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FEATURED TOPIC
LAW OFFICE MANAGEMENT II

Last month's issue discussed Kansas Rule of Professional Conduct 5.1, which deals with supervising and managing lawyers' responsibilities for the work of subordinate lawyers. This month's issue builds off that discussion by looking at KRPC 5.2 on the responsibilities of subordinate lawyers asked to take ethically questionable actions by supervising lawyers and at KRPC 5.3 on the responsibility of supervising and managing lawyers for the acts of internal and external non-legal staff.

KRPC 5.2 reads:

> **(a)** A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.
> **(b)** A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

KRPC 5.2(a) is the corollary of Rule 5.1. Its purpose is to make it clear that a lawyer cannot defend herself against a charge of violating the KRPC on the grounds that she was instructed to take action by a law firm superior. In military law, such a defense is often referred to as the "defense of superior orders" and is generally rejected as valid. Instead, both the KRPC and military code emphasize that each individual must take personal responsibility for her actions, regardless of whether she was instructed by a superior to take them.

KRPC 5.2(b) clarifies the single instance in which following superior orders may properly serve as a defense. If a subordinate lawyer ordered to take an action by a supervising lawyer questions the supervisor's order and the supervisor gives a reasonable justification as to why the order is not a violation of the KRPC, then the subordinate lawyer's compliance with the order will not constitute a violation of the KRPC.

Comment 2 to this section states that the defense applies only when the superior-subordinate discourse is genuine and the superior's explanation is, in fact, reasonable. If the questioned order is clearly unethical ("can only reasonably be answered only one way"), then simply going through the sham of a discussion will not excuse the violation. If, however, the order is "reasonably arguable" then:

> … someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the

> question should protect the subordinate professionally if the resolution is subsequently challenged.

Of course, the question of reasonableness, if there is a dispute, will be judged by the standards of what a reasonable lawyer in the same circumstances in the jurisdiction would do. Thus, in situations where a subordinate lawyer believes that the instructions given by a supervising lawyer's instructions are ethically problematic even after a discussion, the subordinate lawyer may well want to take additional step to ensure compliance with the KRPC. She might speak to another member of the firm about the matter or seek outside ethics counsel.

KRPC 5.3 tracks KRPC 5.1 and extends the responsibilities of supervising and managing lawyers to supervising and managing non-lawyer law firm staff and to "non-lawyers outside the firm who work on firm matters." KRPC 5.3(a) requires that lawyers with managerial authority in a law firm…" shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance" that non-lawyer staff behavior "is compatible with the professional obligations of the lawyer." KRPC 5.3(b) requires that "a lawyer having direct supervisory authority over a non-lawyer "shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." However, the "reasonable efforts" that law firms must take to educate their non-lawyer staff pursuant to KRPC 5.3(a) are not coextensive with those required by KRPC 5.1(a) because many of the Rules will be irrelevant to staff in performing their normal duties.

KRPC 5.3(c) is the exact analogue of KRPC 5.1(c):

> **(c)** a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if: **(1)** the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or **(2)** the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment 2 to KRPC 5.3 (c) further states as to non-lawyers in a firm:

> The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

In practical terms, a lawyer or law firm should, at the very least, include a discussion of basic ethical obligations (including confidentiality and conflicts of interest) in manuals for law firm staff. Firms may well want to provide staff either with in-house ethical instruction on a regular basis or, when available, pay for outside continuing education on ethical matters (such as that generally made available to paralegals by their professional associations).

And, as to non-lawyers outside the firm who are retained to perform services, Comment 3 states:

> The extent of this obligation will depend upon the circumstances, including the education, experience, and reputation of the non-lawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

Compliance in this area can place a considerable burden on law firms, especially when using non-local service providers. For instance, lawyers and law firms that outsource work to companies and individuals not resident in the United States may find it difficult to comply with the requirements set forth in Comment 3 as to discovering and monitoring the "legal and ethical environment" of a foreign company whom they retain.

All in all, the obligations that KRPC 5.2 and 5.3 impose on lawyers and law firms are far from negligible and may, in some cases, be costly to lawyers and law firms in both time and money. On the other hand, violations of KRPC 5.2 and 5.3 can carry heavy sanctions for involved lawyers and firms. In addition, failure to properly supervise non-lawyer staff pursuant to KRPC 5.3 and consequent damage to clients may also expose lawyers and firms to significant malpractice risks—risks law firms may not even realize are present.

