

OCDC SPOTLIGHT

“Am I My Brother’s Keeper?”: Your Duty to Ensure That Staff and Subordinate Attorneys Comply With the Rules of Professional Conduct

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You attend the CLE courses, you review the Rules of Professional Conduct, and you make sure that whether you are filing a pleading, answering a call from an angry opposing counsel or responding to a client inquiry, every action and interaction complies with the Rules of Professional Conduct. But if you are a supervising attorney or a firm partner, your job does not end there. You may be responsible for ensuring that others comply with the Rules of Professional Conduct and you may be subject to discipline if they don’t. This article will examine an attorney’s responsibility to ensure that the Rules of Professional Conduct are followed by subordinate attorneys and support staff, and that an atmosphere fostering adherence to the rules is established within attorney practice.

WHO MUST BE SUPERVISED?

Missouri Supreme Court Rule 4-5.3 provides that a lawyer having direct supervisory authority over a non-lawyer must take reasonable efforts to ensure that the non-lawyer’s actions are compatible with the lawyer’s professional responsibilities. Certainly this rule arises most commonly with respect to secretaries or administrative professionals, but also applies to investigators and paralegals. Some attorneys are under the misconception that if the staff member is an independent contractor, the attorney cannot be held responsible for the staff member’s actions. While this might be true in tort litigation, it is not the case with the Rules of Professional Conduct.

As long as the staff member is completing tasks at an attorney’s direction and on the attorney’s behalf, the attorney is responsible for ensuring that a staff member is complying with the Rules of Professional Conduct. See Comment to Rule 4-5.3.

A lawyer who has supervisory authority over another lawyer must take reasonable steps to ensure that the subordinate lawyer is conforming to the Rules of Professional Conduct. See Rule 4-5.1(b). In fact, a lawyer is responsible for the misconduct of a subordinate attorney if the lawyer: 1) ordered the conduct; 2) knows about the misconduct and ratifies the conduct; or 3) knows of the misconduct at a time when its consequences can be avoided or mitigated, but fails to take remedial action. See Rule 4-5.1(c). A partner in a law firm has the responsibility of ensuring that subordinate attorneys comply with the Rules of Professional Conduct, but also has a broader responsibility. Rules 4-5.1(a) and 4-5.3(a) provide that a partner must make reasonable efforts to ensure that the firm has taken steps calculated to assure that a non-lawyer’s conduct is in accord with a lawyer’s ethical obligations, and that all lawyers in the firm are conforming to the Rules of Professional Conduct. Quite simply, a partner in a firm or a manager in a governmental agency must foster an atmosphere of adherence to the Rules of Professional Conduct.

SUPERVISING NON-LAWYER STAFF

Your secretary likely has direct contact with your clients, access to your files,

and may even have access to client trust accounts. As such, it is imperative that you make efforts to ensure that your support staff does not take action that jeopardizes your ethical obligations. A lawyer must give anyone completing tasks on behalf of the lawyer appropriate instruction concerning the ethical aspects of their position. See Comments to Rule 4-5.3. This means ensuring that secretaries do not mishandle client funds, disseminate legal advice, or divulge confidential client information to third parties. Lack of instruction regarding communications with third parties and with clients presents a substantial opportunity for a rule violation. For instance, a secretary may answer the telephone, take messages, and provide cursory information to a client, but must also be aware of the attorney’s ethical obligation to communicate with clients and do nothing to substantially prohibit client access to the supervising attorney. Likewise, a secretary should be instructed that it is inappropriate to offer legal guidance or opinion on any aspect of the representation. If your secretary is instructing your clients on how to fill out bankruptcy schedules, or offering guidance on the tax consequences of probate matters, then you have likely failed to properly supervise your staff and may be assisting in the unauthorized practice of law.

Attorneys must also provide supervision during the completion of a task. See Comments to Rule 4-5.3. Many attorneys utilize investigators or

paralegals to complete tasks such as witness interviews. Informal Advisory Opinion¹ 950038 warns, however, that if an investigator makes ex parte contact with witnesses whom an attorney could not make appropriate contact, then the supervising attorney has failed to properly supervise the staff member. If you cannot do something as an attorney under the Rules of Professional Conduct, then you must supervise your support staff to ensure that they don't do it either.

