

# Your ethical duty of supervision

**A**s 2019 comes to a close, I would like to focus on your ethical duties as a supervisor. Attorneys sometimes supervise other attorneys and frequently supervise non-attorney staff. While professional ethics certainly govern your personal behavior and choices, the rules also place upon you specific duties related to the ethical conduct of others. This is an important responsibility, and worth a review.

## Who is covered?

Rule 5.1 sets the stage. The rule places specific responsibilities on principals in a legal organization, whether it's a law firm, legal services organization, law department, or government agency.<sup>1</sup> The rule covers not only a managing partner, but extends (depending on the form of the organization) to all members of a partnership or association and all shareholders. And don't be distracted by the rule's use of the term "law firm." By definition, the rule covers other forms of legal organizations beyond law firms.<sup>2</sup> Partners or managers are also not the only ones with obligations regarding the acts of others. The responsibilities also



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apply to anyone having direct supervisory authority over another lawyer.<sup>3</sup> Whether a lawyer has supervisory authority over another in a particular circumstance is often a question of fact.

More broadly, Rule 5.3 extends the same responsibilities to nonlawyers who are employed, retained, or associated with the lawyer.<sup>4</sup> Nonlawyers are not bound by the ethics rules (nor subject to discipline by the

Office of Lawyers Professional Responsibility), but partners, shareholders, managers, and direct supervisors are charged with the responsibility to ensure any nonlawyer with whom they associate acts in a manner compatible with the lawyer's ethics. This covers a broad range of people: Secretaries, paralegals, investigators, law clerks, document management providers, and other vendors that assist the lawyer in the rendition of legal services are all covered, whether they are employees, independent contractors, or third-party vendors.<sup>5</sup> If you have direct supervisory or managerial authority over another lawyer or nonlawyer personnel, you have an ethical obligation regarding those individuals, whether or not they are employed by your organization.

## EXAMPLE:

An attorney failed to supervise or establish adequate measures to prevent his long-time office manager from stealing client and firm funds. The attorney received a lengthy suspension.

## What is the responsibility?

The responsibility is tailored to the role. For those in a management or ownership role, the responsibility is to "make reasonable efforts to ensure that the [organization] has in effect measures giving reasonable assurance that all lawyers in the [organization] conform to the Rules of Professional Conduct."<sup>6</sup> Thus, the responsibility is to establish measures reasonably tailored to "assure" that the lawyers in the organization comply with the rules. With respect to nonlawyers, the responsibility of

managers and owners is, similarly, to "make reasonable efforts to ensure that the [organization] has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligation of the lawyer."<sup>7</sup>

For direct supervisors, the responsibility is more direct: Make reasonable efforts to ensure that the lawyer's conduct complies with the ethics rules and the nonlawyer's conduct is compatible with the lawyer's ethics.<sup>8</sup> While one may rely generally on continuing legal education in professional ethics, particularly for lawyers, such education alone is insufficient to satisfy the managerial obligation to establish effective measures. Nor does it alleviate direct supervisory responsibilities.

## How do you discharge this responsibility?

The text of the rule itself provides no guidance on how to discharge this responsibility but the comments to Rules 5.1 and 5.3 do, and they're worth a read. Because the measures will vary depending on size and the nature of practice, one size does not fit all. For most legal organizations, areas to address likely include:

- conflicts;
- deadlines and diligence;
- communication;
- accounting for client funds and property;
- protection of confidential information;
- marketing practices;
- contact with represented parties;
- security of technology;
- the unauthorized practice of law;
- lawyer impairment;
- reporting violations; and
- harassment and discrimination.

Policies and procedures should exist on these topics specific to lawyers and nonlawyers, as well as any other ethics topic relevant to your area of practice.<sup>9</sup> As with all effective compliance programs, effective measures do not stop with policies and procedures.



You need to include training for lawyers and nonlawyers, and an audit or review program to understand effectiveness. Only then, it seems to me, can you feel confident that you have “measures” in place to “assure” compliance, which is what the rule requires. I also recommend that you spend time thinking about the unique challenges in your environment or practice that affect supervision. For example, do many people work remotely or have flex schedules? Do your policies and procedures work if people are not physically present?

