Ethical Supervision of Non-lawyer Staff

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Rule 32:5.3(a) Responsibilities RE: Non-lawyer Assistance

Attorney with managing authority:
• Reasonable effort to ensure measures in effect to...
• Reasonably assure non-lawyer conduct compatible with lawyer’s professional obligations.
Create process to select, train, and monitor non-lawyers.

32:5.1: Managing/Supervisory Attorneys

• A partner in a law firm/lawyer with comparable managerial authority shall make reasonable efforts to ensure measures giving reasonable assurance all lawyers conform to ethics rules.
• Comment [1] This includes lawyers having comparable managerial authority in government agencies
• Comment [2] lawyers with managerial authority take reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers conform to the Iowa Rules of Professional Conduct.

Rule 32:5.3 (b) Responsibilities RE: Non-lawyer Assistance

Attorney directly supervising non-lawyer:
• Reasonable effort to ensure conduct compatible with lawyer’s professional obligations.
“Boots on the ground supervision”
Train, monitor, correct: actions of non-lawyers.

Rule 32:5.3(c) Responsibility for Conduct of Nonlawyer Assistance

Lawyer responsible for non-lawyer if action would be a rule violation if the lawyer did it and...

• lawyer orders conduct

• lawyer ratifies action w/ knowledge of specific conduct

Partner/managerial authority/direct supervisor over non-lawyer

• Knows of conduct at time could avoid/mitigate consequences
•
• Fails to take reasonable remedial action

Rule 32:5.3 Comment [2]- non-lawyers inside the firm

• Includes: secretaries, investigators, student interns, paraprofessionals
• Includes employees and independent contractors
• Lawyer must give instruction/supervision re: ethical obligations of their employment
  • Don’t disclose information re: client representation
  • Responsibility for their work product
• Measures take account non-lawyers lack legal training & not subject to professional discipline
  •
7 Rule 32:5.3 Comment [3]- non-lawyers outside the firm
  • Those who act for lawyer in rendition of legal services
  • Includes services like data storage, private investigators, scanning services
  • Use “reasonable efforts” to ensure service in manner compatible with ethical obligations of lawyer
  • Lawyer must give instruction/supervision re: obligation not to disclose client information
    • Rule 32:1.6(d)- reasonable efforts to prevent unauthorized disclosure/access to client information
8 Rule 32:5.3 Comment [4]- client- selected non-lawyer service provider
  • Should ordinarily agree with client on allocation of responsibility for monitoring the service provider.
    • Rule 32:1.2 – Lawyer shall abide by client’s decisions concerning objectives of representation and consult with client as to means by which they are pursued.
9 Rule Takeaways....
Ethical liability occurs when you:
  1) Fail to train non-lawyers on ethical duties
  2) Fail to monitor for unethical actions of non-lawyers.
  3) Fail to deal with/correct non-lawyer violations when they occur.
  4) Use non-lawyers to do things that are unethical for you to do.
  5) Rule 32:1.6: CONFIDENTIALITY OF INFORMATION
  • (d) A lawyer shall make reasonable efforts to prevent inadvertent/authorized disclosure or access to information relating to the representation of a client.
    • comment[18] Lawyer to act competently to safeguard ...against inadvertent/unauthorized disclosure by the lawyer or other persons participating in the representation who are subject to the lawyer’s supervision.
    • The unauthorized access ...does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.
10 Special rule for prosecutors...
11 Special Duty of Prosecutors 32:3.8(f)
  • reasonable care to prevent investigators/ law enforcement personnel/ employees/other persons assisting/ associated making extrajudicial statement prosecutor would be prohibited from making under rule 32:3.6 or this rule.
    • 32:3.6 Trial Publicity- extrajudicial statement
    • reasonably should know will be disseminated
• substantial likelihood material prejudice adjudicative proceeding
• Applies to prosecutor’s employees and law enforcement
• For outside entities- appropriate cautions to law enforcement.

**Cases**

• Prior knowledge non-lawyer employee embezzled from the firm.
• Allowed employee to continue to write checks by signing attorney’s name on client trust account.
• Attorney failed monitor payments from account or reconcile account.
• Employee wrote check to herself.
• Found violation 32:5.3
  • No reasonable supervision of non-lawyer employee

**IA S.Ct. Disciplinary Bd. v. Mathahs, 918 N.W.2d 487 (Iowa 2018)**
• 32:5.3(b)- lack supervision of non-lawyer employee failing ensure accurate preparation of billing statements for court appointed criminal defense services.
  • Billed multiple clients for mileage for same trip
  • Billed inaccurate hours
  • Allowed employee work remotely after knew assistant had problems with attentiveness
  • Insufficient care to prevent repeat of mistakes

• Legal assistant incorrectly advised client they needed to submit $1200 payment to have bankruptcy petition filed
• Attorney, unknown to assistant, had set fee at $1000 and had collected $500.
• S.Ct. found plausible subordinate made mistake not due to inattentive instruction or supervision.
• Held evidence insufficient to prove failed to take reasonable efforts to supervise- 32:5.3(b)

**In re Johnston, 872 N.W.2d 300 (N.D. 2015)**
• Attorney disciplined for having paralegal work on same matter that paralegal had worked on for opposing counsel in prior employment.
• Violation of Rule 5.3(a)- failure to put measures in effect to assure non-lawyer conduct compatible with professional obligations.