NEW AUTHORITY
ABA FORMAL OPINION 88-356

On October 19, 1987, the Dow Jones Industrial Average fell 22.6%, leading to the day forever being called "Black Monday." In 2008 the United States experienced what is now called the "Great Recession." These economic crises led many law firms to lay off significant numbers of lawyers and staff in order to protect their profitability, if not viability. Much of the same activity is now taking place because of the financial crisis initiated by the Covid-19 pandemic.

While reductions in legal and non-legal staff may protect firms' financial viability over the short term, they come with a significant risk. Often laid off lawyers and staff take with them a treasure trove of experience and leave the firm at a significantly reduced capacity to take on new work. One potential answer to this capacity problem is for firms to hire temporary or contract lawyers. These attorneys generally are not on a partnership track and are often paid less and provided fewer benefits than partnership-track associates. Generally, too, temporary and contract lawyers will not have employment security beyond completion of the specific tasks for which they were hired. Law firms may, in the alternative, decide to "outsource" some types of work,

such as legal research, to firms that specialize in such activities and who charge significantly less than it would cost a law firm to do the work itself. Many of these firms to which others outsource work are located in the United States and, therefore, may be able to provide significant cost savings even over contract attorneys who are in the U.S.

However, the use of temporary lawyers and the outsourcing of legal work, especially to companies based outside the United States, presents special ethical risks. The American Bar Association Committee on Ethics and Responsibility has issued several opinions on these subjects. The two leading opinions are Formal Opinion 88-356 and 08-451. This month, we will discuss Opinion 88-356. Next month, we will conclude with a discussion of Opinion 08-451 on outsourcing legal services.

88-356

ABA Formal Opinion 88-356 discusses the ethical issues raised when a law firm hires a temporary or contract lawyer. The Opinion addresses a number of issues that arise under the Rules of Professional Conduct.

The first major issue with which the Opinion deals is the question of whether Rules 1.7-1.10 apply to temporary lawyers. The Opinion concludes that the basic conflicts rules of 1.7-1.9 do apply:

> It is clear that a temporary lawyer who works on a matter for a client of a firm with whom the temporary lawyer is temporarily associated "represents" that client for purposes of Rules 1.7 and 1.9. Thus, a temporary lawyer could not, under Rule 1.7, work simultaneously on matters for clients of different firms if the representation of each were directly adverse to the other (in the absence of client consent and subject to the other conditions set forth in the Rule). Similarly, under Rule 1.9, a temporary lawyer who worked on a matter for a client of one firm could not thereafter work for a client of another firm on the same or a substantially related matter in which that client's interests are materially adverse to the interests of the client of the first firm (in the absence of consent of the former client and subject to the other conditions stated in the Rule)

As to the applicability of the imputed disqualification rules of 1.10, the Opinion states:

> The basic question is under what circumstances a temporary lawyer should be treated as "associated in a firm" or "associated with a firm." [FN5] The question whether a temporary lawyer is associated with a firm at any time must be determined by a functional analysis of the facts and circumstances involved in the relationship between the

> temporary lawyer and the firm consistent with the purposes for the Rule.

In holding that a law firm should do a "functional analysis" of the relationship of a temporary lawyer to the law firm that hires her, the Opinion refers to Comment 1 to Rule 1.10 for guidance. In these situations, law firms will have to analyze whether the considerations mentioned in Comment 1 are applicable:

> The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association.

It seems relatively clear that a "rigorous" application of Rule 1.10 to temporary lawyers would, indeed, severely impede the ability of these lawyers to work.

The Opinion goes on to discuss the importance of maintaining client confidentiality as a major factor in any functional analysis pursuant to Rule 1.10:

> Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.
>
> Application of paragraphs (b) and (c) [of Rule 1.10] depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.
>
> Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). **Thus, if a lawyer while**

> **with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict**.

