

Hot Current Topics in Lawyer Supervision

BY RONALD C. MINKOFF

The New York Code of Professional Responsibility makes it clear that attorneys in law firms or corporate or government law offices who have "direct supervisory authority over another lawyer" must "make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules." DR 1104(B). Indeed, this supervisory responsibility applies not just to a particular lawyer, but also to the law firm itself. See DR 1104(C) ("A law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm"). Supervisory attorneys are responsible for violations of the Disciplinary Rules by another lawyer if "[t]he lawyer is a partner in the law firm in which the other lawyer practices... *or has supervisory authority over the other lawyer,*" and either knew or should have known of the misconduct. DR 1104(D)(2) (emphasis added).

While partners in law firms clearly have supervisory responsibility over firm associates and subordinate partners, the application of the supervisory rules gets mighty fuzzy after that. What about lawyers who are "of counsel" to a firm? Lawyers based in New York who supervise attorneys in other jurisdictions, covered by other ethics codes? Attorneys whom a firm hires on a contract basis, either to perform an assignment or cover a court appearance? Attorneys who enter into mutual referral arrangements with each other? And what of *firms* that are "of counsel" to each other, or have looser forms of affiliation? Research reveals few clear answers to these questions, though several Bar Association opinions, including recent opinions in New York, Oregon and California, provide important guideposts.

Lawyers "Of Counsel" To a Law Firm

Defining the lines of supervisory authority over attorneys designated as "of counsel" to a firm is not easy. One reason is that the roles and financial relationships of those bearing the title "of counsel" vary widely, from younger lawyers renting space and splitting fees with the parent firm, to passed over associates working under written contracts, to aging firm founders transitioning into retirement. See ABA Formal Op. 90357 (1990) (listing these and others as common "of counsel" relationships). Under the New York Code, "a lawyer... may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner and associate." DR 2102 (A)(4); *see* N.Y. City 19958 ("of counsel" designation requires "a close, continuing, regular and personal relationship").

Though we could find no case on point, either in New York or elsewhere, there is every reason to believe that any firm attorney responsible for supervising another attorney designated as "of counsel" will be held responsible for that attorney's ethical misconduct. First, and most importantly, the language of DR 1-104 goes beyond partners and associates to cover any lawyer with "supervisory authority" over any "other lawyer." Second, courts and Bar Associations around the country have emphasized the breadth of the supervisory obligation, noting that it covers all attorneys in and even outside the firm. *See, e.g.,* Georgia Ethics Op. 981 (lawyer serving as local counsel can be disciplined for discovery abuse by out-of-state counsel, if lawyer knows of abuse and ratifies it); *In re Yacovino*, 494 A.2d 801 (N.J. 1985)

(supervising lawyer has duty to ensure all lawyers in organization carry out duties to clients in conformity with applicable professional responsibility rules). Third, notwithstanding that DR 1104 imposes direct responsibility on supervisory lawyers, rather than vicarious liability [*see, e.g.,* Annotated Model Rules of Professional Responsibility (5th ed.) at 445 (ABA 2003) (Model Rule 5.1, the analogue of DR 1104, "establishes the principle of supervisory responsibility without introducing vicarious liability")], at least one New York court has held that a law firm may be civilly liable for misconduct by an "of counsel" lawyer "if [the firm] clothed him with the apparent authority to act on its behalf." *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 590 N.Y.S.2d 200, 202 (1st Dep't 1992). For this reason, a leading commentator has noted that although DR 1104 "omits both 'of counsel' lawyers and temporary lawyers," it "ought to cover both categories." R. Simon, *Simon's New York Code of Professional Responsibility Annotated* (2004 ed.) at 66 (West 2004).

Temporary or Contract Lawyers

Speaking of "temporary lawyers," they too raise a difficult problem under DR 1104. While it may be easy to impose supervisory responsibility on a big firm lawyer who hires temporary attorneys to work on a specific project, the situation is less clear when, for example, a solo practitioner asks a lawyer friend to cover a single court appearance, or contracts with someone from a temporary lawyer agency to handle a deposition.

The California State Bar recently addressed this situation in Formal Opinion 2004165 (2004). The inquirer was an attorney handling a variety of litigation matters in different courts who wished to use an agency called Court Appearance Service ("CAS") to provide temporary attorneys to represent the inquirer's clients at "law and motion hearings, status conferences, depositions, and other matters." Formal Op. 2004165 at 1. In analyzing whether this arrangement was permissible under California's Rules of Professional Conduct, the State Bar began with the inquirer's obligation to perform legal services competently. The inquirer's "satisfaction of this duty will be measured not just by his own performance, but also by the adequacy of [the inquirer's] supervision of the CAS lawyer; [the inquirer's] decision to delegate a task does not delegate his own duty of competent representation." *Id.* at 2 (emphasis added). Noting that CAS attorneys will often be retained in emergencies, the State Bar urged the inquirer to "adequately prepare the CAS lawyer for the [court] appearance," and to ensure that the CAS lawyer was competent to handle the representation. *Id.*

