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For law firms, rogue attorneys present risk

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A recent decision from a federal District Court judge in the 1st Circuit should prompt all law firms to take a second look at how they supervise the lawyers who work for them.

The firm in *Robert Smith v. RKelley-Law, P.C.*, C.A. No. 07-12067-RGS (D. Mass. Sept. 15) had judgment entered against it for the fraudulent and deceptive conduct of its associate — conduct it claimed it had no actual knowledge was occurring at its place of business.

A money judgment for vicarious liability is just one of the risks, however, that law firms run when they hire associates. The Rules of Professional Conduct in Massachusetts and Rhode Island make law firms and partners responsible for supervising subordinate attorneys to ensure they meet their ethical obligations.

How does a law firm ameliorate the risk from rogue lawyers? Law firms must develop safeguards both to avoid possible malpractice exposure and to make certain that their attorneys comply with legal and ethical requirements.

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- **Law firms may be vicariously liable for attorneys' wrongful acts.**

The circumstances in *RKelley-Law* should give every law firm pause.

Attorney Louis Bertucci started working at RKelley-Law, P.C., as an associate when he passed the bar exam in 2001. Among other things, his duties included conducting real estate closings on behalf of the firm. He closed between 60 and 80 transactions a month. The firm earned a fee for each closing.

In 2005, Bertucci closed two real estate purchases for Robert Smith, a military veteran who worked as a trash collector and suffered from mental illness. While at work one day, Smith was approached by a real estate agent who invited him to participate in a real estate investment opportunity. Smith agreed, showed up for two closings at RKelley-Law's offices and, without realizing it, walked away with a whopping $800,000 in debt on two residential mortgages. The "straw buyer" transactions earned Bertucci and RKelley-Law thousands of dollars in fees.

The issue in *RKelley-Law* was whether the firm could be held liable for Bertucci's fraud and violations of G.L.c. 93A, the consumer protection act.

Although a jury returned a verdict for Smith, the District Court judge granted the law firm judgment as a matter of law. In essence, the judge held that unless the firm's sole shareholder was involved, the firm was not responsible for the associate's rogue conduct.

The 1st Circuit reversed and remanded, ruling that although the firm's sole shareholder had no individual liability for Bertucci's conduct, there was sufficient evidence to hold the firm vicariously liable.

On remand, the District Court applied Massachusetts' familiar three-factor test for vicarious liability. Were the closings the type of work RKelley-Law employed Bertucci to perform? Did they occur at the time and place at which Bertucci was authorized to perform his work for the firm? Was Bertucci's work on the closings motivated, at least in part, by a desire to serve RKelley-Law?

The judge found all three prongs satisfied and held RKelley-Law liable.

The result in *RKelley-Law* is in keeping with prior decisions concerning vicarious liability of law firms. In *Kansallis Finance Ltd. v. Daniel J. Fern, et al.*, 421 Mass. 659 (1996), the Supreme Judicial Court held that a law firm could be liable for a loan and leasing scheme by one of its partners even though the other partners had no knowledge of the scheme and had not participated in it.

The SJC said that the firm could be responsible (i) if the partner had apparent authority to do the wrongful act, whether or not he intended to benefit the firm, or (ii) if the partner acted without apparent authority but intended to benefit the firm.

The SJC also held that the firm could be liable under G.L.c. 93A despite being entirely unaware of and uninvolved in its partner's unfair and deceptive conduct.

- **Rogue attorneys also expose law firms to risk of direct liability for failure to supervise under the rules of professional conduct.**

An attorney's supervisory obligations under the Rules of Professional Conduct could provide another basis for liability for another lawyer's acts.

Rule 5.1 of the Rules of Professional Conduct in Massachusetts and Rhode Island 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 attorneys at the firm conform to the rules of professional conduct.

The commentary to the Massachusetts and Rhode Island rules states that Rule 5.1 applies to supervising or managerial attorneys in law firms

and government agencies. It also applies to lawyers who have intermediate managerial responsibilities, not merely those who are at the top of the firm ladder.

An attorney who fails to satisfy that supervisory duty exposes the firm and its partners to potential liability.

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).

Furthermore, 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 in establishing the standard of care for attorneys. The firm's breach of the rules of professional conduct could give a legal malpractice plaintiff the hook to convert an attorney's error or wrongful act into evidence in support of a direct claim for negligence against the law firm and its partners.

- **What can law firms do to protect themselves?**

Law firms can do several things to decrease the risk of being held responsible for a partner or associate who has "gone rogue."

First, law firms need to know as much as possible about the practice areas and clients of their fellow attorneys, partners and associates alike. Firms should periodically review on a management-to-partner, peer-to-peer, and partner-to-associate basis the clients and work of other law firm attorneys.

As the commentary to Rule 5.1 advises, a small firm of experienced lawyers may require only informal supervision, periodic review of compliance 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.

For example, if an attorney develops a client with substantial billings but is unable to answer basic questions about who the client is, what the client does, or what role the attorney's work plays in the client's overall business strategy, the firm should dig deeper and perform additional due diligence in coordination with the attorney servicing the client to be sure that this legal work does not expose the firm to liability.

Second, law firms should properly vet the practice of any new or lateral attorney. Before the firm agrees to bring the attorney on as a partner or associate, it needs to understand what the attorney does or plans to do and who his or her clients are.

A small firm of experienced lawyers may require only informal supervision, periodic review of compliance and occasional admonition, while a larger firm, or a firm with numerous inexperienced attorneys or thorny ethical considerations, may require more elaborate procedures.

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.

Third, firms should prepare and disseminate to its partners and associates law 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.

Some of the policies will be practice specific. For example, if attorneys at the firm issue opinion letters on firm letterhead, the firm should consider administering a policy requiring second-partner review of any opinion letter.

Fourth, law firms of all sizes need an attorney who can serve in the role of general counsel and ethics advisor.

While a large firm may have the structural capacity to designate one of its attorneys to fill such a role, most firms should retain an outside attorney to advise them and their lawyers on their ethical obligations and potential risks and liabilities.

Whether the general counsel is in-house or outside the firm, the attorney must be intimately familiar with the rules of professional conduct and firm policies 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 advisor can provide confidential counseling and advise on how to handle issues when they arise.

The lesson from *RKelley-Law* is clear: Failure to understand the work being done by every lawyer at a firm — from the most senior partner in the corner office to the most junior associate in the windowless workstation — and to prepare for potential attorney error or misconduct by instituting best practices and seeking outside counsel can expose the entire firm to substantial risk.

A rotten apple really can spoil the bunch.

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