



Boss Professional Responsibility

When in Charge – Take Charge!

Del O'Roark, Loss Prevention Consultant, Lawyers Mutual Insurance Company of Kentucky

If I'm in charge around here, why is everyone laughing?

"Whether by customary practice, under the terms of a firm agreement, or by force of law, some person within even a two-person or a solo practice will have the responsibility to see to it that the firm runs smoothly in providing legal services." The Law Governing Lawyers

Introduction

When you were in law school, did you ever know a classmate with the burning ambition to boss a law practice? Neither did I. One of the naïve ideas many of us enter the practice of law with is that somehow the administrative minutiae that everyone else must deal with is avoided. Professional life will consist of interesting and exciting legal controversies, others will relieve you of being distracted by trivial matters, and the job of running a law practice carries few responsibilities or risks.

Professional life turned out to be quite different from those minutiae-free dreams. Modern practice requires in, even the smallest firms, leadership, managerial skill, good business practices, and risk management programs. Never forget that, while a lawyer may delegate authority in many circumstances, responsibility for how legal service is provided can never be delegated.

The qualitative difference between managing a law firm and managing a business is that it is more than just a matter of having good business practices. It is not enough to implement administrative systems that allow for the smooth day-to-day operations of a firm. The Kentucky Rules of Professional Conduct (KRPC)¹ impose duties on supervisory lawyers to assure compliance with the KRPCs by firm lawyers and non-lawyer staff. Failure to meet these duties can result in bar discipline and lead to malpractice claims.

Along with the ethics component of law practice supervision, this article covers the vicarious liability of supervisory lawyers for the professional misconduct and malpractice of subordinate lawyers and the errors of nonlawyer staff. It concludes with suggestions for supervising a practice that address professional responsibility duties and malpractice claims prevention.

Supervisory Lawyer Professional Responsibility

Who's the Boss?

Managerial Authority: KRPC 5.1, Responsibilities of a Partner or Supervisory Lawyer, establishes the duty of lawyers responsible for the overall management of a firm to "make reasonable efforts to ensure that the firm has in effect measures

giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."² Comment [1] to the Rule makes it clear that supervisory lawyer in this context is not to be narrowly defined:

"This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm."

Direct Supervisory Authority: Paragraph (b) of the Rule requires lawyers "having direct supervisory authority over another lawyer" to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Thus, lawyers without overall firm managerial responsibilities, but who are responsible for the direct supervision of another lawyer, have the individual duty to assure that lawyers reporting to them comply with the KRPCs.

What is a Reasonable Effort and Adequate Supervision?

Comment [2] to KRPC 5.1 offers general guidance on reasonable effort and adequate supervision:

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

This guidance has proven to be less helpful than intended. As a result the ABA Model Rule 5.1 now includes an additional comment that gives more specific guidance:

Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

The following two cases concern reasonable effort and adequate supervision – one illustrates how not to supervise a firm and the other shows a well supervised firm.

How not to supervise: In a recent Kentucky case the Supreme Court dealt with a disciplinary case that included managing lawyers, lawyers with direct supervision over a subordinate lawyer, and a subordinate lawyer.³ Lawyer W, the senior partner in the firm, received a subrogation matter from an insurance company in 1993. W then assigned the case to Lawyer C who handled it until 1995 when he delegated the case to a subordinate lawyer in the firm. During the representation the client sought updates from W not realizing that he had passed the case to C. W did not respond to the client. From December, 1993 until October, 1995 C had no contact with the client. The case was initially dismissed for missing the statute of limitations, but after taking over the case the subordinate lawyer was able to reinstate part of the client's claim. He left the firm in 1998 and C resumed handling the case, continuing to ignore requests from the client for updates. A year later the client discharged the firm.

Key findings of the case for the purposes of this article are:

- Other than casual interoffice conversation, W did not supervise C or monitor the progress of the case.
- W and C failed to supervise or otherwise direct the subordinate lawyer.
- W and C “did not maintain institutional controls, such as tickler systems, cover letters for transmitting copies of pleadings to clients, periodic review of files, or diary systems, in order to monitor and direct control over their files.”

The upshot of the case was that along with other violations W and C were both found to have failed in their managerial and direct supervisory duties in violation of KRPC 5.1 (a) and (b). They were disciplined with public reprimands. It is noteworthy that the Supreme Court decision specifically mentions several standard risk management work control procedures as appropriate measures for making a reasonable effort to assure compliance with professional responsibility rules.