In a later part of the opinion, the State Bar noted that although CAS's advertisements and retainer agreements attempted to disclaim an attorney client relationship between the CAS lawyer and the inquirer's clients, basic professional responsibility rules took precedence. "The appearance by a CAS attorney in a representational capacity on behalf of a lawyer's client constitutes [an attorney client] relationship for purposes of analyzing his or her ethical duties," both because the CAS lawyer's activities "create[] an expectation that the lawyers have a duty of fidelity" and because the CAS lawyer acquires client confidences and secrets. *Id.* at 56.

In sum, although Formal Opinion 2004165 does not explicitly discuss the inquirer's responsibilities under the California equivalent of DR 1104, it makes clear that the inquirer, by hiring the CAS lawyer, takes on the responsibility under the California Rules of Professional Responsibility of ensuring that the CAS lawyer performs his or her work competently and observes the duties of loyalty and confidentiality. This may easily be stretched to require supervision of the CAS lawyer's compliance with other ethical duties as well.

NY Attorneys Supervising Out of State Lawyers (And Vice Versa)

Requiring one lawyer to supervise another whether a partner, associate, "of counsel" or "temp" makes sense when both the supervisor and subordinate are admitted in the same state and are obligated to follow the same ethics rules. The situation becomes more complex when the supervising lawyer is admitted in one jurisdiction and the subordinate is admitted in another. No New York court has addressed the issue in a matter involving supervision over a lawyer admitted in another state, but the New York State Bar Association has dealt with the issue as it relates to lawyers in foreign countries.

In Opinion 762 (2003), the NYSBA Committee on Professional Ethics noted that DR 1104(A) and (B) imposed supervisory responsibilities on New York lawyers and the law firm itself, and then divided the rest of the firm the "subordinates" into two groups: 1) New York lawyers, and 2) lawyers admitted in foreign countries (considered "nonlawyers" under DR 1104 for this purpose). As to the first group, the Committee made clear that "[a] New York law firm must make reasonable efforts to ensure that any lawyer in the firm who is subject to the New York Code complies with the disciplinary rules." The Committee reviewed prior opinions describing the steps New York supervisory lawyers must take to comply with the rules including, where appropriate, drafting detailed written policies, one on one supervision, consulting outside experts, and responding immediately to "any ethical issue that comes to [their] attention."

As to the second group, the Committee stated that DR 1104 "does not impose an obligation on a New York law firm to ensure compliance with the Disciplinary Rules by affiliated lawyers licensed in foreign countries who are not subject to the New York Code." Nevertheless, supervisory responsibilities over this group do exist. For example, the firm has to take steps to "ensure that all persons affiliated with the firm understand the sanctity" of the requirement that the firm maintain attorney client confidences, even "lawyers licensed in foreign countries whose confidentiality rules may differ." The firm also has to ensure that any lawyers working in the New York office, including licensed foreign lawyers, are competent to handle any matters entrusted to them.

Furthermore, the firm has to make "reasonable efforts to ensure that adherence to the disciplinary rules of a foreign country by a lawyer licensed in a foreign country does not expose the New York firm or its New York lawyers to the possibility of violating the New York Code." For example, a foreign lawyer may be obligated to reveal a client's past fraud, while a New York lawyer would be prohibited from doing so. The New York supervisor has to take steps, such as denying the foreign lawyer access to attorney client confidences, to prevent the foreign lawyer from compromising the firm's adherence to New York ethical standards.

Firms "Of Counsel" To Each Other

As New York State 762 (2004) demonstrates, defining the scope of a supervisor's duties can be difficult

even within a single firm. The task becomes even harder when two separate firms, operating as "affiliates" or "of counsel" to each other, are involved.

The notion of a law firm being an "affiliate" of, or "of counsel" to, another law firm has a long and tortured history. Initially, such relationships were prohibited, since they were considered misleading to members of the public. *See, e.g.,* N.Y. City 8228 (rejecting the term "affiliated" to describe the relationship between two firms). This changed with ABA Formal Opinion 351 (1984), which ruled that "neither the Model Rules nor the Model Code prohibits the communication that one law firm is affiliated or associated with another, so long as the relationship between the two firms is such that the communication is not false and misleading and the law firms adhere to the applicable rules regulating the disclosure of confidential information and conflicts of interest as if they were a single firm." The opinion recognized that affiliate or "of counsel" relationships between law firms may prove useful to clients, especially when they involve law firms from different states who practice together regularly. Still, the opinion said that to avoid misleading the public, such a relationship has to be closely akin to a single lawyer serving as "of counsel" to a firm: "[t]he relationship must be close and regular, continuing and semi permanent, and not merely that of forwarder receiver of legal business."

