep personal reflection and honesty with ourselves
121 about our limitations. Often, the judicial decision sanctioning an attorney for violating this
122 provision is accompanied by a deeply tragic story of a lawyer whose hardships quickly
123 overwhelmed them. Their condition prevented them from making the thoughtful and careful
124 decisions they would normally make, including the decision to withdraw, and their clients
125 suffered. As a profession, we should support attorneys who must make the difficult decision to
126 withdraw due to a physical or mental condition that impairs their ability to represent their client.
127 We can do this by reaching across the aisle, by showing compassion, and by offering counsel
128 assistance, even when it is not requested. And if the day comes when we are the ones facing that
129 difficult decision, we also must be willing to ask for help.

130

131 Endnotes:

- 132 1. *State v. Lopez*, 190 Wash. 2d, 104, 410 Pp.3d 1117 (2018) (“attorneys and judges may
133 have disabilities of all kinds, mental as well as physical, but that alone does not disable
134 them from practicing law or adjudicating cases. The ability to be an effective professional
135 depends, instead, on the actual effect of the disability on the attorney’s performance.”)
- 136 2. RPC 1.16(a) states: “Except as stated in paragraph (c), a lawyer shall not represent a
137 client, or where representation has commenced, shall, notwithstanding RCW 2.44.040,
138 withdraw from the representation of a client if: ... (2) the lawyer’s physical or mental
139 condition materially impairs the lawyer’s ability to represent the client;”
- 140 3. ABA Model Rule 1.16.
- 141 4. Mark J. Fucile, *Model Rule 1.16(a)(2): Where Wellness Meets Withdrawal*, American Bar
142 Association, October 02, 2020,
143 [https://www.americanbar.org/groups/professional_responsibility/publications/professiona
145 l_lawyer/27/1/model-rule-116a2-where-wellness-meets-withdrawal/#ref13](https://www.americanbar.org/groups/professional_responsibility/publications/professiona
144 l_lawyer/27/1/model-rule-116a2-where-wellness-meets-withdrawal/#ref13)
- 146 5. *Kessler v. State Farm Fire & Cas. Co.*, No. 3:23-CV-05527-TMC, 2024 WL 4950136, at
147 *2 (W.D. Wash. Dec. 3, 2024); *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Cunningham*,
812 N.W.2d 541, 548 (Iowa 2012).
- 148 6. RPC 1.1 states: “A lawyer shall provide competent representation to a client. Competent
149 representation requires the legal knowledge, skill, thoroughness and preparation
150 reasonably necessary for the representation.”

- 151 RPC 1.3 states: “a lawyer shall act with reasonable diligence and promptness in
152 representing a client.”
- 153 RPC 1.4 governs the communication between a lawyer and their client and requires a
154 lawyer, among other things, to “keep the client reasonably informed of the matter,”
155 “explain a matter to the extent reasonably necessary to permit the client to make informed
156 decisions,” and “promptly comply with reasonable requests for information.”
- 157 7. *In re Disciplinary Proceeding Against Wickersham*, 178 Wash.2d 653, 659 (2013)
158 (upholding a three year suspension against a lawyer who suffered an acute substance
159 induced psychosis).
- 160 8. *See e.g. Riccio v. Committee on Professional Standards*, 426 N.Y.S.2d 887
161 (N.Y.App.Div.1980) (finding an attorney failed to withdraw based on a material
162 impairment caused by open heart surgery); *In re Gudmundson*, 556 P.2d 212 (Utah 1976)
163 (attorney became disabled from eye cataract surgery and could not complete his civil
164 cases, but failed to withdraw).
- 165 9. *See e.g. Cincinnati Bar Association v. Brown*, 678 N.E. 2d 513 (Ohio 1997) (finding that
166 an attorney should not have accepted a new client when suffering from manic depression
167 that rendered the attorney incapable of performing as an attorney); *State v. Ledvina*, 237
168 N.W.2d 683 (Wis.1976); cf. *Annot.*, 50 A.L.R.3d 1259 (1973) (finding that a personality
169 disorder was not a defense to professional misconduct and a lawyer facing a depressive
170 episode should have withdrawn).
- 171 10. *See, e.g., In re Loew*, 642 P.2d 1171 (Or. 1982); see also *In re Loew*, 661 P.2d 922 (Or.
172 1983); *In re Loew*, 676 P.2d 294 (Or. 1984).
- 173 11. *See State ex rel. Oklahoma Bar Ass’n v. Southern (Southern)*, 15 P.3d 1 (Okla. 2000)
174 (lawyer should have moved to withdraw while suffering from a vitamin B-12 deficiency
175 that caused erratic behavior and short-term memory lapses that rendered him ineffective
176 even though he regained competency upon receiving regular B-12 injections).
- 177 12. RPC 1.4(a)(3) states: “a lawyer shall... (3) keep the client reasonably informed about the
178 status of the matter.”
- 179 13. Restatement (Third) of the Law Governing Lawyers § 32, comment g (2000) (“When
180 there is any reasonable possibility that the lawyer should withdraw, the lawyer must
181 inform and advise the client so that the client can decide whether the representation
182 should continue. A client’s informed consent ordinarily relieves the lawyer of any duty to
183 withdraw.”).
- 184 14. *In re Pers. Restraint of Marshall*, No. 81659-4-I, 2023 Wash. App. Lexis 996, at *38 (Ct.
185 App. May 22, 2023).
- 186 15. RPC 5.1 states:
- 187 (a) A partner in a law firm, and a lawyer who individually or together with other
188 lawyers possesses comparable managerial authority in a law firm, shall make
189 reasonable efforts to ensure that the firm has in effect measures giving
190 reasonable assurance that all lawyers in the firm conform to the Rules of
191 Professional Conduct.
- 192 (b) A lawyer having direct supervisory authority over another lawyer shall make
193 reasonable efforts to ensure that the lawyer conforms to the Rules of
194 Professional Conduct.”
- 195 (c) A lawyer shall be responsible for another lawyer’s violation of the Rules of
196 Professional Conduct if:

