

# The Duty To Supervise: A Firm Responsibility

BY MARVIN FRANKEL & CHARLOTTE FISCHMAN

New York stands alone in requiring law firms as well as lawyers (at least those with management responsibility in the firm or “direct supervisory authority” over another lawyer) to make “reasonable efforts to ensure” that “lawyers in the firm conform to the disciplinary rules.” DR1-104(a),(b). DR1-104(c) says that “a law firm shall adequately supervise as appropriate, the work of partners, associates and nonlawyers who work at the firm;” the subsection goes on to list factors which must be taken into account in measuring the degree of supervision required. Experience to date suggests that DR1-104 may be having a major impact on internal firm workings but thus far no public impact in the form of reported cases.

DR1-104 differs from Model Rule 5.1 of the ABA Model Rules of Professional Conduct in extending the responsibility for supervision to the law firm in addition to certain individual partners in the firm. The New York rule requires in its opening paragraph that “[a] law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.” DR1-104(a). Law firms are further enjoined to “adequately supervise” the work of all lawyers and non-lawyers at the firm. DR1-104(c). The actual “degree of supervision” required is defined only as supervision “which is reasonable under the circumstances ...”

Of these two basic duties — 1) to ensure conformance with the disciplinary rules, and 2) to supervise the work of others — only the former is imposed broadly on individual lawyers at the firm, i.e., those with “management responsibility” or “direct supervisory authority over another lawyer.” DR1-104(b). In addition, vicarious liability for a violation of the disciplinary rules by another lawyer is addressed in DR1-104(d)(i). This subsection provides that a lawyer — whether partner, associate or counsel — is responsible for another’s violation of the Disciplinary Rules if the lawyer in question orders or directs the conduct or has knowledge of the specific conduct and ratifies it. In addition, partners or supervisory lawyers are vicariously liable for ethical infractions if they know or “should have known” of such conduct so that reasonable remedial action could be taken. DR1-104(d)(2).

## No Other State Follows NY Lead

In the four years since New York modified the Code to permit the discipline of law firms, no other jurisdiction has followed this course. The ABA Ethics 2000 Commission (the “Commission”) initially considered and rejected a proposal to extend potential discipline under Model Rule 5.1 (the inspiration for DR1-104) from the partners in a law firm to the firm itself. The rejection was apparently the result of deliberations in which disciplinary counsel expressed the view that an extension of discipline to law firms was “unnecessary,” that one or more individual lawyers could normally be disciplined for an infraction and that law firm discipline “would not add anything important to available sanctions.” Ethics 2000 Commission, *Proposed Rule 5.1- Reporter’s Explanation of Changes* (Nov. 15, 1999). More recently, a member of the Commission has announced a turn-about on the recommendation of the ABA Standing Committee

on Professional Discipline to extend these duties to law firms. See Margaret Colgate Love, Ethics 2000 Commission, *Update on Ethics 2000 Project and Summary of Recommendations to Date* at para. 25 (June 15, 2000).

This development suggests that a harder look at the New York experience is in order. To the best of our knowledge, there have been no reported cases in which law firms have been disciplined under DR1-104. There are cases in which individual lawyers have been disciplined for failure to supervise other lawyers as well as non-legal staff. In *In re Chatarpaul*, 706 N.Y.S.2d 714 (2d Dept. 2000), an attorney was suspended for three years for failing to supervise under DR 1-104(c); in *In Re LaBella* (2d Dept. 1997), an attorney was suspended for five years, in part for failing to supervise another lawyer in his office, contrary to DR 1-104(a)(2).

Cases in which law firms are disciplined are most likely to arise in the First Department where many of the larger New York law firms are located. Lawyers working in the discipline field have suggested that while the text of DR1-104 causes a closer look at management and supervisory lawyers, there has been no spillover to law firms because large firms have a hierarchy of command which makes it easier to identify individual lawyers in imposing discipline.

