

# Is Your Support Staff Supporting You?

By Mark Flanegin

Lawyers may spend years working to build a successful law practice. With that success comes increased demands on your time: court appearances, discovery, legal research, client interviews, and preparation of petitions and motions. You rely on your support staff to assist you in the day-to-day operation of the law firm. But is your support staff supporting you?

The purpose of this article is to remind lawyers that an occasional review of office procedures with members of your staff may help to prevent complaints from your clients.

## Responsibilities Regarding Non-Lawyer Assistants

Rule 4-5.3 requires a partner of a law firm to make efforts to ensure that the firm has established procedures that give reasonable assurance that the conduct of a non-lawyer with the firm is compatible with the professional obligations of the lawyer. The Rule also requires lawyers who have direct supervisory authority over a non-lawyer to make reasonable efforts to ensure the person's conduct is compatible with the professional obligations of the lawyer.

Non-lawyers include administrative assistants, investigators, paralegals, and law student interns, whether employees or independent contractors.<sup>1</sup>

This obligation mandates that assistants be given instruction and supervision concerning the ethical

requirements of their employment. The Rules do not specifically address how this instruction should be presented. At a minimum, the lawyer's ethical obligations should be addressed in detail at the time the assistant is hired. An assistant's failure to comply with ethical obligations could adversely impact the assistant's employment and may result in a client complaint and discipline of the lawyer. Periodic review of ethical obligations should take place with support staff. Providing the assistant with a written description of the ethical requirements may avoid misunderstandings and emphasize the importance of this responsibility.

Rule 4-5.3(c) makes it clear a lawyer may be subject to discipline for the conduct of a non-lawyer. The lawyer will be responsible for the conduct of an assistant that would be a violation of the Rules of Professional Conduct if the lawyer orders the conduct, or with knowledge of the conduct, ratifies the conduct. If the lawyer is a law firm partner, a lawyer who has comparable managerial authority, or has direct supervisory authority over the assistant, the lawyer will be responsible for the conduct of the assistant if the lawyer knows of the conduct when the consequences of the action can either be avoided or mitigated, but does not take remedial action.

*In Re Williams*, 711 S.W.2d 518 (Mo. banc 1986), a case decided before the adoption of the Rules of Professional Conduct, provides guidance concerning a lawyer's responsibility. This discipline case

involved irregularities with a lawyer's trust account. Mr. Williams delegated the tasks of making bank deposits, writing checks, and balancing the checking account to his assistant. He testified he was unaware that the trust account was overdrawn at the time the check in question was deposited, that he did not know of the transactions that caused the insufficiency, and that the problem was caused by the assistant who did not notify him of the problem. The record disclosed that Mr. Williams was aware of problems with the trust account, but had taken little or no corrective action. The Supreme Court concluded that because Mr. Williams had knowledge of the problems with the account and exposed a client's funds to the risks of the account, he "must be held accountable to the same degree as if he had known of the specific problems encountered with the [client] payment."<sup>2</sup>

## Land Mines That May Go Boom

Lack of instruction concerning communication with clients presents an opportunity for a violation of the Rules. Client contact with your firm may often be with support staff. The records of the Office of Disciplinary Counsel show that a lack of communication is consistently one of the most common complaints of clients. The fact that a client can call the law office and speak with support staff may not be sufficient to comply with Rule 4-1.4. Lawyers must keep clients reasonably informed of the status of their case and explain matters

to the extent a client can make an informed decision.<sup>3</sup>

Assistants should not be expected to shield the lawyer from a client.

Daily contact with clients is a valuable and necessary function of assistants; however, if clients are not able to get past the “gate keeper” and cannot get information from their lawyer, that lawyer is subject to discipline for violation of the Rule. Assistants who fail to inform the lawyer that a client has requested a return call or information from the lawyer may not only cause the loss of a client, but also a complaint with the OCDC.

Lawyers who fail to instruct an assistant that it is inappropriate to offer legal guidance or provide legal advice to a client may be subject to discipline for the unauthorized practice of law.<sup>4</sup> This is also true if the lawyer fails to monitor the assistant’s conduct.

Lawyers may want to take a quick assessment of their support staff by asking themselves: 1) Am I promptly getting my messages?; 2) Is my support staff shielding me from my clients?; 3) Is my support staff treating my clients with respect?; and 4) Is my support staff making promises I can’t keep?

Documents received by a law firm usually are first seen by members of the support staff. Copies of correspondence, pleadings and motions filed by opposing counsel, discovery, notice of depositions and court rulings and judgments must be reviewed and forwarded to the lawyer handling the case. Procedures on how to handle the firm’s mail must be understood by support staff. Those procedures should include recording the date of receipt and the timely presentment of the documents to the lawyer. Failure of support staff to understand the necessity to promptly direct documents to the appropriate

lawyer may result in not filing a necessary pleading, filing a pleading out of time, or judgment being entered against the client. Not only would the client’s case be adversely affected, the lawyer could be subject to discipline for a lack of diligence.

Lawyers have an obligation not to reveal information relating to the representation of a client.<sup>5</sup> This obligation applies to matters communicated in confidence by the client but also applies to all information, whatever the source, related to the representation. The obligation continues even after the death of the client.

Support staff should be instructed not to disclose information about a client or an ex-client’s case to anyone not employed with the law firm. They should also be advised that information should be placed in the appropriate client file. Information related to a client (medical records, financial papers, discovery, etc.) should only be provided to the client, opposing counsel or other individuals the lawyer has authorized to receive the information. OCDC has received complaints that confidential material was provided to another client or mailed to a wrong address.

## What About Subordinate Lawyers?

Many of the same responsibilities a lawyer has to supervise support staff also apply to subordinate lawyers. A lawyer who has direct supervisory authority over another lawyer must make reasonable efforts to ensure that lawyer is conforming to the Rules of Professional Conduct.<sup>6</sup>

A lawyer will be responsible for a subordinate lawyer’s violation of the Rules of Professional Conduct if the lawyer: 1) orders the conduct; 2) has knowledge of the conduct and

ratifies the conduct; or 3) is a partner, has managerial authority in the firm, or has supervisory authority over the lawyer and knows of the conduct when its consequences can be avoided or mitigated, but fails to take remedial action.<sup>7</sup>

Partners in the firm and lawyers with managerial authority must take reasonable steps to ensure the law firm has measures in place to provide reasonable assurance that the firm’s lawyers conform with the Rules. Procedures should be established to detect and resolve conflicts of interest, identify filing dates, account for client funds and property, and provide for supervision of inexperienced lawyers. Other necessary procedures may consist of informal supervision and periodic review to more formal written procedures depending on the size of the firm, the experience of the lawyers in the firm, and the nature of the law practice.<sup>8</sup>

## Conclusion

Taking the time to review office policies and properly supervise support staff can prevent a lawyer’s violation of the Rules of Professional Conduct. It can also assist the support staff in performing their work and establishing good will with your clients.

## Endnotes

1 Rule 4-5.3 Comment [1].

2 *In Re Williams*, 711 S.W.2d 518, 520 (Mo. banc 1986).

3 Rule 4-1.4.

4 Rule 4-5.5.

5 Rule 4-1.6.

6 Rule 4-5.1(a).

7 Rule 4-5.1(c).

8 Rule 4-5.1 Comment [3].

**Mark Flanegin** is staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City.