Duty to Supervise Nonlawyer Staff: Sloppy Oversight is No Excuse

by Wendy F. Inge

No Excuses

A lawyer in the District of Columbia was suspended for 180 days for violations of Rule 1.1 Competence and 5.3 Supervising Nonlawyers. The lawyer's secretary embezzled $47,000 from the estates of two incapacitated adults for whom the lawyer was acting as court-appointed guardian. Over a nine-month period, the secretary forged the lawyer's signature on thirty-six checks.

Although the banks sent the lawyer monthly statements, she did not discover the thefts for more than a year because, she said, she had delegated the task of reviewing the statements to her secretary and did not check the secretary's work. The lawyer also claimed that she had good reason to trust the secretary and that the stolen checks had been secured in a locked safe in her office.

Along with the suspension, the court concluded that, "a lawyer's failure to supervise or review an employee's work may contravene Rule 5.3(b) even if the lawyer does have reason to believe the employee is both honest and capable. 'Reasonable 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 re Cater, D.C.*, No. 03-BG-624, 11/23/05).

An Oklahoma lawyer was publicly reprimanded for facilitating his employee's unauthorized practice of law by failing to supervise an employee hired to run a self-sustaining "research center" within the law office. The "research center" was intended to provide legal support services such as photocopying and organizing legal documents. According to the court, the nonlawyer told Martin, the lawyer, that he was on probation for committing a white-collar crime and needed a job as a condition of his probation. The lawyer admitted that the "research center" was set up under his name as the lawyer, and he never did a background check on the nonlawyer employee and never monitored the operation of the "research center." Martin set up a separate bank account for the "research center" and allowed the nonlawyer employee to make all the deposits and write all the checks on that account.

The nonlawyer employee contacted an inmate and offered the lawyer's services on post-conviction relief. The inmate's parents agreed to pay the fee of $19,000 to hire the lawyer. The nonlawyer filed two pro se petitions on behalf of their son without the knowledge of the lawyer.

In finding a violation of Rule 5.3 (Supervision of a Nonlawyer) the judge stated "[t]he fact that the lawyer himself was victimized by the employee's unauthorized practice does not reduce his culpability in law one iota. The gravity of the breach is treated the same as if the lawyer had committed the infractions himself." The court also stated "all licensed lawyers are fully and absolutely accountable for all breaches of professional ethics committed not only by fellow lawyers in the law firm, but also by those persons who are unlicensed or lay employees of a lawyer or of an association of lawyers in a single firm, regardless of the firm's name or of its precise legal entity." *State ex rel. Oklahoma Bar Ass'n v. Martin, Okla.*, No. SCBD-5518, 9/21/10.

A Florida lawyer was suspended for one year for allowing a paralegal to act on his behalf in dealing with an immigration matter, including handling all interaction with the clients, and preparing and filing pleadings on the clients' behalf. The court noted "[i]n the present case, the record shows that even though Akbas (paralegal) worked as a paralegal at U.S. Entry, she actually was the person in control of the corporation's day-to-day operations. She met with the clients, conducted the client interviews, and made the decisions as to the appropriate course of action for the clients." "Abrams did not merely fail to supervise Akbas in the transmission of legal advice, but rather he provided no legal advice whatsoever. Instead, Akbas conducted client intake and formulated and dispensed legal advice." *Florida Bar v. Abrams*, 919 So. 2d 425, 429, 430 (Fla. 2006).

Lawyer's Responsibilities Regarding Nonlawyers

Lawyers have traditionally used the services of nonlawyers, such as secretaries, legal assistants, interns, bookkeepers, and investigators to help them provide legal services to their clients. Skilled assistants can be invaluable in a law practice. Lawyers should take care, however, not to become complacent about their supervisory responsibilities for their nonlawyer staff. The "it wasn't me" defense often does not work.

