Ethical Issues that Arise when Supervising Attorneys Work with Junior Attorneys and Nonattorney Professionals

Presented by the Ethics & Professional Compensation and Young & New Members Committees

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Rule 5.1 – Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Condu111ct if:

(1) the lawyer orders or, with 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 other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2 – Responsibilities of a Subordinate Lawyer

(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.

11 U.S.C. 1320

(b) The trustee shall—

(4) advise, other than on legal matters, and assist the debtor in performance under the plan;

Rule 5.3 – Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(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 on Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

- Nonlawyers Within the Firm

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Comment on 5.3, Continued

• Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; 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. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Rule 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law: Law Firms and Associations

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Rule 5.5, continued

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

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I. Introduction

II. The Supervision of Junior Attorneys – A Duty to Supervise

a. Rule 5.1 of the Model Rules of Professional Conduct – Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Condu111ct if:

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(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

b. Rule 5.2 of the Model Rules of Professional Conduct – Responsibilities of a Subordinate Lawyer

(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.

c. Case Summaries

***In re Engel* and *In re Corkery*, 246 B.R. 784 (Bankr. W.D. Pa. 2000)**

Key statutes and rules: 11 U.S.C. § 105(a), ABA Model Rule of Professional Conduct 5.1

Noteworthy Issue: Whether the Bankruptcy Court could use 11 U.S.C. § 105(a) or Bankruptcy Rule 9011 to sanction the debtors' attorney for his omissions and undervaluation of assets on the debtors' schedules and for violating Model Rules 5.1 and 5.3.

Facts: Attorney Stephen Bresset was the attorney for the debtors in both cases. In the Engel case, the schedules prepared by Bresset's associate failed to disclose the debtor's ownership interest in a closed corporation. Bresset unsuccessfully attempted to amend the schedules to include the stock and state that it had a negative book value. The next day, Bresset represented the debtor at the sale of the debtor's stock interest in that corporation for $50,000. Bresset also undervalued the debtor's real estate at $58,000 despite his awareness of a $132,000 appraisal. Similarly, in the Corkery case, the schedules prepared by Bresset's associate failed to disclose the debtors' interest in a corporation as well as an $800,000 claim against a third party. The U.S. Trustee filed motions for sanctions against Bresset in both cases under 11 U.S.C. § 105 and Rule 9011, asking the Bankruptcy Court to assess against Bresset the costs and expenses in filing the motions and for additional sanctions. The U.S. Trustee also argued at the hearing that Bresset should be suspended from the practice of law. Bresset defended the allegations by asserting that a subordinate associate had the responsibility for preparing the schedules and valuing the real estate and the associate was at fault, not Bresset.

Holding: The Court rejected Bresset's attempt to blame his associate, noting that Model Rule 5.1 placed accountability on Bresset. The Court held that regardless of who prepared the schedules, Bresset was obligated to review them with his client and to take timely remedial action when he realized his associate had made errors in the schedules. The Court stated, "This becomes especially true, where, as here, a material omission can support a conviction for bankruptcy fraud." Exercise its authority under 11 U.S.C. § 105, the Court fined Bresset $2,500 for each case plus fees and costs incurred by the U.S. Trustee.

Lesson: Failing to supervise associates preparing bankruptcy petitions and schedules can result in sanctions and could potentially result in a conviction for bankruptcy fraud.

***In re Taylor*, 407 B.R. 618 (Bankr. E.D. Pa. 2009), aff'd in part, vacated in part, and rev'd in part, 655 F.3d 274 (3d. Cir. 2011)**

Key statutes and rules: Federal Rule of Bankruptcy Procedure 9011.

Noteworthy Issue: Whether the failure to supervise an inexperienced attorney can be at least partial grounds for imposing Rule 9011 sanctions against the attorney, his supervisor, and his firm.

