



Independent Duties of Supervision

ERs 5.1 and 5.3 of the Arizona Rules of Professional Conduct¹ require a lawyer to ensure that work performed by others under the lawyer's supervision conforms with the same ethical standards as if the lawyer were doing the work himself. Supervisory issues come up in a variety of situations, three of which are discussed here.


First, and most obvious, is the responsibility of a lawyer to take steps to ensure that the people in his firm, including non-lawyer assistants, are complying with the ethical standards, especially competence and diligence, as required by the rules. This responsibility is recognized in virtually every jurisdiction and is ignored by lawyers at their peril. As an example, in a recent Ohio case,² a lawyer was suspended from practice for 18 months for failing to properly supervise a secretary with whom he entrusted a bankruptcy practice. The secretary was allowed to use his office to meet with clients, to collect fees, to manage the office checking account and to use the lawyer's credit card to pay for filing fees after she filed bankruptcy cases online using the lawyer's electronic signature. Finding that the lawyer had abdicated his professional duty to oversee his bankruptcy practice, and had not terminated her services until the secretary had embezzled a substantial sum of the lawyer's money, the Ohio Supreme Court found a number of violations of Ohio's then-existing ethical rules and cited a list of cases where the lawyers involved received substantial suspensions for failing to properly supervise lawyers and non-legal assistants in their offices. Similar cases exist in Arizona.³

Another area where supervisory duties come into play is when a client is referred to another lawyer, including a lawyer in another jurisdiction, to assist the referring lawyer in a matter. We examined this issue in another column,⁴ particularly in reference to the duty of the referring lawyer to use good judgment in choosing a lawyer to whom to refer the matter. But here, we are looking at the situation where the referring lawyer keeps control of the case, using the other lawyer to perform duties the referring lawyer either can't or doesn't want to do. In these cases, the referring lawyer risks the other lawyer's negligence being imputed to him: ER 5.1 imposes an independent duty of supervision that can be breached even though the supervised lawyer is neither negligent or unethical.⁵

Most cases arise, however, when something goes wrong. In a recent New York case,⁶ a law firm was found to be liable when the Florida lawyer it retained to assist it failed to file a claim against an estate. The court viewed the Florida lawyer as a subagent of the New York firm, especially since the client was not aware of the Florida lawyer's role and continued to rely on her New York lawyer to handle all aspects of her claim.

Finally, supervisory duties are getting increasing attention in the modern trend of "outsourcing" legal and non-legal support services. A recent formal ethics opinion published by the American Bar Association⁷ has determined the outsourcing trend to be "salutary" for a globalized economy, and a way to reduce costs to clients. Outsourcing in this context includes

everything from using a local photocopy shop for large copying jobs to hiring a foreign firm to do legal research. The opinion points out that ERs 5.1 and 5.3 require the outsourcing lawyer to ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project independently and appropriately. This might involve checking references and determining how secure the provider's premises and computer network are. A final consideration that must be considered, especially where the relationship between the firm and the individuals performing the outsourced services is "attenuated" or remote, is that it may be wise and even necessary for the referring lawyer to provide information concerning the outsourcing relationship to the client and, in some cases, to get the client's consent to the process.

Delegation, referring and outsourcing are facts of professional life in the practice of law, but the ethics rules and the courts have recognized that the client need look only to the lawyer she hired if and when things go wrong. This requires us, in turn, to pay close attention to the people we use to assist us in serving our clients. 

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endnotes

1. Rule 42, ARIZ. R.S.C.T.
2. *Disciplinary Counsel v. Maley*, 119 Ohio St. 3d 217 (2008).
3. Arizona cases and relevant ethics opinions are collected in DANIEL J. MCAULIFFE, ARIZONA LEGAL ETHICS HANDBOOK (2nd ed. 2003), at Chapters 37 and 39.
4. *Referring Clients to Other Lawyers*, ARIZ. ATT'Y, Oct. 2006, at 10.
5. AMERICAN BAR ASSOCIATION, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 153 (1987).
6. *Whalen v. DeGraff, Ivy, Conway, Holt-Harris & Mealey*, 2008 WL 2756834 (N.Y. App. Div. 2008).
7. *Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services*, ABA Formal Op. 08-451 (Aug. 5, 2008).