How to supervise: A South Carolina law firm fared much better because of its excellent management practices and records when it was sued over an associate's unauthorized conduct.⁴ The case concerned an associate lawyer who prior to joining the firm established a relationship with a business in which he was to provide accounting and legal services. The associate did not inform the firm of this relationship until he received a demand letter from the business for misappropriated funds and malpractice. The firm promptly fired the associate, but was subsequently sued by the business for negligence, breach of fiduciary duty, and negligent supervision.

The firm won a summary judgment based on the following evidence:

- The associate's employment conditions were reflected in a letter to him that provided:

Work Assignments. We are looking forward to having you as an associate attorney, primarily in the litigation area of our firm. You will be working with Brad Waring in connection with your training and most of your work assignments. He will be accountable to the firm for the progress of your training. You should discuss with him all matters relating to your assignments and with me, all other matters relating to your relationship with the firm. The firm is employing your total and best professional efforts.

- The firm had strict procedures for keeping track of all attorney professional activities whether or not these activities were directly related to their work at the firm. The associate never complied with these procedures with regard to his business client.
- The firm required all attorneys to record the exact amount of time spent on client matters each day and all other time spent on activities not billable to a client. The associate never recorded any hours related to his business client.
- The firm never opened a file for the business, never sent an engagement letter, and never billed the business for any services performed by the associate as was its established procedure in accepting and representing a client.
- The business never had any direct contact with the firm regarding the associate.

The contrast between these two cases is a lesson in itself. The ability of the South Carolina firm to show specific procedures to control work, train associates, and set the standards for practice within the firm gave them an easy win in the law suit and would have been a more than an adequate defense had the business filed a bar complaint.

What about Nonlawyer Staff?

KRPC 5.3, Responsibilities Regarding Nonlawyer Assistants,⁵ parallels KRPC 5.1 by imposing the duty on lawyers responsible for overall management of the firm and

those directly supervising nonlawyer staff to make reasonable efforts to assure that nonlawyer conduct is compatible with the professional duties of lawyers. The comment to the Rule provides this guidance on what a reasonable effort is for nonlawyer supervision:

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

It is important to note that Kentucky has a Supreme Court rule outside the KRPCs specifically governing paralegals that must be read in conjunction with KRPC 5.3 SCR 3.700, Provisions Relating to Paralegals, is an extensive rule with detailed supporting comments. The key points of this rule are:

- Direct supervision of a paralegal by a licensed lawyer is required.
- A lawyer must ensure that a paralegal does not engage in the unauthorized practice of law.
- It must be made clear to a client that a paralegal is not a lawyer.
- The lawyer remains fully responsible for the representation.
- The lawyer must instruct a paralegal to preserve the confidences and secrets of a client.
- The Kentucky Rules of Professional Conduct are not binding on lay personnel.

When developing firm professional responsibility guidance for nonlawyer staff, be sure to review SCR 3.700 along with KRPC 5.3. These two rules provide most of the guidance needed to establish a satisfactory program for assuring that nonlawyers comply with the firm's professional responsibility.

A Supervisor's Vicarious Responsibility for the Misconduct and Errors of Those Supervised

A powerful motivation to set high standards and establish proactive ethics compliance programs is for supervising lawyers to recognize their accountability for the misconduct and errors of others in the firm. What follows is a recapitulation of the basis for that accountability and examples of how lawyers have gotten into trouble for failing to properly supervise firm members.

Accountability

Paragraph (c) of KRPCs 5.1 and 5.3 makes a lawyer vicariously responsible for another lawyer's or nonlawyer's KRPC violation if:

- the lawyer orders or with knowledge of the specific conduct ratifies the conduct; or
- as a managing lawyer or a direct supervisor knows of the conduct in time to avoid or mitigate the harm, but took no reasonable remedial action.⁶

Comment [4] to KRPC 5.1 offers this guidance on vicarious responsibility for supervised lawyers that is generally applicable to nonlawyers as well:

Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Paragraph (c) of both rules requires actual knowledge by a supervising lawyer for vicarious responsibility to attach.⁷ More than one court has held, however, that willful blindness, studied ignorance, or "I didn't know and I didn't want to know" approach by a supervising lawyer will not relieve the supervisor from responsibility for a subordinate's misconduct under paragraph (c).⁸

Under well established malpractice liability law a firm is subject to civil liability for the conduct of its principals, employed lawyers, and nonlawyer staff.⁹ SCR 3.022, Forms of Practice of Law, reinforces lawyer vicarious civil liability in paragraph f. as follows:

Subject to judicial or prosecutorial immunity which may be recognized by law, each lawyer practicing in Kentucky shall be personally liable and accountable to his or her clients for (i) all of his or her acts, errors, and omissions in the practice of law; and (ii) the act, errors, and omissions of other lawyers under such lawyer's direct supervision.

