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PROFESSIONAL QUANDARIES AND QUAGMIRES

Navigating the Ethical Landscape: Supervisory Practices in Law Firms

By Chuck Lundberg
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This month's column offers a deep dive into an increasingly critical issue for any law firm seeking to avoid ethics complaints and malpractice claims. The ethics rules affirmatively require firms to adopt supervisory practices for all firm lawyers and non-lawyer staff, and effective supervision is an essential component of law firm risk management.

Cassie Hanson

Sara Gross Methner

To present this weighty topic, we interviewed two ethics experts with extensive and recent background in the subject matter, Cassie Hanson and Sara Gross Methner. Cassie and Sara are putting together an advanced program on Best Practices in law firm supervision for the Minnesota Firm Counsel Group this month, and they will be presenting the topic again to the Ramsey County Bar in June.

To focus our discussion, here is the mandatory language of Rule 5.1:

Sidebar: A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority 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.

Q: How has Rule 5.1 been enforced since its adoption in 1985?

Cassie: The Office of Lawyers Professional Responsibility (OLPR) has focused on supervisory practices relating to law firm governance and practice management. Trust account supervision was the first big issue: OLPR implemented an overdraft notification program for trust accounts. That resulted in an increase of disciplinary cases against lawyers for inadequate supervision and policies relating to trust account management. For instance, a bookkeeper's routine failure to deposit unpaid filing fees into a trust account, combined with the lack of a firm policy for handling client funds, can constitute a violation of Rule 5.1(a).

DEPOSIT PHOTOS

OLPR also created disciplinary measures aimed at preventing recidivism. Lawyers placed on probation for violations involving Rule 5.1 are required to develop policies and procedures to safeguard against recurrence, including written office procedures to help supervise staff and formal trust account policies.

Partners can also be disciplined under 5.1(c) for the actions of others if they ordered, ratified, or failed to take reasonable remedial action regarding misconduct. Here the partner's responsibility is not strictly vicarious; it requires active participation or knowledge of misconduct without appropriate preventive or corrective measures.

Several recent discipline cases and commentary underscore an increasing expectation of supervision in law firms. In one notable cautionary tale, a solo attorney was publicly reprimanded in 2019 because her paralegal had repeatedly forged her signature on legal documents and communicated with courts on her behalf without authorization. The attorney had a policy requiring her signature on all filings, but lacked checks to ensure compliance, highlighting the importance of active compliance auditing alongside written policies. What happened there could easily happen to any lawyer who does not actively supervise firm employees.

In 2020, the OLPR disciplined the sole shareholder and manager of a law firm for failing to ensure that firm lawyers were aware of recent critical amendments to the Rules of Civil Procedure that directly impacted a client's case. The OLPR also recently pursued a number of high-profile public discipline cases against county attorneys for failing to adopt Brady policies to ensure the disclosure of exculpatory information. These recent decisions and more are discussed in detail in Wernz, Ethics Wake-Up Calls for Supervisory Responsibilities, Minn. Bench & Bar July 2020 and Humiston, Your ethical duty of supervision, Minn. Bench & Bar Dec. 2019

Q: What constitutes "reasonable" supervision under the ethics rules?

Cassie: The rules do not define "reasonable efforts," nor what degree of certainty is required to establish "reasonable assurance" of ethical compliance by lawyers in a firm. But under Rule 1.01(i), "reasonable conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." Community standards are highly relevant when determining what is reasonable (and therefore a subject of expert testimony). Ultimately, the question of reasonableness is fact-specific and tailored to the role of the lawyer in a law firm. At a minimum, "reasonable" probably includes written policies, training, and auditing for compliance to ensure that policies are followed.

Sara: Rule 5.1, Cmt. 3 notes that law firm size may be a factor in considering what's reasonable. Smaller firms typically have less formal supervisory arrangements and systems than large firms, and that's generally OK. A small firm arguably complies with Rule 5.1 if its members have developed good, consistent practices and routinely confer with each other or an outside ethics practitioner when ethics questions arise. In contrast, larger firms with multiple offices require more formal safeguards; it would not be reasonable to assume that good habits and regular conversation are sufficient to assure awareness and consistent practices across their firm. Mid-sized firms arguably should have at least a blend of formal policies, procedures, and audits, with collegial interaction.

