

## RESPONSIBILITY FOR OTHERS REDUX

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Reprinted from *Bench & Bar of Minnesota* (December 1994)

It is hard to figure when responsibility went out of fashion, but the popular press says it's true — we're a nation of victims. Shirking responsibility for our actions. Looking for an excuse. Some argue that lawyers are responsible for creating a society where acknowledging responsibility can bankrupt but an excuse can exculpate. And yet lawyers themselves are held to the highest standards of responsibility, not only for their own actions but sometimes for the misconduct of others.

Every lawyer licensed to practice law in Minnesota is of course responsible for ensuring that his or her personal professional conduct comports with substantive ethical requirements found in the Minnesota Rules of Professional Conduct (MRPC). The Rules also impose responsibilities on lawyers to ensure that others conform to the ethical standards. Rule 5.1 sets out a lawyer's responsibilities as to other lawyers.[Ftn 1](#) Rule 5.3 sets out a lawyer's obligations with respect to nonlawyers.[Ftn 2](#)

Under Rules 5.1 and 5.3, partners must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers and nonlawyer assistants in the firm conform to the Rules.[Ftn 3](#) What are reasonable efforts? There is no objective safe harbor applicable to all partners in all firms. What is reasonable for a partner in a 100-plus lawyer firm with offices throughout the country or throughout the world may not be reasonable for a partner in a two-person firm. But the Rules don't allow partners to hide their heads in the sand. Rule 5.1 places on partners the responsibility for setting up reasonable systems to ensure that all lawyers in a firm know their ethical responsibilities and act accordingly.

## RESPONSIBILITY FOR SYSTEMS

A firm advertised its services in the yellow pages. A secretary dealt with the phone company representative regarding the ads. Before each publication the phone company sent copies of the proposed ad to the firm for approval. One year the phone company on its own initiative added the term "specialist" to the listing title. No lawyer in the firm, however, was certified as a specialist in any field by any organization approved by the State Board of Legal Certification. The ad appeared that year and the next in the yellow pages listings.

An admonition was issued to a partner in the firm who accepted responsibility for the firm and whose secretary had dealt with the phone company. The partner violated Rule 5.1(a) and 5.3(a). He had failed to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that the lawyers in the firm conform to the Rules, here the advertising rule regarding specialists, Rule 7.4(b), MRPC. The firm's measures weren't adequate because no lawyer reviewed the ads before or after publication. The lawyer had also failed in his responsibility to ensure that his secretary was apprised of the

rules regarding advertising.

This example makes clear that partners are also responsible for setting up systems at their law firm to ensure that nonlawyers comply with the Rules. Education as to what is permissible and/or impermissible conduct is the key component for nonlawyers, but vigilant supervision of the system is no less critical. Adequate systems governing trust accounts, billing practices, expense reimbursement, advertising and marketing, and applying to all lawyers and/or nonlawyers in the firm, can reduce a law firm's risk exposure substantially.

A classic example of where lawyers have run afoul of such systems responsibilities under Rule 5.3 is with client trust accounts. Most lawyers delegate the task of maintaining client trust accounts, as well as firm business accounts, to nonlawyers. The responsibility for proper maintenance of those accounts, however, rests with the lawyer. *See, e.g., In re LaChappelle*, 491 N.W.2d 17 (Minn. 1992).

The Director's Office received an overdraft notice of a firm's trust account. The firm's investigation of the overdraft showed that for several years the firm had improperly paid annual attorney registration fees for its lawyers from the trust account. Nearly half the fees had been paid with client money. The shortages weren't discovered for a number of years because the firm did not regularly reconcile the trust account, as required by the Rules. On receipt of the notice the firm immediately deposited funds to rectify the shortage. The firm during those same years had improperly allowed a nonlawyer employee to sign trust account checks, which included the checks for the attorney registration fees. The partner with signatory authority over the trust account was issued an admonition.

### **RESPONSIBILITY FOR LAWYERS' MISCONDUCT**

Partners are also sometimes responsible under the disciplinary rules for the misconduct of other partners or lawyers in the firm. If a partner knows of another lawyer's misconduct at a time when the consequences can be avoided or mitigated, but fails to take reasonable remedial measures, Rule 5.1 places responsibility for the misconduct on both lawyers. A partner's failure to adhere to this rule can have serious disciplinary consequences as is evident from a case now pending in the disciplinary system.