(emphasis added). The Opinion concludes this long discussion by stating:

> Ultimately, whether a temporary lawyer is treated as being "associated with a firm" while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm…
>
> The distinction drawn between when a temporary lawyer is or is not associated with a firm is only a guideline to the ultimate determination and not a set rule. For example, if a temporary lawyer was directly involved in work on a matter for a client of a firm and had knowledge of material information relating to the representation of that client, it would be inadvisable for a second firm representing other parties in the same matter whose interests are directly adverse to those of the client of the first firm to engage the temporary lawyer during the pendency of the matter, even for work on other matters. The second firm should make appropriate inquiry and should not hire the temporary lawyer or use the temporary lawyer on a matter if doing so would disqualify the firm from continuing its representation of a client on a pending matter…

In some jurisdictions, temporary lawyers can be "screened" to prevent their acquisition of certain client information.

Opinion 88-356 goes on to discuss general confidentiality issues under Rule 1.6 that might arise when a firm hires contract lawyers. Here, again, a law firm must analyze the facts and circumstances of the temporary lawyer's employment:

> The extent to which the prohibitions in the Rules against revealing protected information will affect a temporary lawyer depends on the nature of the relationship between the temporary lawyer and the firm. Thus, a temporary lawyer who works for a firm, in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients ordinarily would be deemed to be "associated with" the firm as to all other clients of the firm, unless through accurate records or otherwise, it

> can be demonstrated that the temporary lawyer had access to information relating to the representation only of certain other clients. If such limited access cannot be demonstrated, the temporary lawyer in that situation must not disclose information relating to the representation of persons known to the lawyer to be firm clients regardless of the source of the information…
>
> Thus, where the temporary lawyer is in a position to have obtained information relating to the representation of other clients in the course of employment by the firm, it is assumed for purposes of the Rules that such information was in fact learned in that capacity. On the other hand, where the temporary lawyer actually has information relating to the representation of a firm client which could not have been obtained in the course of employment by the firm, the Rule is no more applicable to the temporary lawyer than it would be to a totally independent lawyer associated with a firm in a particular matter only, who obtains information relating to the representation of firm clients other than through working with the firm.

Whether a law firm must disclose to a client that it is using a temporary lawyer to work on the client's matters generally depends on the extend of firm supervision over the temporary lawyer's work on that client's matter:

> The Committee is of the opinion that where the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the temporary lawyer will work on the client's matter and the consent of the client must be obtained. This is so because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer. On the other hand, where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client. A client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm.

The Opinion also addresses the issue of whether a law firm must disclose its compensation arrangements with the temporary lawyer and other ethical issues that may arise when a temporary lawyer is not hired directly by a law firm, but, rather, through a placement agency. Also relevant to this discussion are Formal Opinion 97-379 and Formal Opinion 00-420.

The bottom line on the use of temporary or contract lawyers: Law firms may do so, but, if they do, they must take care not to violate the Rules. Be careful—especially, when analyzing potential issues relating to conflicts of interest, confidentiality, and disclosure of fees and other employment relationships.

TECH TIP
SECURING YOUR LAPTOP

by Matthew Beal, JD, MCSE, MCP, A+, SEC+

Laptop computers present a special sort of challenge in meeting the requirements of KRPC 1.6(c)'s requirement to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Laptops are portable, which can allow the unauthorized possessor the time and secrecy to directly attack the security of the device. A laptop in the wrong hands is always a vulnerability, but there are some things that can be done to mitigate this threat.

One basic rule to always follow is never attaching an unknown device to your laptop. Doing so can make you the link between the confidential information on your laptop and a bad actor—even when your computer is in your physical possession. There are plenty of reports of unauthorized access to a device based on a USB key or, in the case of Apple computers, even the power cable itself. In the time it takes for the operating system to recognize the added hardware, programs can be installed such as keystroke loggers, remote access tools, or other viruses. In addition, never log onto an unknown or unsecured public WIFI or to a hotspot device. Such devices are often found in hotels and cafés to access the internet.

Second, take care to prevent unauthorized physical access to your computer. Laptops left unattended are easily stolen. Don't leave a laptop containing client information in a place where an unauthorized party can use or take it. But guard against this possibility should it arise. Specifically, employ password protection where possible.

When a computer is powered on, a special operating system called the Basic Input / Output System, or BIOS, is launched. The BIOS is responsible for reporting environmental conditions to the Windows or Apple operating environment. This includes information on the different devices attached to the computer and how the operating environment is to interact with them. Most computer BIOS allow for the setting of a password. If the password is not entered or entered incorrectly, the computer will not relay instructions to the operating environment and nefarious parties are locked out of the computer and data within it. After entering a BIOS password, the computer will continue its startup procedure.

