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Good Help: Lawyers' Responsibilities for Staff Conduct

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For many of us, we couldn't do our jobs as lawyers without the great support we get from our nonlawyer staff. We as lawyers have long been responsible for the ethical conduct of our nonlawyer staff or other assistants. For example, the Oregon Supreme Court in *In re Osites*, 333 Or 366, 40 P3d 500 (2002), disciplined a lawyer when his investigator misrepresented his identity during a witness interview. The new Oregon Rules of Professional Conduct now make that duty explicit.

RPC 5.3(a) requires that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." RPC 5.3(b), in turn, provides that "a lawyer shall be responsible for conduct of . . . [nonlawyer staff] . . . that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders, or with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." The official commentary to the analogous ABA

Model Rules emphasizes that it is the lawyer's responsibility to both train staff in the professional obligations that we must all observe and then to supervise staff to ensure compliance.

Let's look at three areas in particular that illustrate both the importance of training and obligation to supervise.

Confidentiality. Our confidential communications with clients are often channeled through our staff and our staff is frequently privy to confidential client information. The Evidence Code recognizes this reality by incorporating staff within the attorney-client privilege through OEC 503(1)(e)'s definition of "representative of the lawyer": "One employed to assist the lawyer in the rendition of professional legal services." If I relay my legal advice to a client through my secretary or paralegal, therefore, it should fall within the attorney-client privilege just as if I had spoken to the client myself provided that the requisite confidentiality is maintained in those communications. It is on this last point that the lawyer's obligation to train staff is underscored: we need to provide staff with the requisite training so that they maintain the attorney-client privilege and the related confidentiality obligations under RPC 1.6. Just as a lawyer shouldn't reveal confidential client information while chatting on the sidelines of a child's soccer game, so, too, with staff who are privy to that same information.

Contacts with Witnesses. Paralegals and other staff are often key players in locating and interviewing witnesses. Lawyers need to ensure that staff are

familiar with RPCs 4.1 (truthfulness in statements to others), 4.2 (communications with represented parties) and 4.3 (dealing with unrepresented persons). RPC 4.2 highlights the importance of training in this area because it holds the lawyer liable for an unauthorized contact with a represented party both if the lawyer does it directly or if the lawyer “cause[s] another to communicate” in a prohibited manner.

Billing. The Oregon State Bar has issued a number of ethics opinions that touch on various aspects of timekeeping and billing practices. They are all framed around the description that the Oregon Supreme Court gave of the attorney-client relationship in *In re Howard*, 304 Or 193, 210, 743 P2d 719 (1987): “one of special trust and confidence” that “must be characterized by fairness, honesty and good faith.” Just as lawyers must make sure that their own time entries are fair and accurate, they must also make sure their staff timekeepers know and observe the appropriate standards.

Providing legal services today in many ways isn’t all that different than when my mother was a legal secretary 50 years ago. It’s a team effort and some of the most important members of the team are our nonlawyer staff. We owe it to our clients and to our staff to make sure that our staff has the training to both do their jobs well and in keeping with the RPCs. And, in the final analysis, it’s our licenses and reputations as lawyers that are on the line if we haven’t taken the time to properly train staff and something goes wrong.

ABOUT THE AUTHOR

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