Facts: A law firm with a high-volume practice represented creditor HSBC in a bankruptcy case. The firm received an assignment from HSBC to file a stay relief motion. The assignment and limited information for the motion were conveyed through a computerized system and the firm had little to no ability to contact

HSBC directly for any additional information such as whether the debtors had any equity in the property and whether the amount of the arrearage was correct. The firm's staff prepared and filed the motion under the signature of Lorraine Doyle, the managing attorney at the firm. The firm sent a junior associate to the hearing where he admitted the motion erroneously said the debtors had not made their mortgage payments. Nonetheless, he pressed for stay relief. The Court *sua sponte* issued an order to show cause, directing the associate, Doyle, the firm's only partner, and others to give testimony concerning the possibility of sanctions. During the hearing, the firm offered the associate's inexperience as an excuse for pursuing an incorrect stay relief motion.

Holding: The Court found that the associate, Doyle, the sole partner, the firm, and HSBC all committed Rule 9011 violations in connection with the stay relief motion. The Court did not cite to Model Rule 5.1 specifically but found that Doyle and the firm had failed to adequately supervise the associate and this failure was at least part of the Rule 9011 violations. The Court did not impose monetary sanctions but instead ordered Doyle to complete 3 hours of CLE in professional responsibility/ethics and ordered Doyle and the sole partner to conduct training sessions on the requirements of Rule 9011 with respect to pre-filing due diligence. The U.S. District Court reversed but the Third Circuit affirmed the imposition of sanctions against Doyle and the partner.

The Lesson: Placing too much emphasis on high-volume, high-speed foreclosure processing at the expense of providing supervision and guidance to junior associates can lead to Rule 9011 violations.

***Bill Parker & Associates v. Flatau (In re Rainwater and In re White)*, 124 B.R. 133 (M.D. Ga. 1991)**

Key statutes and rules: 11 U.S.C. § 329, Federal Rule of Bankruptcy Procedure 9011.

Noteworthy Issue: Whether a bankruptcy court can disallow fees to a firm and impose sanctions against attorneys for Rule 9011 violations arising at least in part by the firm's failure to supervise a junior attorney.

Facts: Bill Parker law firm was hired to file bankruptcy petitions for two sets of debtors. In each case, a senior attorney sent the debtors questionnaires to complete and return. When received, the attorney determined under which chapter to file. A secretary prepared the petitions which were signed by a junior associate of the firm without verifying any of the information therein. At the creditors meetings, the Chapter 7 Panel Trustee noted significant errors, falsities, and omissions in the debtors' schedules, including information about payments

made to the firm. The Trustee filed motions to examine the payments to the firm on the grounds they were excessive. The Bankruptcy Court held hearings and issued orders under 11 U.S.C. § 329(b) denying the firm an award of attorneys' fees and declaring that the amount still owed by the debtors forfeited to The firm Parker appealed to U.S. District Court.

Holding: Bill Parker first argued that the errors and misstatements in the debtors' schedules were harmless because the debtors received their discharges anyway. The appellate court rejected this contention, noting that the debtors could have been prosecuted for perjury under 18 U.S.C. § 152 because of the deficiencies. The firm also argued that the sanctions should have been imposed against the individual attorneys and not the firm itself. The Court concluded that the methods employed by the firm were directly responsible for the errors and falsities in the bankruptcy schedules. Although the Court did not cite to Model Rule 5.1, the Court recognized that senior attorneys cannot engage in an unethical method of practicing law and then attempt to evade responsibility and sanctions by having a junior attorney actually sign the pleadings. The Court modified the sanctions order to provide that the sanctions be borne by the senior attorney and the junior associate jointly and severally. The Court also strongly suggested that Bill Parker pay the sanctions for its attorneys, "since the record hints that they were engaged in practices which were normal for that firm."

The Lesson: Even if a firm is not sanctioned under Rule 9011, maintaining a firm culture with relaxed standards of professional conduct in representing debtors might cause the firm's fees to be disallowed as unreasonable.