- 197 (1) the lawyer orders or, with knowledge of the specific conduct,
198 ratifies the conduct involved; or
- 199 (2) The lawyer is a partner or has comparable managerial authority in
200 the law firm in which the other lawyer practices, or has direct supervisory
201 authority over the other lawyer, and knows of the conduct at a time when
202 its consequences can be avoided or mitigated but fails to take reasonable
203 remedial action.”
- 204 16. ABA Formal Opinion 03-429, *Obligations with Respect to Mentally*
205 *Impaired Lawyer in the Firm* (June 11, 2003).
- 206 17. RPC 1.3 mirrors the ABA Model Rule 1.3. Comment 5 to ABA Model
207 Rule 1.3 recommends practitioners prepare a plan in the event of their
208 disability or death that designates another competent lawyer who will
209 serve in a trustee capacity “to review client files, notify each client of the
210 lawyer’s death or disability, and determine whether there is a need for
211 immediate protective action.” It would be prudent for any lawyer
212 experiencing a condition that may cause potential impairment to ensure
213 such a plan is in place.
- 214 18. Dave Kehr, : ‘Cast Away’ Director Defies Categorizing, N.Y. TIMES (Dec. 17,
215 2000), [https://www.nytimes.com/2000/12/17/movies/film-cast-away-director-](https://www.nytimes.com/2000/12/17/movies/film-cast-away-director-defies-categorizing.html)
216 [defies-categorizing.html](https://www.nytimes.com/2000/12/17/movies/film-cast-away-director-defies-categorizing.html).
- 217 19. Mark J. Fucile, *Model Rule 1.16(a)(2): Where Wellness Meets Withdrawal*,
218 American Bar Association, October 02, 2020,
219 [https://www.americanbar.org/groups/professional_responsibility/publications/prof](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/model-rule-116a2-where-wellness-meets-withdrawal/#ref13)
220 [essional_lawyer/27/1/model-rule-116a2-where-wellness-meets-withdrawal/#ref13](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/model-rule-116a2-where-wellness-meets-withdrawal/#ref13)
221 citing *In re Lowe*, 642 P.2d 1171, 1174 (Or. 1982) (Peterson, J., concurring) (“The
222 sole practitioner sometimes has no ear to bend, no ready assistance and no
223 sympathetic counsel.”).
- 224 20. See the WSBA Member wellness program available at [https://www.wsba.org/for-](https://www.wsba.org/for-legal-professionals/member-support/member-wellness-program)
225 [legal-professionals/member-support/member-wellness-program](https://www.wsba.org/for-legal-professionals/member-support/member-wellness-program).
- 226 21. *See e.g. Kessler v. State Farm Fire & Cas. Co.*, No. 3:23-CV-05527-TMC, 2024
227 WL 4950136, at *2 (W.D. Wash. Dec. 3, 2024) (Denying an attorney’s motion to
228 withdraw based on declining mental health issues including a diagnosis of anxiety
229 and depression because there was no substitute counsel available.
- 230 22. *In re Cohen*, 150 Wash. 2d 744, 757, 82 P.3d 224, 230 (2004) (finding that an
231 attorney wrongfully withdrew and that a doctor’s note ordering him to reduce his
232 workload based on stress and depression was insufficient to support his claim of
233 withdrawal under RPC 1.16(a)(2).
- 234