SCR 3.700, Provisions Relating to Paralegals, Sub-Rule 2 C., specifically provides that lawyers are responsible for errors of paralegals:

The lawyer remains fully responsible for such representation, including all actions taken or not taken in connection therewith by the paralegal to the same extent as if such representation had been furnished entirely by the lawyer and all such actions had been taken or not taken directly by the lawyer.

It is important to appreciate that a supervisory lawyer can be liable for a malpractice claim based on an act of a supervised lawyer or nonlawyer without actual knowledge of the act. In fact, it is usually the case that the supervisory lawyer was unaware of the acts that led to the malpractice claim.

What Could Go Wrong?

In my research I visited the Website of the National Organization of Bar Counsel¹⁰ and surveyed several other sources for examples of problems that lawyers have had with supervision. What I learned is that misconduct concerning supervision typically involved these problems:

- No appreciation whatsoever of the duties required by KRPC 5.1 and 5.3.
- An absence of work control systems such as client intake procedures, calendaring, file review, etc.
- Reliance on loose, informal, and casual office contact to monitor ethics and malpractice issues.
- No written procedures for supervising subordinate lawyers and nonlawyers.
- Too much delegation to nonlawyers without heightened close supervision.
- Failure to closely monitor client trust account management.
- Systemic risks to ethics compliance because of firm compensation and productivity policies. *E.g.*, too high billable hour requirements and over-leveraging by depending on too many inexperienced lawyers and too many nonlawyers to provide service.
- Inadequate or no continuing ethics training programs for inexperienced lawyers, newly hired nonlawyers, and the firm as a whole.
- Relying too much on mandatory CLE to comply with Rules 5.1 and 5.3.

Be aware that supervisory ethics and malpractice problems can come up in unanticipated ways that are easy to overlook. Examples are:

- Employing a disbarred or suspended lawyer as a paralegal or office staff.
- Sharing nonlawyer employees in shared office practices.
- Allowing nepotism, sexual harassment, and office romantic entanglements to derail otherwise good supervisory practices.
- Failing to include of counsel and retired firm lawyers in ethics

compliance, work control, and risk management programs.

- Failing to perform supervisory duties when serving as local counsel with an out-of-state counsel admitted *pro hac vice*.
- Assigning an inexperienced lawyer as local counsel for a domineering out-of-state counsel with no firm supervision.
- Not recognizing that independent contractors require the same supervision for ethics compliance as members of the firm.
- Not giving temporary hires and summer interns adequate instruction on ethics compliance requirements.

How Ethical Are Your Firm's Supervisory Practices?

What Are They?

Over the course of writing this article I asked several experienced lawyers I knew to be of good character with impeccable reputations for ethical conduct how their firm fulfilled the requirements of KRPC 5.1 and 5.3. I was struck first by the fact that they found the question more than a little perplexing because they were not accustomed to thinking about their supervisory duties in terms of the professional responsibility rules. Understandably, the tendency is to focus thinking about management practices on getting the work done and that was theirs.

Their approach to the ethical concerns of supervision was reactive as opposed to proactive. Supervision was aggressive when a problem arose and came to the attention of management, but there did not appear to be many, if any, firm management practices that were designed to be specifically responsive to the requirements of the professional responsibility rules. In terms of supervisory problems that could arise, dealing with conflicts of interest was their first concern. Few other supervisory problems came readily to mind and there was no mention of client trust account supervision which is the source of many inadequate supervision problems that are usually expensive.

My guess is that the input I got from these lawyers is typical of how most firms supervise. While some firms may have a general counsel, an ethics partner, or ethics committee, most rely on informal contact within the firm, standard firm business operating procedures, and mandatory CLE to cover their supervisory professional responsibility. While this approach may work most of the time, it will not work all the time. When it does not, it will be costly.

The intent of KRPC 5.1 and 5.3 is that managing lawyers set the ethical environment with established and well disseminated procedures and programs for the firm's professional responsibility compliance. Lawyers directly supervising other lawyers and nonlawyers attend to the details of assuring competence and ethical conduct. This is more than mere availability to discuss ethical questions. It is not good enough to allow inexperienced lawyers and nonlawyers to 'sink or swim,' to rely on *ad hoc* on-the-job training, or assume that everyone in the firm diligently adheres to the KRPCs. It must be direct supervisory contact on a continuing basis.

I close this section by asking you how well your firm's supervisory practices comply with the requirements of KRPC 5.1 and 5.3?

How Would You Defend a Bar Complaint or Malpractice Claim Based on Inadequate Supervision?