Ten years later, the ABA Committee went into far greater detail. In Formal Opinion 94388, the Committee noted the confusion caused by "the vast array" of words and phrases used to describe relationships between firms: "of counsel," "associated," "affiliated," "strategic alliance," "network," and "correspondent," to name a few. The Committee eschewed any effort to define these terms, and instead ruled that, in order to avoid misleading clients, firms having these relationships - which may range from sharing office space and working on client matters together, to making only occasional referrals - must describe to clients "the exact nature of the relationship and the extent to which resources of another firm will be available in connection with the client's retention of the firm that is having that relationship." This description had to include: whether professional personnel from the other firm would be involved in providing professional services; whether fees and profits will be shared with the other firm; whether the firms share common strategies and expertise; and whether the firms share common operations.

Similarly, the ABA Committee went on, the peculiar nature of the relationship between two given firms calling themselves "affiliates" determines whether they have to clear conflicts with each other. This, in turn, will depend on whether "a particular representation may be materially limited by an existing relationship." See Model Rule 1.7(b) (defining conflicts of interest). Thus, the ABA Committee noted that where two firms make "casual referrals," or engage in "periodic mutual back scratching," they will not have to clear conflicts with each other, while "[a] more regular practice of referral," [or] the entry of two firms into a joint nonlegal business (such as forming a title company together, or one firm lending money to another), or the sharing of profits will require them to behave as if they are a single firm in evaluating possible conflicts of interest. *Accord, Mustang Enterprises, Inc. v. PlugIn Storage Systems*, 874 F. Supp. 881, 888, 890 (N.D. Ill. 1995) (law firms that publicly announce themselves as "affiliated with" one another had to be treated "as the equivalent of two offices of the same firm" for conflicts purposes unless they made clear, when describing their relationship to the public, that it was limited in some way).

The Association of the Bar of the City of New York (the "ABCNY") has taken a somewhat stricter view. In Formal Opinion 19958, the ABCNY agreed that firms could hold themselves out as "of counsel" to each other but, unlike the ABA, ruled that this could not be used to designate "the mere referral of business" or

"occasional collaborative efforts" between firms. Instead, the relationship must be "close, personal and regular," akin to one firm sharing space with or being actively involved in the cases and affairs of another. Consequently, the ABCNY concluded, firms qualifying as "of counsel" to each other under this strict test will always constitute a single firm for conflicts of interest purposes. The ABCNY reiterated this view five years later, stating in Formal Opinion 20004 that the same requirements apply to firms wishing to designate themselves as "associated" or "affiliates."

The implications for supervisory liability under DR 1104 are obvious. Given the ABCNY's statement in Formal Opinion 20004 that "the relationship between firms must be sufficiently close, personal and continuing to warrant the designation of 'affiliated' and that this relationship mandates that we treat the clients of each member as clients of every member of the group," disciplinary prosecutors will almost certainly succeed in establishing that managing attorneys at one firm have supervisory responsibility over the work of attorneys at another, "affiliated" firm, especially when the two firms are working on the same matter.

Business Referral Clubs

A recent Oregon State Bar opinion, OSB Formal Ethics Op. No. 2004175 (2004), dealt with a new phenomenon that raises troubling supervisory issues: the business referral club. Though not described in detail in the opinion, these organizations include lawyers and nonlawyers, and are intended to facilitate the referral of business between members. Members are required to attend monthly meetings and to make referrals to each other as a condition of membership. Though the organization's rules make clear that they are subordinate to any professional ethics rules that individual members are obligated to follow, the members are required to follow up on referrals.

The Oregon State Bar made clear that a lawyer could not participate in this type of organization. Central to this determination was the fact that the organization's members were required to make reciprocal referrals. This requirement would cause the lawyer to violate DR 2103 - the relevant portion of which is the same in Oregon and New York - which prohibits a lawyer from "compensat[ing] or giv[ing] anything of value to person or organization to recommend or obtain employment by a client." Since the referral by the lawyer is a "thing of value" to the nonlawyer, the quid pro quo nature of the relationship violates the rules.

The existence of business referral groups, or even informal referral networks, may raise troubling supervisory issues. When, if ever, does a lawyer who makes a referral retain supervisory authority over the matter? Does this occur only when the lawyer remains involved in the matter, or seeks a piece of the fee? Or is the mere fact that the lawyer took responsibility for the matter by finding another lawyer enough? Again, there are no clear answers. But as bar organizations, and disciplinary prosecutors, continue to scrutinize these nontraditional relationships, answers will come soon enough.

Ronald C. Minkoff is a member of Frankfurt Garbus Kurnit Klein & Selz. He has a practice emphasizing commercial litigation and professional responsibility issues. He is an Adjunct Professor of Professional Responsibility at Brooklyn Law School, and President Elect of the Association of Professional Responsibility Lawyers.