If there is a reluctance to proceed against law firms, the uncertainty as to what sanctions to apply may be a factor. When the Committee on Professional Responsibility of the Association of the Bar of the City of New York first proposed a revision to the Disciplinary Rules to include law firm discipline, there was a recognition that "there exists no enforcement mechanism to sanction firms which violate [the] rules." Committee on Professional Responsibility, Association of the Bar of the City of New York, *Discipline of Law Firms*, The Record 628, 635 (1993). The recommendation was accompanied by a proposal to amend relevant provisions of the Judiciary Law to make clear that law firms could be censured or fined. See *id.* at 636-37. Those legislative changes, however, never came about, leaving firms subject to the same array of sanctions levied against individual lawyers. When the 1996 changes were reported in the legal press, there was said to be a disagreement among the four Appellate Divisions on the sanctions issue, the First Department proposing that firms be subject to reprimand, censure, "fine or restitution, but not suspension or disbarment." Edward A. Adams, *New Rule Authorizes Discipline of Firms*, N.Y. L.J., June 6, 1996, at 1.

As a result, both the Disciplinary Rules and Judiciary Law are silent on the form of discipline to be applied to firms, and there is no express statutory authorization to impose fines. That leaves public censure or restitution as the most likely sanctions that may be available for law firm discipline. At least without clear authority, different or more drastic sanctions do not seem to be authorized.

### **Steps Recommended For Code Compliance**

While there are no reported disciplinary cases against law firms, the disciplinary rule may well have fulfilled some of its expectations: creating a practice environment which would discourage ethical violations; furthering the self-policing of the profession; recognizing that in the modern-day firm, some areas of supervision may be the responsibility of the entire firm, not a single lawyer; and encouraging self-reflection about a law firm's organization and operating procedures. [These were some of the potential benefits anticipated by the Committee of Professional Responsibility of the Association of the Bar of the City of New York, *supra*, when it recommended extending the Disciplinary Rules to law firms.]

Medium and larger firms are using these techniques to comply with the supervisory responsibility of DR1-104 to ensure that all lawyers comply with the Code:

- Create an ethics committee for the resolution of issues. Associate membership on the Committee will encourage younger lawyers to bring issues to the table.
- Provide current copies of the Code to every lawyer.
- Periodically issue law firm policy statements or opinions to every lawyer, to be maintained in a permanent loose-leaf binder, on recurring issues like conflict procedures, ethical obligations concerning non-lawyer employees, and conflict clearance procedures for new attorneys.
- Retain an independent, outside ethics expert to consult on a regular basis with respect to particularly knotty issues or those on which partners cannot agree.
- Designate an in-house, full time ethics counsel to review the firm's procedures, keep lawyers abreast of developments in the ethics field and provide instant expertise.
- Designate partners with an ethics background to participate in informal roundtable discussions with other firms to air common issues and cross-fertilize.
- Circulate recent developments in ethics to all attorneys.
- Present in-house ethics programs on a regular basis geared to the interests and needs of the particular lawyer group (whether first-years, corporate or litigators).
- Make sure that there is regular communication or overlapping membership between the management and ethics committees of the firm.
- Train lawyers on doing ethics research, which is somewhat specialized in nature. Make it easy to get quick answers.
- Establish systems for determining conflicts of interest, accounting for client funds, and assuring that inexperienced lawyers are properly supervised. [DR 5-105(e) requires all New York law firms to maintain records of prior engagements as well as a procedure for checking conflicts.]

While awaiting the development of a body of disciplinary law, law firms need to address the risk of law firm discipline by the adoption of prophylactic measures such as those just suggested. In the meantime, law firms might look to the securities-broker-dealer area where the duty to supervise has been well developed. Many of the cases and administrative proceeds in the securities area deal with an institution's failure to detect and prevent primary violations or with guidelines that ensure compliance with institutional directives. *See generally* 6 Louis Loss & Joel Seligman, *Securities Regulation*, 3049 n. 188 (3d ed. 1990); 2 Thomas Lee Hazen, *The Law of Securities Regulation*, 149-55 (3d ed. 1995.)

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