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Good Help: Lawyer Responsibility for Staff Conduct

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Law practice has long been a team effort, with many key roles played by nonlawyer staff. Although the Rules of Professional Conduct are not directly applicable to nonlawyer staff, the RPCs instead impose supervisory duties on the lawyers who have management responsibility for staff. In this column, we'll first survey our supervisory duties for staff under the RPCs. We'll then turn to three areas that provide recurring illustrations: conflicts; trust accounting and billing; and litigation conduct.

Before we do, however, three preliminary points warrant comment.

First, although our emphasis is on the RPCs, lawyers and their firms are also responsible for staff errors that lead to malpractice claims. As the Court of Appeals put it in *Tegman v. Accident & Medical Investigations, Inc.*, 107 Wn. App. 868, 876, 30 P.3d 8 (2001), *reversed on other grounds*, 150 Wn.2d 102, 75 P.3d 497 (2003): “[A]ny deficiency in the quality of the supervision or in the quality of . . . [staff] . . . work goes to the attorney’s negligence[.]”

Second, although our focus in this column is on supervisory duties, lawyers are also responsible for directly ordering staff misconduct. Under RPC 8.4(a), lawyers are prohibited for violating the RPCs “through the acts of another.” In *In re Dynan*, 152 Wn.2d 601, 609-10, 98 P.3d 444 (2004), and *In re*

Haskell, 136 Wn.2d 300, 307-08, 962 P.2d 813 (1998), for example, the lawyers involved were disciplined for directing staff to, respectively, improperly alter fee petitions submitted to courts and improperly alter travel expenses submitted to a client.

Third, although we most often use the term “staff” to describe law firm employees, both the comments to the RPCs (see, e.g., RPC 5.3, Comment 1) and the ethics opinions (see, e.g., WSBA Advisory Op. 1996 (2003)) note that our supervisory duties also extend to independent contractors who work with us.

Supervisory Duties Generally

Supervisory duties in the law firm or legal department context come in two forms—one general and one specific.

First, RPC 5.3(a) requires law firm partners or those with “comparable managerial authority” to undertake “reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that . . . [staff] . . . conduct is compatible with the professional obligations of the lawyer[.]” The comments to RPC 5.3 explain that this general duty is oriented around implementing internal policies and procedures consistent with lawyers’ duties under the RPCs.

Although nominally phrased in terms of “law firms,” corporate and governmental legal departments are included in the definition of “firms” under RPC 1.0(c). The ethics opinions (see, e.g., WSBA Advisory Ops. 2018 (2003) (legal department staff) and 2219 (2012) (examining the analogous provision—RPC 5.1(a)—

addressing supervision of firm lawyers)) emphasize that what constitutes “reasonable efforts” varies with the particular circumstances involved.

Second, RPC 5.3(b) imposes a specific duty on a lawyer who has direct supervisory authority over staff to “make reasonable efforts to ensure that . . . [staff] . . . conduct is compatible with the professional obligations of the lawyer[.]” The Washington Supreme Court in *In re Trejo*, 163 Wn.2d 701, 727, 185 P.3d 1160 (2008), noted that a supervising lawyer doesn’t necessarily need to know of or participate in the staff misconduct involved to violate RPC 5.3(b). Rather, the Supreme Court in *Trejo* emphasized that a *knowing failure to supervise* triggers a violation.

Conflicts

Under the “firm unit rule,” RPC 1.10, a firm lawyer’s conflicts are generally imputed to the firm as a whole. The firm unit rule can come into play in two relatively common situations that have been extended to staff.

First, when a staff member joins a firm, the nonlawyer may bring a conflict to the “new” firm from an “old” firm just like a lawyer. For example, a paralegal or secretary working opposite a firm may join the firm while the matter involved is still being litigated. The United States District Court for the Eastern District in *Daines v. Alcatel, S.A.*, 194 F.R.D. 678 (E.D. Wash. 2000), allowed a firm to successfully screen a nonlawyer in this circumstance to avoid disqualification. When the RPCs were subsequently updated in 2006, the Supreme Court cited

Daines and adopted a specific comment (Comment 11) to RPC 1.10 that includes staff within both the imputed conflict rule and RPC 1.10's screening mechanism.