Finally, an attorney must review and approve the final product. See Comments to Rule 4-5.3. It is commonplace to use a paralegal to draft certain pleadings and more commonplace for secretaries to produce form correspondence. But if the supervising attorney does not approve the final product and an ethics violation occurs, it is the attorney who will ultimately be responsible. For instance, if your paralegal drafts a pleading that contains false information, you will be responsible for having submitted false information to the court and possibly failing to supervise your support staff. The Office of Chief Disciplinary Counsel receives a significant amount of complaints concerning notaries. If a notary in your office is notarizing blank documents to be filled in later, or notarizing signatures when the signator is not present, and you utilize those documents in court, then you could face multiple ethics violations, including the failure to supervise your non-lawyer staff.

SUPERVISING SUBORDINATE LAWYERS

Members in a partnership, shareholders in a law firm, managers in a governmental agency and even lawyers who have intermediate managerial duties are in some respect responsible for ensuring that the firm or agency, and the subordinate attorneys in it, comply with the Rules of Professional Conduct. A lawyer in one of these roles must ascertain the needs

of the firm or agency in which they work. For example, in a small firm consisting of four attorneys, informal supervision may be sufficient to ensure that subordinate attorneys are adhering to the rules. See Comments to Rule 4-5.1. The Comments also provide that, in a large firm, partners may need to rely on regular continuing legal education to ensure that all attorneys understand their ethical obligations. Some large firms may wish to implement a procedure whereby attorneys in the firm can confidentially report an ethics violation. *Id.* The American Bar Association has even suggested that the Rules of Professional Conduct require firms to establish ethics committees as a resource for firm attorneys who have questions. See "Report of Committee on Professionalism," 111 Reports of the American Bar Association NO. 2 at 397 (1986). If the management in a large firm makes clear that adherence to the Rules of Professional Conduct is a necessary and mandatory function of all lawyers' duties within the firm, it will surely effect the way that lawyers in the firm conduct themselves.

Further, to foster an atmosphere that is conducive to ethical behavior, a supervising attorney must be aware of a subordinate attorney's *ability* to adhere to the rules. Other state supreme courts have determined that a partner violates his or her ethical duty to supervise a subordinate attorney if the partner imposes overly burdensome working conditions that diminish the subordinate attorney's ability to adhere to the Rules of Professional Conduct. ABA/BNA Lawyers Manual on Professional Conduct, *Supervisory and Subordinate Lawyers* § 91:103 (2005) (citing *Davis v. Alabama State Bar*, 676 So.2d 306 (Ala. 1996) (partner violated Rule 4-5.1 where partner required associates to carry a large caseload, restricted the amount of time that could be spent with clients, and prohibited the return of client phone calls); *Attorney Grievance Commission v. Ficker*, 706 A.2d 1045 (Md. 1998) (supervising attorney assigned too many

cases to allow subordinate attorneys to adequately represent clients as proscribed by the Rules of Professional Conduct)).

Whether a lawyer has direct supervisory authority over the performance of another attorney is subject to the surrounding circumstances and is a question of fact. Comments to Rule 4-5.1(c). This would suggest that an attorney does not have to carry the label of a "manager" to be responsible for the ethical conduct of a subordinate attorney. As long as there is supervisory control over the work of another, a supervising attorney may be responsible for the subordinate attorney's ethical misconduct.

A supervising attorney is expected to intervene to prevent the "avoidable consequences" of misconduct if the supervising attorney knows that misconduct has occurred. Appropriate remedial action will depend on a number of factors, including the level to which the supervising attorney was involved in the project and the seriousness of the misconduct. See Comments to Rule 4-5.1. In handling any delegation of duties, however, it is best to keep in mind that "an ounce of prevention is worth a pound of cure."