Lawyers are obligated to make reasonable efforts to ensure that the nonlawyer employee's conduct is compatible with the lawyer's professional responsibilities as expressed in the ethics rules. Rule 5.3(a) requires that a law firm's

partner "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer." Rule 5.3(b) similarly requires that a lawyer "having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

There are several ways lawyers can be held responsible for the misconduct of their nonlawyer staff. A lawyer's responsibility for nonlawyer staff typically arises in the following contexts: ordering or ratifying misconduct; failing to educate nonlawyers to avoid disclosure of confidences and to screen for conflicts of interest; assisting in the unlawful practice of law; failing to safeguard client property; and failing to adequately train and supervise.

Ordering or Ratifying Misconduct

A lawyer can be disciplined for ordering or ratifying misconduct by an assistant. Rule 8.4(a) makes it a violation of the ethics rule for a lawyer to assist or induce another to do what the lawyer cannot. Since the lawyer has a supervisory responsibility to make sure assistants do not violate the ethical rules then the lawyer certainly cannot ignore that responsibility and ask the assistant to engage in any conduct in which the lawyer cannot ethically undertake. Don't tell an employee to do anything you are not ethically allowed to do yourself.

Failing to Screen for Conflicts of Interest

The conflicts rules that govern attorneys generally apply to assistants too. Nonlegal staff should receive training on what constitutes a conflict of interest. Nonlegal staff who will work on a matter should be included in the conflicts search. Staff should be encouraged to notify the lawyer if they feel they may have a conflict regarding a new or existing case. If a conflict is discovered then the nonlegal staff person should be screened from involvement in the matter. This is particularly important where the nonlegal assistant has worked at another law firm. For purposes of conflicts, treat the hiring of nonlegal staff as you would the hiring of an attorney. *See* Virginia LEO 1800 (2004). A two-member law firm hiring a secretary who until the previous week was the only secretary at another two-member law firm representing a litigation adversary will not be disqualified from the case, as long as the new firm: warns the secretary not to reveal or use any client confidences acquired at the old firm; advises all lawyers and staff not to discuss the matter with the new secretary; and screens the new secretary from the litigation matter (including the new firm's files on the matter). Although not mandating any specific steps, the bar recommends that the new firm "develop a written policy statement" regarding such situations, and note the need for confidentiality "on the cover of the file in question." *See also* Virginia LEO 1832 (2007).

Confidentiality

Nonlawyers should be instructed not to reveal, even to their closest friends and relatives, any information related to the representation of a client. The duty of confidentiality should be fully explained to nonlegal staff upon employment. It should also be made clear that the duty continues even if the employment relationship ends. Additionally, the nonlegal employee should be asked to agree to and sign a confidentiality statement regarding any information they learn while employed by the firm. *See* Virginia LEO 1832 (2007). Although not bound by lawyers' ethics rules, law firms' secretaries must maintain the confidentiality of information they learn. For an expanded discussion on this issue see *A Basic Guide for Paralegals: Ethics, Confidentiality and Privilege* by Tom Spahn, Esq., McGuireWoods LLP (10-2006).

Unauthorized Practice of Law

Nonlegal staff should be trained to appreciate what tasks if undertaken by a nonlawyer would constitute the unauthorized practice of law and they should be sensitive to avoiding such activities. Virginia's Unauthorized Practice Rules can be found in the Rules of the Supreme Court of Virginia Part 6, § 1. The UPL Committee also adopted by recommendation the *Virginia Alliance Paralegal Guidelines* that address the ethical performance of services by legal assistants in Virginia. Both of these resources should be reviewed by all legal assistants and lawyers who have staff. Problems often include counseling clients about legal matters or providing a legal opinion in response to questions of the client. It is not uncommon to find "opinion creep" as the assistant becomes more experienced in an area of law. Remind employees what questions they can and cannot answer. Note what your staff discusses with clients on the phone. Sometimes the client assumes that the assistant is a lawyer. Such wrong impressions should be immediately corrected. Virginia UPL Opinion 191 (10/28/96) lists the following activities as impermissible: "[A] nonlawyer is not permitted to determine the validity of a claim, explain documents, fee agreements, the settlement of a claim, or negotiations with the adverse party or their insurer to a client. Each of these activities appears to directly involve the application of legal principles to facts, purposes or desires, and are therefore considered the practice of law and must be performed only by a licensed attorney." UPL Opinion 191 describes the permitted activities as follows: "[A] nonlawyer employee working under the direct supervision of a Virginia attorney may participate in gathering information from a client during an initial interview—provided that this involves nothing more than the