Second, when a lawyer leaves a firm with a matter the lawyer's conflicts generally leave with the lawyer unless the firm remains involved in the same or substantially related matter and other lawyers remain at the firm who were privy to the confidential information of the client involved. Although the rule involved, RPC 1.10(b)(2), is framed in terms of "lawyers," the United States District Court for the Western District in *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F.Supp.2d 1055, 1065 (1999), also examined whether staff members with confidential information remained behind when a lawyer who had principally handled a matter moved to a new firm and the old firm later took on a related matter on the other side. Relying in part on the fact that staff who had the client's confidential information remained behind, the District Court disqualified the old firm.

Trust Accounting and Billing

Trust accounting and billing are tasks that are often handled by firm staff. Although lawyers are permitted to delegate these tasks, the responsibility for problems almost always remains with the firm.

In the *Trejo* case noted earlier, for example, a lawyer's secretary who handled his trust account stole client funds. The lawyer was suspended for three months, with the Supreme Court concluding (163 Wn.2d at 727): "[A]lthough he

did not know about or participate in . . . [the secretary's] . . . check floating and misappropriation, he knew that he had completely abdicated all responsibility for complying with the ethical requirements of trust accounting to a nonlawyer assistant.” Where a firm employee has stolen client funds, the firm’s problems can extend well beyond regulatory discipline. In *Stouffer & Knight v. Continental Cas. Co.*, 96 Wn. App. 741, 982 P.2d 105 (1999), for example, the Court of Appeals affirmed the denial of coverage for a secretary’s embezzlement of client funds under a “dishonesty” exclusion in the firm’s malpractice policy. Similarly, in *Bank of America NT & SA v. Hubert*, 153 Wn.2d 102, 101 P.3d 409 (2004), a law firm was found liable to its bank when a paralegal used the firm’s trust account for a check-kiting scheme.

In re Vanderbeek, 153 Wn.2d 64, 77, 101 P.3d 88 (2004), in turn, involved failure to adequately supervise a law firm office manager in client billing. The office manager added unauthorized charges to client bills and improperly manipulated both time and rates on client bills. The supervising lawyer was disciplined, with the Supreme Court commenting: “Because of . . . [the lawyer’s] . . . failure to respond to client complaints, monitor . . . [the office manager’s] . . . billing practices, and her ‘willful failure’ to learn more about her firm’s billing system, the hearing officer concluded that the WSBA had proved that she violated RPC 5.3(a) and (b).”

Litigation Conduct

Richards v. Jain, 168 F.Supp.2d 1195 (W.D. Wash. 2001), illustrates firm responsibility for staff litigation conduct. In *Richards*, a law firm's client in a stock option dispute with his former employer provided the firm with a disk that included virtually all of his emails from the five years that he had been a senior executive with the company concerned. The firm lawyers handling the case gave the disk to their paralegal and asked him to search the disk for any useful information. Although the client's position involved regular contact with the company's inside and outside counsel, the firm lawyers did not instruct the paralegal on what to do if he discovered any attorney-client communications on the disk. By the District Court's later count, there were 972 such messages on the disk. The District Court disqualified the firm for improperly invading privilege. In doing so, the District Court focused on both the lawyers' use of the attorney-client communications without first litigating waiver and the failure to instruct the paralegal. As the District Court put it (at 168 F.Supp.2d 1199 n.2): "Equally shocking to the Court is the failure of . . . [the lawyer] . . . to explicitly alert . . . [the paralegal] . . . that the [d]isk might have confidential or privileged materials and to caution him to stop his work if such were discovered."

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