

6 Steps To Becoming A Superior Supervising Attorney

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“See no evil, hear no evil, speak no evil” — many lawyers might be tempted to take this approach to the ethical practices of the lawyers working for them and with them. Do the other lawyers in your law firm practice according to the rules of professional responsibility? If your answer is to close your eyes, plug your ears and keep quiet, you may be putting yourself and your law firm at risk. In fact, in many circumstances, you have an obligation to take reasonable steps to ensure that the lawyers you work with, especially those you supervise or manage, follow the rules.

The ABA Model Rules of Professional Conduct, like similar rules in many states including Massachusetts and Rhode Island, make law firms and partners responsible for supervising subordinate attorneys to ensure they meet their ethical obligations. Rule 5.1 provides that partners and lawyers possessing supervisory or managerial authority are required to 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 of professional conduct. Commentary on the rule in some states suggests that the rule applies to lawyers who have intermediate managerial responsibilities as well, and not merely those who are at the top of the firm ladder.

An attorney who fails to satisfy this supervisory duty exposes the firm and its partners to potential liability. For example, under Massachusetts law, although “[a] violation of a canon of ethics or a disciplinary rule is not itself an actionable breach of duty to a client[,] if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney's negligence.” *Fishman v. Brooks*, 396 Mass. 643, 649 (1986). Similarly, in Rhode Island cases concerning attorney negligence, such as *Vallinoto v. DiSandro*, 688 A.2d 830, 834 (R.I. 1997), refer to the rules of ethics to establish the standard of care for attorneys. A firm’s breach of the rules of professional conduct in failing to take reasonable steps to ensure that firm lawyers comply with the rules could give a legal malpractice plaintiff just the right hook to convert a junior attorney’s error or

wrongful act into a direct claim for negligence against the law firm and the attorney's supervisors.

How can your law firm provide superior supervision to avoid this risk? Start with these six steps to develop safeguards both to avoid possible malpractice exposure and to make certain that your attorneys comply with legal and ethical requirements.

1. Ensure that all attorneys with supervisory or managerial authority — from the managing partner to each case manager — use reasonable efforts to practice ethically.

All lawyers need to make sure that the lawyers who work for them on a deal or a case understand the ethical expectations for that client, deal or case. As with all expectations, ethical expectations should be clearly articulated and not left up in the air. The biggest risk factor for lawyers new to the bar may be overzealousness. It is up to senior attorneys to make sure that the lawyers working on their client matters understand that they are never encouraged, expected to or permitted to mislead the other side, communicate with a party known to be represented by counsel, overstate the facts or the law to the tribunal, or do anything else in the "heat" of battle that may cross an ethical line. Culture starts at the top and a culture that requires ethical compliance needs to be expressed from the top.

2. Know the practice areas and clients of all lawyers in the firm.

Firms should periodically review on a management-to-partner, peer-to-peer and partner-to-associate basis the clients and work of all firm attorneys. As the commentary to Rule 5.1 advises, a small firm of experienced lawyers may require only informal supervision, periodic compliance reviews, and occasional admonition, while a larger firm, or a firm with numerous inexperienced attorneys or thorny ethical considerations, may require more elaborate procedures. Periodic review of partner and associate practices can catch potential red flags before they become serious problems.

3. Conduct ethics trainings on a regular basis.

Whether or not the law firm has inside general counsel, the firm should conduct periodic training on the rules of professional ethics. These could be as simple as providing an update on any revisions to the rules during an attorney lunch, to asking outside counsel or the firm's insurance carrier to come and do a presentation. Most ethical lapses are just that — inadvertent failures of attention. Most are not intentional or nefarious (and if they are the law firm has bigger problems). Periodic ethics training insures that all lawyers understand and appreciate the importance of, and the firm's commitment to, ensuring compliance with the rules of professional conduct.

4. Thoroughly vet the practice of any new or lateral attorney.

Law firms should properly vet the practice of any new or lateral attorney. Before the firm agrees to hire any lawyer, it must understand what the attorney does or plans to do and who his or her clients are. If the attorney has a book of business, firm management should review the attorney's history of clients, hours, rates and total billings, as well as perform independent research into the business and practices of the attorney's more significant clients. If the attorney's practice looks "too good to be true," it very well may be. Performing due diligence before associating with a new attorney can prevent significant headaches further down the road.

5. Prepare and distribute policies based on best practices in the industry.

Law firms should prepare and disseminate to their partners and associates firm policies based on best practices in the industry. These policies should run the gamut from client intake and conflicts to client communication and termination. For example, the firm should develop a model engagement letter that states the terms and scope of the firm's engagement as well as set up an internal process for examining any substantive changes to the model terms. The firm should design and implement policies to detect and resolve potential conflicts, identify and calendar dates and deadlines for action, account for and retain client funds and property, and ensure that inexperienced lawyers are properly supervised in pending matters.

6. Appoint in-house general counsel or have outside general counsel on speed dial.

Law firms of all sizes need an attorney who can serve in the role of general counsel and ethics adviser. While a large firm may have the structural capacity to designate one of its attorneys to fill these roles, most firms should retain outside attorneys to serve in the capacity of general counsel and ethics adviser in order to advise the firm and its lawyers on its ethical obligations and potential risks and liabilities. Whether the general counsel is in-house or outside the firm, that attorney must be intimately familiar with the rules of professional conduct, all firm policies, and the practices and practice areas of the firm, and be able to provide guidance to help avoid potential risks to the firm. An in-house or outside attorney performing the role of general counsel and ethics adviser can provide confidential counseling and advise the firm and its attorneys on how to handle issues when they arise.

While it may be tempting to put your head in the sand, doing so can cost you. Rather than a policy of seeing, hearing and saying nothing, following these six rules will give you the peace of mind that you are abiding by the rules of ethics, and will make you a superior supervising attorney.

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