Q: Who is responsible for supervision in a law firm setting? Do situations arise when a law firm has to decide who is responsible for an ethical lapse in supervision resulting in the filing of an ethics complaint?

Sara: Firm principals and leaders are primarily responsible for maintaining appropriate supervisory systems and practices. Billing attorneys are responsible for the conduct of attorneys who work on their client matters. Any attorneys who directly manage the work of others — not just the work of more junior attorneys, but also professional staff like legal administrative assistants or paralegals, and outside service providers — are responsible for the conduct of those individuals. Even junior associates who provide work direction to their legal assistants are responsible for making sure that work is performed competently. Rule 5.1 Cmt. 5 states that partners and lawyers with comparable authority have at least indirect responsibility for all of the firm's work.

However, if an ethics complaint implicates firm systems or practices that are not directly tied to an individual attorney's conduct, it's not the firm as a whole that will be held responsible; the firm has to determine which attorney will take responsibility. In those cases, the leading candidates are likely to be the ethics partner/general counsel or the managing partner.

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Cassie: That's because the OLPR disciplines only individual lawyers, not law firms. The OLPR occasionally sends a "who's responsible?" letter to a law firm. The designated responsible lawyer faces the possibility of personal discipline if the OLPR determines misconduct occurred.

Prior to joining Fredrikson & Byron as ethics counsel, I spent 20 years as discipline counsel at the OLPR. I recall several instances where lawyers strongly disagreed over who was responsible for a trust account overdraft. No one wanted to take responsibility. Law firms should designate attorneys responsible for various compliance areas before an ethics complaint is filed.

Q: Speaking of "who's responsible," are there many cases in Minnesota where a lawyer has been disciplined for the conduct of another?

Cassie: Every year, some lawyers face discipline for neglecting their supervisory duties, typically resulting in private forms of discipline like admonitions or probation. The OLPR's 2023 annual report notes three admonitions and 14 private probations linked to supervisory lapses.

Disciplinary issues often arise from inadequate training and policies for supervising nonlawyers or junior associates, leading to problems like mishandling trust accounts, missed deadlines, unreturned client communications, and improper investigatory communications by nonlawyers.

In rare cases, severe supervisory failures result in public discipline, especially when they enable serious misconduct like theft from trust accounts and resulting significant harm to clients.

Q: The COVID-19 pandemic fundamentally changed how lawyers practice together in a firm setting. Most law firms permit employees to work hybrid and/or fully remote. What are the biggest challenges that hybrid/remote work present for law firms in terms of supervisory duties?

Cassie: It's hard to have eyes on what your associates and staff are doing when they're not on-site. One major ethics challenge is maintaining effective communication and oversight. In a hybrid or remote work environment, it is more difficult for supervisors to stay connected with their team members, leading to potential gaps in supervision and guidance. This lack of direct, in-person interaction can hinder the ability to promptly address issues, provide feedback, and ensure that work is being conducted ethically and in compliance with firm policies.

I always encourage lawyers with supervisory responsibilities to engage in "active supervision" with supervisees. That means getting to know them, asking how work is going, having an open-door policy, and implementing regularly scheduled check-ins — both as a team and one-on-ones. For newer associates, this also means training and mentoring along with constructive feedback and opportunities to shadow you in client meetings and trials. This ensures clients' legal matters are being handled competently and diligently and client communications are not being ignored.

Sara: It's also important to consider jurisdictional issues — making sure there are controls to keep remote attorneys from engaging in the unauthorized practice of law by inadvertently holding themselves out as practicing in jurisdictions where they're physically located but not licensed.

We've grown used to seeing pets, children, and partners in the background of virtual meetings, but that new normal doesn't lessen our ethical obligations. We still have to ensure confidentiality of client information, which means paying careful attention to where you work, whether your Wi-Fi system is secure, how you maintain files in your remote workspace, keeping your technology safe and locked when you're not working, maintaining privacy during conversations or meetings with or about clients, avoiding the potential for listening devices to capture those conversations, and similar issues that can arise when you're in a space that's less private or secure than your on-site firm office.