gathering of factual data and the nonlawyer renders no legal advice . . . A nonlawyer employee may convey direct information from their supervising attorney to a client regarding the status of a case, or deliver documents with a request for some particular action." *See also* Virginia UPL Opinions147 and 129.

Failing to Safeguard Client Property

Lawyers have a fiduciary duty to safeguard clients' funds and property under Rule 1.15 Safekeeping Property. If nonlawyer staff will be involved in handling books and accounts involving client funds, the lawyer should ensure that staff is thoroughly trained and familiar with the requirements of Rule 1.15. A lawyer should never completely abrogate to one staff person all activities related to client escrow accounts as this makes commission of fraud easier. Appropriate accounting checks and balances should be in place to help prevent fraud. An annual audit can help check for ways to safeguard against fraud by lawyers and staff. For additional suggestions for preventing fraud in your practice, *See* articles: "*Prevent fraud in your workplace,*" by *CBIA News*, May 2007 – Vol. 85, No. 4 and "*Thinking About the Unthinkable: How to Guard Against Fraud and Embezzlement in your Firm,*" by David Debenham and Shelia Blackford, June 2009-Vol. 35, No. 4.

Marketing Activities

Nonlawyers who will be involved in the development of marketing materials for the firm need to be carefully trained and supervised to make sure they understand the ethics requirements as they relate to lawyer advertising. The lawyer needs to be responsible for the finale review of any information to be communicated for advertising purposes to ensure compliance with the ethics rules. A lawyer should not delegate in-person solicitation to a nonlawyer, even acting under the lawyer's supervision. *See* Virginia LEO 1290 (1989). A law firm staff member may not solicit business for the firm even if the nonlawyer is to receive no additional compensation for the service (because the staff member would be compensated with a regular salary for recommending or securing employment for the law firm).

Failing to Adequately Train and Supervise

As may be obvious by now, most of the ethical problems resulting from nonlawyer staff conduct arise because lawyers have abdicated their training and supervisory responsibilities. While there are many appropriate uses for nonlegal assistant the ethical rules still require direct supervision and review by the lawyer. Rule 5.3(c) states:

> …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 if:
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> • the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
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> • the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

The lawyer must give nonlegal assistants appropriate instruction and supervision concerning their work, and should be responsible for overseeing and reviewing their work product. *See* Virginia LEO 1600 (1994). A lawyer should not open up a branch office to be staffed entirely by nonlawyers (with the lawyer expecting to visit the branch office two days each month), because a lawyer's supervision over non-lawyer staff "should be significant, rigorous and efficient."

The Buck Stops Here

Ultimately, lawyers are obligated to make reasonable efforts to ensure that the nonlawyer employee's conduct is compatible with the lawyer's professional responsibilities as expressed in the ethics rules. It is the lawyer's ongoing responsibility to educate and supervise nonlegal staff. Failure to do so is an ethical violation for which the lawyer can be disciplined. Lawyers may also be found liable for malpractice if they fail to adequately supervise and train paralegals. *Musselman v. Willoughby Corp*., 230 Va. 337, 337 S.E.2d 724 (1985) (finding that a lawyer had committed malpractice that arose out of actions taken by his nonlawyer staff in preparing documents and participating in the closing of a real estate transaction). As lawyers, the buck stops with us, so we need to remain vigilant in educating, training and supervising our staff. (Note, paralegals who engage in the unauthorized practice of law can be subject to criminal charges in most states, including Virginia where it is a Class 1 misdemeanor.)

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