As the comments also note, you should think about the ethical atmosphere of the organization—the “tone at the top.”<sup>10</sup> If you asked the lawyers and staff in your organization, would they say compliance with professional ethics is important and expected, and they know how to do their jobs in a compliant manner? Or are you relying on people to figure it out? Do you have competing policies or practices that are antithetical to compliance with the ethics rules? Do people know where to turn for answers when questions arise? Do you have confidential “up-the-ladder” reporting avenues where violations or close questions can be addressed? Are there meaningful consequences for noncompliance, depending on the seriousness of the issue, or is everyone just happy the Office of Lawyers Professional Responsibility didn’t find out about it? If noncompliant conduct was found, did you look to see if there were others instances of noncompliance that point to a systemic issue, or did you just address the issue in isolation?

What will work best for your legal organization will depend on many factors, but asking yourself these

questions will help you determine whether you have “measures” in place to “assure” compliance.

### When is professional discipline imposed?

As the comment to Rule 5.1 makes clear, vicarious civil and criminal liability for the acts of others is beyond the scope of the ethics rules.<sup>11</sup> Nor are you strictly liable for the conduct of others. However, you can be professionally liable under these rules in basically three ways: (1) You are a covered attorney who did not have reasonable measures in place, or make reasonable efforts appropriate to your role, and misconduct occurred; (2) you order or, with knowledge of the conduct, ratify the misconduct; or (3) you are a covered attorney, you know of the misconduct at a time when consequences can be avoided or mitigated, and you fail to take remedial action.<sup>12</sup>

Lawyers have been disciplined recently under Rule 5.1 and Rule 5.3, both publicly and privately. For example, a solo attorney failed to put adequate measures in place to prohibit and detect the fact that her paralegal was forging her name on numerous pleadings and falsely notarizing affidavits of service in multiple cases.<sup>13</sup> The attorney received a public reprimand. In another case, an attorney failed to supervise or establish adequate measures to prevent his long-time office manager from stealing client and firm funds.<sup>14</sup> The attorney received a lengthy suspension. In both instances, trusted employees engaged in conduct wholly incompatible with the lawyer’s professional responsibilities, and the lawyer was disciplined.

Finally, do not forget your obligation under Rule 8.3, MRPC. If you know that another lawyer has committed

a violation of the rules that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer, you have an ethical obligation to report to this Office.

### Conclusion

Because even the most trusted of personnel can engage in wrongdoing, the ethics rules focus on effective compliance measures—something you no doubt talk to your business clients about frequently. If you have good policies and procedures, train your lawyers and nonlawyers, and audit your organization’s compliance with your policies and procedures, you will likely deter noncompliance in the first place or detect it before it poses a professional issue for you. As 2020 starts, resolve to review your organization’s compliance with Rules 5.1 and 5.3, MRPC. Please call the ethics advisory line at 651-296-3952 if you have questions about your ethical responsibilities. ▲

### Notes

<sup>1</sup> Rule 5.1(a), Minnesota Rules of Professional Conduct (MRPC).

<sup>2</sup> Rule 1.0(d), MRPC; Rule 5.1(a), Cmt. [1].

<sup>3</sup> Rule 5.1(b), MRPC.

<sup>4</sup> Rule 5.3(a) and 5.3(b), MRPC.

<sup>5</sup> Rule 5.3, MRPC, Cmt. [2] [3].

<sup>6</sup> Rule 5.1(a), MRPC.

<sup>7</sup> Rule 5.3(a), MRPC.

<sup>8</sup> Rule 5.1(b), MRPC; Rule 5.3(b), MRPC.

<sup>9</sup> For example, ABA Opinion 467 provides specific guidance to prosecutors on their Rule 5.1 and 5.3 obligations. See ABA Formal Opinion 467 (9/8/2014).

<sup>10</sup> Rule 5.1, MRPC, Cmt. [3].

<sup>11</sup> Rule 5.3, MRPC, Cmt. [6].

<sup>12</sup> Rule 5.1, MRPC, Cmt. [6]; Rule 5.1(c), MRPC; Rule 5.3(c), MRPC.

<sup>13</sup> *In re Naros*, 928 N.W.2d 915 (Minn. 2019).

<sup>14</sup> *In re Rosso*, 919 N.W.2d 477 (Minn. 2018).