

Supervising Staff

by Keith A. Call

For many of us, good non-lawyer assistants are crucial to our success. I would personally be lost in my practice without outstanding secretaries, paralegals, clerks, and other non-lawyer professionals.

Other than penalties associated with the unauthorized practice of law, non-lawyers may not be bound by many of the codes and rules that govern lawyers. *See* Utah Code Ann. § 78A-9-103 (LexisNexis Supp. 2012) (practicing law without a license prohibited); Utah R. Prof'l Conduct 5.3, cmt. 1 (training of non-lawyers should take into account that non-lawyers are not subject to professional discipline); Utah R. Jud. Admin. R. 14-111. While non-lawyer staff may not be bound by the ethics rules, the warning bell for lawyers is that *the lawyer may be responsible for ethical breaches by their staff*. This article summarizes some of the ethical responsibilities Utah lawyers have for the conduct of their non-lawyer staff.

Responsibilities of Law Firm Partners and Managers

Any lawyer with management responsibility in a firm has a personal ethical duty to take reasonable steps to assure that the conduct of the firm's non-lawyer staff is compatible with a lawyer's professional obligations. This rule extends to anyone who is a firm partner or its equivalent. *See* Utah R. Prof'l Conduct 5.3(a). Any firm partner or lawyer with comparable management authority can be personally responsible for a non-lawyer staff member's violation of the rules if the lawyer knows of the conduct at a time when its consequences could be avoided or mitigated. *See id.* R. 5.3(c)(2).

If you are a partner or hold a management position at your firm, consider whether your firm needs to do more to make sure your non-lawyer staff is complying with the rules. And if you become aware of a violation by a non-lawyer in your firm, move quickly to take remedial action if that is possible.

Supervisory Responsibilities

If you directly supervise any non-lawyer staff, you are obliged to take reasonable measures to assure that the conduct of those you supervise is compatible with your own professional obligations. *Id.* R. 5.3(b). A lawyer is personally responsible for his or her staff's violations of the rules if the lawyer directed the conduct or if the lawyer knowingly ratified the conduct. *Id.* R. 5.3(c)(1).

Particular Areas of Concern

Utah opinions and commentary have identified several areas of special concern. Here are just a few to consider.

Client Confidences

People talk. People also tweet, post, and blog. It is easy for anyone to forget the importance of protecting client confidences, especially in casual communications with trusted friends and relatives. Staff who lack extensive legal training may not even understand the full scope of a lawyer's obligations of confidentiality. For example, staff may be unaware that some client information can be part of the public record but still off limits for restaurant chat. Even the fact that a client is represented can be confidential. Lawyers should consistently train and remind non-lawyer staff to keep client secrets secret. *See id.* R. 5.3, cmt. 1 ("A lawyer must give [non-lawyer] assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding

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the obligation not to disclose information relating to representation of the client . . .”).

Avoidance of Conflicts

In the case of hiring an attorney laterally, the concept of creating screens or “Chinese walls” is well-known and accepted. *See, e.g.*, Utah R. Prof’l Conduct 1.10(c)(1). Do you follow the same procedures when you hire a paralegal, secretary, or other non-lawyer assistant? There is good authority that says you should. *See* Utah State Bar Ethics Advisory Opinion Committee, Op. 145 (1994).

Competence

Non-lawyer assistants can do a lot to help a lawyer. For example, a paralegal may be allowed to represent clients in evidentiary hearings before a government agency that authorizes non-lawyer representation. *See* Utah State Bar Ethics Advisory Opinion Committee, Op. 03-03 (2003). However, the partner, managerial lawyer, and supervisory lawyer must take reasonable measures to ensure that the non-lawyer’s services are compatible with the lawyer’s professional obligations, which include competence. *See* Utah R. Prof’l Conduct 1.1. Do not ask your paralegal or other assistant to perform legal services he or she is not competent to provide.

Employing Disbarred or Suspended Lawyers

Some lawyers have employed disbarred or suspended lawyers to work as legal assistants. Their training and experience could be valuable in such a role. In such situations, a supervising lawyer must be extra careful to provide appropriate supervision. “Because such an individual has had significant legal training and experience, there may be a tendency for him to engage in conduct that is not properly supervised and, therefore, constitutes the unauthorized practice of law.” Utah State Bar Ethics Advisory Opinion Committee, Op. 99-02 (1999). The managerial or supervisory lawyer could then be responsible for assisting another in the unauthorized practice of law. *See* Utah R. Prof’l Conduct 5.5(a). Because the line separating what *is* and what *isn’t* the practice of law is very fuzzy, this could be a potentially dangerous area for the employing lawyer.

Dealing with Adverse Non-Lawyer Staff

When communicating with opposing counsel’s non-lawyer staff about substantive matters, a lawyer may safely presume the

non-lawyer is supervised within the requirements of rule 5.3. That presumption can be overcome, however, if the lawyer becomes aware of circumstances indicating that adequate supervision is lacking. In such a case, continued communication with opposing counsel’s non-lawyer staff could be considered assisting in the unauthorized practice of law in violation of rule 5.5(a). *See* Utah State Bar Ethics Advisory Opinion Committee, Op. 99-02 (1999).

Conclusion

The “big picture” message here is that a lawyer can be personally responsible for violations of any of the Rules of Professional Conduct by her non-lawyer staff. It therefore behooves the lawyer to train and re-train his or her staff on all standards of ethical conduct, especially those applicable to her particular practice.

If you are one of the new generation lawyers who manage to practice law with nothing more than a laptop and a cell phone, then you have one less thing to worry about. For all of the rest of us, carefully consider what you can do to better assure your non-lawyer assistants are fully compliant with your professional obligations.