Q: The rise of generative artificial intelligence (AI) might be the biggest game changer yet for law firms. What risks does AI present for the ethical duty to supervise? What kinds of policies are law firms adopting for supervising members' use of AI platforms?

Sara: Law firm principals must ensure that their members are complying with several ethics rules that AI use implicates. Ethics considerations include maintaining the security and confidentiality of client information; ensuring the quality and accuracy of work product generated by AI; deciding whether/how the firm will charge clients for the use of AI platforms; and potential client and court disclosure obligations about the firm's use of AI platforms.

Florida Ethics Opinion 24-1 (January 2024) is one of the first state ethics opinions on AI use. It is worth reviewing, as other states and the ABA ultimately may follow its lead. It emphasizes that lawyers must review AI-generated work just as they would a memo drafted by a paralegal or law clerk. The Opinion points out that, pursuant to Rule 5.3, the duty to supervise the use of AI platforms also applies to individuals outside the firm, such as third-party vendors.

Larger clients are establishing their own rules for AI usage as part of outside counsel guidelines. If a firm regularly serves such clients, their requirements will shape the firm's AI policies and practices. Regardless of client demands, any firm that permits members to use AI platforms for client work must have an AI policy, and the policy must be revisited and revised as the technology continues to evolve.

Q: What does AI have to do with law firm billing practices?

Cassie: The Florida opinion specifically addresses these duties, and firms should consider building that guidance into their AI policies. It would require lawyers to inform clients, preferably in writing, of the lawyer's intent to charge clients the actual cost of using AI. Any charge to a client should be reasonable and not duplicative. According to the Florida opinion, if the exact cost for a client's case can't be determined, the lawyer shouldn't prorate AI charges but include them as overhead. Additionally, while lawyers can bill for time spent on case-related tasks with AI, they may not charge for time spent learning basic AI skills.

Further, clients may define what you can and cannot bill. If the only way you can pay for an AI platform being marketed specifically to law firms is to charge it to clients, that may be a problem. As Sara mentioned, clients are already moving the ball for you through outside counsel guidelines detailing what they will and will not pay for. Pay attention.

Q: Statistically, what areas present the greatest risk and need for formal written supervisory policies and procedures?

Sara: Trust account issues are the single biggest area of risk. For 2022, OLPR reports 39 admonitions and 125 probations related to safekeeping client property. Even if the firm's finance employees are performing the day-to-day trust account recordkeeping, the firm's attorneys remain responsible for reasonable assurance of compliance with the rules. Clear policies and procedures are particularly important in this area.

While the AI issue is still too new to be reflected in formal statistics, it is already clear that this rapidly evolving area implicates multiple ethics rules and requires a formal policy.

Cassie: Conflicts of interest remains a top risk factor reported by malpractice insurers; it is in the top five for high value malpractice claims. Failing to establish a formal intake process with clear policies for comprehensive conflict checks can lead to severe repercussions, including disqualification, legal malpractice claims, damage to reputation, and ethics complaints.

Managing conflicts of interest requires robust written policies that are implemented in daily operations. To be sure, law firms encounter challenges in conducting thorough conflict checks due to factors such as incomplete client information, evolving client relationships, and complexity in interpreting results. This complexity is amplified in larger firms or those with diverse practice areas, where managing the sheer volume of data can be time-consuming and intricate. These hurdles can result in delays in client onboarding or overlooked conflicts. To tackle these challenges, law firms should adopt best practices such as establishing clear policies, conducting regular staff training on conflict check procedures, and performing routine audits to ensure compliance and identify areas for improvement in the conflict check process. At least one partner, in addition to the billing partner, should be involved in deciding whether to take on new clients or matters that are out of the ordinary.

Q: Finally, do you foresee any significant changes in this area on the horizon?

Cassie: Yes. Mandatory self-assessments may be coming to Minnesota. Several states have already adopted "self-assessment" requirements focused on law office management. The OLPR Director has advocated for trust account and law firm self-assessments. Another enforcement trend that could apply here is a movement away from discipline to diversion programs for non-serious misconduct. The Supreme Court has appointed an Advisory Committee that is developing a diversion program, including a trust account school that would assist lawyers with developing policies for trust account oversight.

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