ATTORNEY DUTY TO THE PROFESSION

While the Supreme Court of Missouri does not appear to have spoken directly to the consequences of failing to supervise non-attorney staff and subordinate attorneys, prior to the enactment of the Missouri Rules of Professional Conduct the Court did hold an attorney responsible for his bookkeeper's failure to accurately account for client funds, even though the attorney claimed he was unaware of the problems with the bank account. *In re Williams*, 711 S.W.2d 518 (Mo. banc 1986). The Court stated that the subject attorney had been generally aware of ongoing problems with the trust account, yet knowingly exposed a

client's funds to the "unstable account" and "must be held accountable to the same degree as if he had known of the specific problems encountered with the [client] payment." *Id.*

The Missouri Supreme Court considers the attorney sanctioning guidelines as contained in the American Bar Association model rules for attorney discipline ("ABA Standards"). *In re Crews*, 159 S.W.3d 355, 360 (Mo. banc 2005). The ABA Standards indicate that failure to adequately supervise a subordinate attorney or non-attorney is a violation of an attorney's duty to the profession and can draw a range of discipline, from an admonition for an isolated incident of negligence to disbarment for knowingly engaging in conduct that is a violation of an attorney's duties.

Other state supreme courts have unequivocally held attorneys responsible for failure to supervise non-attorney staff. See e.g. *Mahoning County Bar Assoc. v. Lavelle*, 836 N.E.2d 1214 (Ohio 2005) (attorney suspended where his inattention to the

office and its personnel allowed attorney's secretary to place false information in documents and forged signatures on notarized statements); *In re Sledge*, 859 So.2d 671 (La. 2003) (attorney disciplined where non-attorney support staff handled all non-litigation files by settling and closing cases with little to no supervision and instruction from attorney); *In re Harrell*, 617 S.W.2d 368 (S.C. 2005) (attorney disciplined for failure to supervise a paralegal who filed an incorrect real estate deed); *In re Kalal*, 704 N.W.2d 575 (Wis. 2005) (attorney suspended for failure to monitor bookkeeping that resulted in inaccurate accounting of an employee 401k administration).

State supreme courts have likewise spoken to the discipline to be imposed for failure to supervise subordinate attorneys. See e.g. *In re Froelich*, 838 A.2d 1117 (Del. 2003) (citing *In re Bailey*, 821 A.2d 851 (Del. 2003) (where the court held that, as a managing partner, the attorney had "enhanced duties, vis-à-vis other lawyers and employees of the firm, to ensure compliance with record keeping and tax obligations.")); *In re Conwell*, 69

P.3d 589 (Kan. 2003) (court found that attorney should have known associates were mishandling due diligence fees and failed to take remedial steps to protect client funds); and *In re Chasanov*, 886 A.2d 1277 (Del. 2005) (where firm entered into an agreement with the disciplinary authority, partner in the firm disciplined for failure to ensure that the agreement was implemented within the firm.).

In conclusion, the Rules of Professional Conduct do not require you to "babysit" your colleagues and they do not require you to micro-manage your non-attorney staff. The rules require each attorney in the state of Missouri to take reasonable steps to ensure that subordinate staff and attorneys are adhering to the Rules of Professional Conduct and that your place of business is one in which ethical behavior is fostered.

Footnotes

¹ Informal Advisory Opinions are non-binding opinions issued by the Legal Ethics Counsel.

NEWS TO USE

DOJ Offers Forensic DNA Training Resource

The Department of Justice now has a CD-ROM available for interactive training on the use of forensic DNA in judicial proceedings.

The training program is designed primarily for prosecutors, defense attorneys, judges and other officers of the court. It describes DNA

technologies and the legal issues that arise when DNA evidence is presented in court, including: the biology of DNA (including statistics and population genetics); DNA laboratories; quality assurance in testing; understanding a laboratory report; forensic databases; victim issues; presentation of DNA

evidence at trial; and post-conviction DNA cases.

The CD-ROM is available by contacting the National Criminal Justice Reference Service at www.ncjrs.gov or call 800-851-3420 (ask for NCJ 212399). There is also an online tutorial available at www.dna.gov.