DUTIES OF AN ATTORNEY WHO IS PHYSICALLY UNABLE TO REPRESENT HIS CLIENT

I. INTRODUCTION

Attorneys, despite large popular sentiment these days, are humans and as such, they are subject to the same illnesses and physical disabilities which are likely to strike anyone. It is easy for the physically ill school teacher to call a substitute the morning he wakes up ill and cannot make it to teach school that day. But what is the attorney’s duty who cannot make it to court to represent his client who has been accused of murder because he has been undergoing chemotherapy for treatment of his cancer?

The purpose of this Article is to discuss the duties of an attorney to his clients when the attorney is physically unable to promptly attend to his clients’ business.

II. ANALYSIS: DUTY TO CLIENT

An attorney who is physically unable to attend to his clients’ business has the duty to "act with reasonable diligence and promptness in representing [his] client." The attorney should either withdraw from his representation or employ cocounsel to assist him during his illness.

Counsel, whether well or ill, is under a duty to represent his clients competently. Curtis v. United States Postal Service involved a suit against the United States Postal Service for personal injuries suffered by Curtis as a result of an automobile accident. Curtis failed to comply with Federal Rule of Civil Procedure 4(d)(4) by failing to deliver a copy of the summons and complaint to the United States Attorney. The United States filed a motion to dismiss the action for Curtis’s failure to com-

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1994).
3. See id. at *3.
5. See id.
6. See id.
ply with Federal Rule of Civil Procedure 4(d)(4). Curtis argued that he had good cause for his failure to comply with the Rule because his attorney had been injured in an automobile accident and was undergoing medical treatment which sometimes led to partial paralysis which left the attorney "unable to attend to demanding legal practice." The court stated that the attorney should have either "withdrawn from representation of Mr. Curtis (and all of his other clients), or arranged for cocounsel to monitor his docket during his illness." The court cited Vannoni v. TSO, which held that "counsel, well or ill, is under a duty to represent his clients competently." Vannoni also involved a plaintiff attempting to show good cause for why Rule 4 had not been complied with. The Vannoni court quoted the Pennsylvania Code of Professional Responsibility which stated that "A lawyer shall not . . . (3) neglect a legal matter entrusted to him." The court went on to say that if an attorney is suffering from an illness which interferes with his effective representation of his client, "it should be a matter of common sense to the attorney to withdraw from representation." Under the Vannoni decision, withdrawal of an attorney was governed by Model Code of Professional Responsibility DR 2-110(C)(4). The equivalent Rule under the Model Rules of Professional Conduct is Rule 1.16(a)(2) which states: "A lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." The Vannoni court held that if

7. See id.
8. Id.
9. Id. at *2.
15. See id.
an illness was so serious as to prevent counsel from serving process that counsel should have withdrawn from his representation so that his clients would be able to secure counsel to effectively represent their interests.\textsuperscript{17} The Curtis court followed the reasoning of Vannoni and held that the attorney should have withdrawn from his representation if his injuries were so serious as to prevent him from complying with Rule 4.\textsuperscript{18} The court held that the attorney's illness did not constitute good cause for the purpose of avoiding Rule 4 requirements.\textsuperscript{19}

In Oklahoma Bar Ass'n v. Champion\textsuperscript{20} the Supreme Court of Oklahoma held that an ill attorney's duty to his clients and to the public "was clear; either return the fees, or share his fees and employ competent counsel, or else try the cases."\textsuperscript{21} Champion involved the disciplinary hearing of an attorney who was charged with six complaints by different clients.\textsuperscript{22} Two of the complaints involved criminal cases wherein Mr. Champion represented defendants who were charged with murder.\textsuperscript{23} Prior to the murder trials Mr. Champion had been granted two continuances for the postponement of the trials because he was suffering from a bleeding ulcer.\textsuperscript{24} When the second continuances were granted, notice was given to Mr. Champion that third continuances would not be granted due to his ulcer.\textsuperscript{25} When the cases were called for trial Mr. Champion refused to try them stating that he was unable to because he was physically ill.\textsuperscript{26} Both trials went on without Mr. Champion examining jurors, making opening statements, cross-examining the State's witnesses, or presenting evidence on behalf of the defendants.\textsuperscript{27} In both cases the trial judge offered to declare a mistrial and appoint an attorney to represent the defendants but the defendants refused at Mr. Champion's advice.\textsuperscript{28} One of the defendants was convicted of manslaughter.\textsuperscript{29}