Both Windows and Apple operating systems allow you to password protect your device. In the case of a Windows computer running a modern version such as Windows 8 or 10 and most Apple computers, the information on the hard drive is encrypted until authorized access to the operating environment has been established. To prevent unauthorized access, once the computing environment has been set, you should be prompted to enter user credentials consisting of a unique username and password. This approach allows multiple users to access the same device while maintaining separate and secure data for each user.

Once the user has logged into the laptop, the next layer of security is on the data itself. A directory of client files, as well as the individual files themselves can be password protected.

Your office may mandate password complexity guidelines. These should be followed at all times. One best practice regarding passwords is that a password should be at least 8 characters including at least one capital letter, a number, and a special character such as an exclamation mark. The password should be changed on a regular basis, and you should not reuse a password. There should be no reference to the password in proximity to the computer, and common words or phrases such as 1LoveU2! should be avoided.

Because of the different passwords used on your laptop, the internet, and other places, it is common that people will use a single password in every setting. This is a dangerous practice. Once that password is guessed correctly, it can give a nefarious actor unauthorized access to everything on the laptop. A better approach is to utilize a password keeper, which is a password protected program that secures a list of passwords for the user to reference.

Some laptops contain a bioscanner, such as a fingerprint reader, and these devices can be used to supplant individual passwords and may decrease the potential to forget a password. In addition, there are other devices, such as a SecureID, that rely upon a combination of methods to secure the environment. One example is a device that randomly generates a code that must match the code the laptop is anticipating to gain access to the computer. Without the matching code, the computer is inaccessible to the user.

As always, what protective efforts are "reasonable" will depend on the circumstances. The first step is to recognize potential threats and vulnerabilities. Then, tailor protective measures accordingly. When possible, employ layers of protection.

ETHICS & MALPRACTICE RESEARCH TIP
THE AMERICAN BAR ASSOCIATION
ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT

The American Bar Association's Annotated Model Rules of Professional Conduct should be on every lawyer's bookshelf. The ABA has just published the ninth edition of this important text on professional responsibility.

The Model Rules of Professional Conduct are the basis for virtually every state's ethics rules, including the Kansas Rules of Professional Conduct. Most lawyers are primarily concerned with the rules adopted in their jurisdiction of practice since state-specific rules govern their professional behavior. But lawyers with multiple bar memberships or who are professionally active in other states under circumstances in which such activity is permissible (see, KRPC 5.5) must also be concerned with the Rules of other jurisdictions which may apply. KRPC 8.5 sets out a basic jurisdictional rule:

> A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

Comment 1 to Rule 8.5 discusses the issues that may arise when a lawyer is either licensed in more than one state or is professionally active in more than one state:

> In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5. If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction. Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

The ABA's Annotated Model Rules provides a quick reference guide to the ethics rules adopted in all jurisdictions that base their rules on the Model Rules. In addition, it highlights the differences in the rules between different jurisdictions. This is critical information because these differences can be significant. Many of the basic ethics rules, such as the rules on confidentiality (Rule 1.6), on the safekeeping of property

(Rule 1.15), or on conflicts of interest (Rules 1.7-1.10) are different in many states. The Annotated Model Rules make these differences crystal clear.

Further, each new edition of the text includes recent amendments and additions to the Model Rules. The ninth edition features new Model Rule 8.4(g), which forbids discrimination in law practice. This new rule has not yet been adopted in all states.

The new ninth edition of this text is advertised as being current as of February 2019. It is not an inexpensive volume. The list price is $199.95 for lawyers who are not members of the ABA. The price is lower for ABA members. Despite the hefty price, the book is well worth the investment.

BLAST FROM THE PAST
CHARACTER OF AN HONEST LAWYER

An Honest Lawyer is the lifeguard of our fortunes, the best collateral security for an estate; a trusty pilot, to steer one through the dangerous and oftentimes inevitable) ocean of contention: a true priest of justice, that neither sacrifices to fraud or covetousness; and in this outdoes those of a higher function; that he can make people honest that are sermon proof. He is an infallible anatomist of Meum and Tuum, that will presently search a cause to the quick and find out the peccant humour, the little lurking cheat, though masked in never so fair pretences; one that practices law, so as not to forget the gospel, but always wears a conscience as well as a gown; he weighs the cause more than the gold; and if that will not bear the touch, in a generous scorn puts back the fee.

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