A petition for public discipline alleging violations of conflict of interest rules, conduct involving dishonesty, fraud, deceit or misrepresentation, as well as Rule 5.1(c) is currently pending against a Minnesota lawyer.<sup>Ftn 4</sup> Millions of dollars of loans had been arranged by the attorney's law firm between several of the law firm clients, from the clients to the law firm, and from the clients to each of the two lawyers in the firm.<sup>Ftn 5</sup>

After the disciplinary hearing, the referee found that although the lawyer's partner was more directly involved in solicitation of the loans, the lawyer was a direct recipient of some loans and was a signatory and guarantor of certain loans. The referee found that in addition to other rule violations, the lawyer was responsible for his partner's misconduct under Rule 5.1(c). He knew of the partner's misconduct at a time when its consequences could have been avoided or mitigated. By serving as signatory and/or guarantor of certain of the loans, he ratified the partner's conduct. He failed to take remedial action at a time when the injury, or further injury, to the clients could have been avoided. The case is pending at the Court for imposition of discipline.

### **DIRECT SUPERVISOR'S RESPONSIBILITIES**

Lawyers who have direct supervisory responsibility over other lawyers – whether associates, independent contractors, or partners – have an obligation under Rule 5.1(b) to make reasonable efforts to ensure that the lawyers they supervise conform to the Rules. The level of supervision required is not objectively quantifiable; instead, reasonableness is judged based upon all of the circumstances. For example, among the factors considered are the qualifications and experience of the lawyer being supervised, the complexity of the matter assigned, the supervisor’s familiarity and prior experience working with the lawyer being supervised, etc.

A lawyer had handled a number of matters over the years for a particular client. In 1986 he assigned a new matter to an associate to handle. In October 1986 the associate made an offer of settlement on the case. After the offer was rejected by the defendant, the associate did nothing else on the file, and left the firm in early 1988. The supervising lawyer then took direct responsibility for the file. The client placed numerous calls to the supervising attorney during the course of the representation, asking the status of the case. The supervising attorney told the client, without ever checking the file, that he was awaiting a court date. Concerned about the delay, in 1989 the client hired an attorney from a different firm to handle the file. The new attorney’s review of the file showed that no depositions or witness statements had been taken, and no note of issue filed. The case was settled on behalf of the client by the new attorney, but for half the amount originally sought, due to the difficulties in the neglected file. The supervisor was admonished for failing to ensure that the associate pursued the matter, failing to review the file to determine its status, and failing to pursue the claim diligently himself.

Direct supervisors of other lawyers’ work may also violate the Rules, if, like partners, they ratify or know of misconduct of the lawyer they are supervising at a time when the consequences can be avoided or mitigated and they fail to take remedial measures.

As law firms have mushroomed in size in the last decade, the problems of setting up systems that will reasonably ensure that lawyers and nonlawyers alike comply with the ethical rules have become more complicated. Many firms, large and small, are addressing the issues of education, supervision, and compliance as to systems issues through use of firm ethics committees. A properly functioning ethics committee can be an excellent means to help establish an ethical atmosphere within a firm. Committee members can assist individual lawyers confronted with professional responsibility issues, while overseeing systemic issues that can have serious implications in both lawyer disciplinary proceedings and malpractice cases.

## NOTES

<sup>1</sup> *The responsibility that lawyers bear under Rules 5.1 and 5.3 is coupled with their burden under Rule 8.3 to report to the Director’s Office violations of the Rules that raise a “substantial question as to the lawyer’s honesty, trustworthiness or fitness.”*

<sup>2</sup> *See Rule 5.1, Responsibilities of a Partner or Supervisory Lawyer, M.R.P.C.*

<sup>3</sup> *See Rule 5.5, Responsibilities Regarding Nonlawyer Assistants, M.R.P.C.*

<sup>4</sup> *In re Petition for Discipline against Bruce P. Wyant, No. C3-94-519.*

<sup>5</sup> *The petition for discipline charges that the loans were not fair and reasonable transactions: the clients were not advised of the high-risk nature of the loans, or to seek the advice of independent counsel, or that the interests of the law firm and/or lawyer-borrowers were adverse to those of the client-lenders.*