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\textsuperscript{17} See Vannoni, 120 F.R.D at 504.
\textsuperscript{18} See Curtis, 1993 WL 278449, at *3.
\textsuperscript{19} See id.
\textsuperscript{20} 468 P.2d 794 (Okla. 1970).
\textsuperscript{21} Id. at 798.
\textsuperscript{22} See id. at 795.
\textsuperscript{23} See id.
\textsuperscript{24} See id.
\textsuperscript{25} See Champion, 468 P.2d at 795.
\textsuperscript{26} See id. at 796.
\textsuperscript{27} See id.
\textsuperscript{28} See id.
\textsuperscript{29} See id.
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The *Champion* court noted that Mr. Champion had not returned his fees, did not assist his clients in the selection of other counsel, but instead elected to stand mute at their trials. The court stated that lawyers are officers of the court and are therefore responsible for assisting courts in the administration of justice. The court held that as an officer of the court, Mr. Champion's duty was clear and that he failed his duty. He did not return the fees, he did not share the fees and employ cocounsel nor did he try the cases. The court stated that Mr. Champion's conduct was "indefensible and indicate[d] an irresponsibility to his clients as well as to the courts." When an attorney knows in advance that he will be unable to handle a case due to physical illness, he has the duty to familiarize another attorney who will appear for him to proceed with the case. *Refiners Petroleum v. White Water Petroleum Terminals* involved a plaintiff who failed to appear at trial after the case had already been continued thirteen times and dismissed twice for want of prosecution but reinstated each time. The attorney plead that he was suffering from illnesses due to his overwork for the year preceding the trial, including extreme exhaustion, spastic colitis and a cyst in one kidney. The attorney had been hospitalized for six days approximately one month before the trial. He stated that he remained at home pursuant to doctors' advice and that he made only occasional appearances at his office. The Appellate Court of Illinois reversed the trial court's decision to vacate judgment against the plaintiffs and reinstate plaintiff's cause of action. The court held that the attorney had notice of his illness in sufficient time to educate another attorney and have that attorney appear for him.

30. See *Champion*, 468 P.2d at 798.
31. See id.
32. See id.
33. See id.
34. Id.
36. Id.
37. See id. at 749.
38. See id. at 750.
39. See id.
40. See *Refiners Petroleum*, 212 N.E.2d at 750.
41. See id. at 754.
42. See id.
An attorney’s ill health is no excuse for his poor performance.\textsuperscript{43} The Iowa Supreme Court in Committee on Professional Ethics and Conduct of the Iowa State Bar Ass’n v. Robinson\textsuperscript{44} suspended an attorney for six months for her failure to respond to the bar committee’s request for admissions and her neglect of duties as a lawyer.\textsuperscript{45} The attorney in Robinson suffered from physical and emotional health problems.\textsuperscript{46} The Iowa Supreme Court, citing Committee on Professional Ethics and Conduct of the Iowa State Bar Ass’n v. Paulos,\textsuperscript{47} held: “Although we consider these circumstances when determining an appropriate sanction, we do not recognize an attorney’s ill health, emotional problems, or the general stress of the law practice as an excuse for an attorney’s unsatisfactory conduct.”\textsuperscript{48} The Iowa Supreme Court made the same holding in both Paulos and Committee on Professional Ethics and Conduct of the Iowa State Bar Ass’n v. Hoffman.\textsuperscript{49}

The Rule that an attorney who is physically unable to promptly attend to his client’s business has an obligation to refer the clients’ matters to another attorney also applies when the attorney is disabled by alcoholism.\textsuperscript{50} In Hoffman, the Iowa Supreme Court also stated that in addition to physical illnesses, emotional problems, personality disorders, general stress from a busy law practice, and the effects of prescription narcotics and amphetamines on the attorney’s judgment are also not excuses for an attorney’s ethical misconduct.\textsuperscript{51} Hoffman discussed the effects of prescription narcotics and amphetamines on an attorney’s judgment.\textsuperscript{52} The court held that the lawyer had a duty to be sensitive to the circumstances which might impair his judgment, in that case—prescription drugs.\textsuperscript{53}

\textsuperscript{43} See Committee on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Robinson, 458 N.W.2d 393, 394 (Iowa 1990); Committee on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Paulos, 410 N.W.2d 260, 261 (Iowa 1987); Committee on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Hoffman, 402 N.W.2d 449, 451 (Iowa 1987).
\textsuperscript{44} 458 N.W.2d 393.
\textsuperscript{45} See id. at 393.
\textsuperscript{46} See id. at 394.
\textsuperscript{47} 410 N.W.2d 260.
\textsuperscript{48} Id. at 394-95 (citing Paulos, 410 N.W.2d at 262).
\textsuperscript{49} 402 N.W.2d 449.
\textsuperscript{50} See Matter of Tidball, 503 N.W.2d 850, 856-57 (S.D. 1993).
\textsuperscript{51} See 402 N.W.2d at 451.
\textsuperscript{52} See id.
\textsuperscript{53} See id.
Even though physical illnesses will not shield an attorney from his professional responsibility, such illnesses might be considered as a mitigating factor in an attorney's disciplinary hearing.\textsuperscript{54} There is a wide range of punishments for an attorney who has neglected his professional duties.\textsuperscript{55} The various methods of discipline include: removing an attorney from a case, disbarment, suspension for a fixed period, suspension for a fixed period and until rehabilitation, suspension for an indefinite period, probation, and public reprimand.\textsuperscript{56} In addition to these measures which the court or state bar disciplinary board can take, the client, and in some cases a third party, may also sue the attorney for malpractice.

III. CONCLUSION

A lawyer's duty to his clients does not disappear when the lawyer becomes ill. And a lawyer should not lose his common sense and ethical judgment either. The Rules of Professional Conduct make clear what a lawyer's duties are and the cases discussed in this Article illustrate that a physical illness will not be an excuse for the neglect of those duties. Disciplinary review boards may consider the illness as a mitigating factor in some circumstances, but lawyers should never be able to expect to use their own illnesses or injuries as an excuse for neglecting their duties to their clients.

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\textsuperscript{54} See Committee on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Robinson, 458 N.W.2d 393, 394 (Iowa 1990).
\textsuperscript{56} See id.