How you answer this question should reveal how well you have complied with your supervisory professional responsibility. Should you actually face such a claim you can expect to be called upon to show how the miscreant lawyer or nonlawyer was supervised and what management programs were in effect to avoid, prevent, or remedy the misconduct. Ideally you would be able to show:

- An office procedure guide that specifically references KRPCs 5.1 and 5.3 with guidance on the standards to be met by firm members and how to report ethics and malpractice issues for resolution.
- Firm sponsored education programs on a recurring basis (at least annual) for all members of the firm reinforcing professional responsibility compliance and risk management.
- Employment hiring procedures that screen candidates for good character and high ethical standards.
- Clear lines of supervisory responsibility so that both the supervisor and supervised understand their duties and accountability.
- Office procedures that cover client intake, docket and work control, file review, billing, client trust account management, internal controls, and risk management.

Those of you practicing in small firms or solo may be gasping at the foregoing list of management actions to meet ethical duties and prevent misconduct and malpractice. The principle is what counts. As the rules indicate, smaller firms can meet their professional responsibility with less formal procedures than larger firms. Every practice, regardless of size, should have office procedures that cover client intake, docket and work control, periodic file review, billing, client trust account management, internal controls, and risk management. A letter of instruction from a solo practitioner to her legal secretary covering the ethics standards that must be observed with a periodic informal review should be more than a satisfactory way of showing compliance with supervisory ethics responsibility. Smaller firms should encourage nonlawyer staff to participate in paralegal associations and send them to appropriate CLE programs. An enormous paper trail need not be created, but if called upon to justify supervisory controls, the more office procedures and CLE that are documented the better. As shown by the Kentucky disciplinary case discussed above, winging it is not a defense to an inadequate supervision bar complaint.

Conclusion

I conclude this article with an extract from the sad case of *In re Cater*.¹¹ A solo practitioner worked as a guardian for the estates of incapacitated adults. She hired a secretary who took over management of her client trust account. The lawyer failed to supervise the secretary's management of the trust account and had no internal controls. Over time the secretary stole over \$50,000 from the trust account. What follows is the Court's excellent analysis of what is required in supervising a non-lawyer. It describes a well balanced standard for small firms that is useful to both small and large firms.

“[R]easonable efforts to ensure” that an employee's conduct is compatible with the lawyer's professional obligations is a proactive standard that requires more than careful selection and appropriate training of the employee. As authoritative commentary to the Rule and case law make clear, proper supervision is necessary also. In important matters such as the maintenance of financial records for a conservatorship and the monitoring (or handling) of client funds, there must be some system of timely review and internal control to provide reasonable assurance that the supervising lawyer will learn whether the employee is performing the delegated duties honestly and competently or not. If no such system is in place, it will not do for a lawyer to profess ignorance of the employee's dishonesty or incompetence. Internal controls and supervisory review are essential precisely because employee dishonesty and incompetence are not always identifiable in advance.

The type of controls and review required in any given situation will vary depending on the nature, extent and complexity of the delegated tasks; the experience, skills and training of the employee; the perceived or foreseeable risks and vulnerabilities; the circumstances under which the tasks are to be performed; the feasibility, cost and likely effectiveness of alternative internal control measures, and the overall work environment, among other factors. Responsible supervision does not mean that the lawyer must duplicate the employee's work or scrutinize and regulate it so closely that the economic and other advantages of the delegation are lost. Rule 5.3 (b) requires “reasonable efforts,” not overkill. Reasonable controls and review need not be overly intricate or unduly burdensome. In the present case, respondent was a sole practitioner who served as court-appointed conservator for the uncomplicated estates of several incapacitated individuals. In delegating account monitoring duties to her secretary, it would have been a simple matter for respondent to have maintained the checkbooks securely and to have reviewed the monthly bank statements periodically. Those two steps would have been effective; no more elaborate measures were necessary. ■

ENDNOTES

1. SCR 3.130
2. SCR 3.130(5.1) Responsibilities Of A Partner Or Supervisory Lawyer
(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct only if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

3. *Kentucky Bar Association v. Weinberg, Capello, and Unnamed Attorney*, 2006-SC-0225-KB (9/6/2006).
4. *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 598 S.E.2d 717 (2004).
5. SCR 3.130(5.3) Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) 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; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer only if:

(1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner 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.

6. See notes 2 and 5.
7. See SCR 3.130 Terminology (5).
8. *E.g.; In re Cohen*, 847 A.2d 1162 (DCAA 2004); Formal Advisory Opinion 05-10, Supreme Court of Georgia (4/25/2006).
9. Mallen and Smith, *Legal Malpractice* 2007 Ed., § 5.8 Employees. See generally, Mallen and Smith, *Legal Malpractice* 2006 Ed., Chapter 5.
10. <http://www.nobc.org>.
11. 887 A.2d 1, 15 (2005).