***In re Martinez*, 393 B.R. 27 (Bankr. D. Nev. 2008)**

Key statutes and rules: Federal Rule of Bankruptcy Procedure 9011, ABA Model Rule of Professional Conduct 5.2 (codified as Nevada Rule of Professional Conduct 5.2)

Noteworthy Issue: Whether a junior associate can be subject to Rule 9011 sanctions when the associate was merely following orders given by a senior attorney.

Facts: During a hectic Chapter 13 day, counsel for Wells Fargo presented the debtors' attorney with a stipulating lifting the automatic stay on one of the debtors' properties. The debtors' attorney signed it and the Court entered it. Both lawyers later realized the order pertained to the wrong property. The lawyer for Wells Fargo admitted the mistake but refused to consent to vacating the order. At the hearing on vacating the order, the Court issued an order to

show cause why Wells Fargo's attorney and his firm should not be sanctioned for refusing to consent to vacating the order.

Holding: The Court found that Wells Fargo, its attorney, and his firm violated Rule 9011 by advocating the propriety of the mistaken stipulation after the attorney admitted it was entered by mistake. The Court discussed Model Rule 5.2 and held that Wells Fargo's attorney was bound by the Rules of Professional Conduct even though he was acting at the direction of Wells Fargo. The Court also stated that for purposes of Rule 9011, it was irrelevant whether the attorney acted of his own initiative or the initiative of a senior lawyer. The attorney had a duty to inform his firm that its proposed course of action was improper and in failing to do so, the attorney violated Rule 9011. As a result, he was subject to sanctions in the form of a private reprimand.

The Lesson: The Nuremberg defense to accusations of ethical misconduct does not work.

***Banner v. Cohen, Estis and Associates, LLP (In re Balco Equities Ltd.)*, 345 B.R. 87 (Bankr. S.D.N.Y. 2006)**

Key statutes and rules: 11 U.S.C. § 327, New York Disciplinary Rules of the Code of Professional Conduct Part 1200.5 (substantially similar to ABA Model Rules of Professional Conduct 5.1 and 5.2)

Noteworthy Issue: Whether the bankruptcy court could enforce Model Rule 5.1's supervision requirement by denying a firm's fee application.

Facts: The debtor retained a law firm to file a Chapter 11 petition. The firm filed a retention application and attached a verified statement pursuant to Bankruptcy Rule 2014, inaccurately setting forth the firm's connections with the debtor, creditors, and other parties in interest. In the statement, the firm represented that it had no significant connections with the debtors and parties in interest, had no known conflicts of interest, and was a "disinterested person" as defined in 11 U.S.C. § 101(14). However, at the time it filed the debtor's bankruptcy filing, and for some time after, the firm had actual conflicts of interest and connections with parties in interest. More particularly, the firm represented the principal and largest unsecured creditor and another major creditor. The firm continued to represent the debtor for about a year post-petition, performing a substantial amount of work. The firm then filed a fee application after the case was converted to a Chapter 7 case and the Chapter 7 Trustee filed an adversary complaint against the firm, asking that the Court order the firm to disgorge the retainer it received from the debtor for failure to disclose the firm's conflicts of interest. In defending its fee application, the firm

blamed its former associate (Andrew Wulfman) for failing to disclose the conflicts when he drafted the Rule 2014 statement and similar affidavits signed by the firm's principal. The Court denied the fee application due to its multiple, untimely and incomplete disclosures under Rules 2014(a) and 2016(b) and lack of disinterestedness. The Court also ordered that the firm disgorge its retainer. The firm moved for reconsideration.

Holding: Citing New York's version of Model Rules 5.1 and 5.2, the Court was not impressed with the firm's attempt to deflect responsibility for its failure to disclose its conflicts of interest to Mr. Wulfman. The Court found that the ultimate responsibility for the firm's failure to disclose rested with the firm's partners. The Court further found that the principal of the firm was required in his "reasonable exercise of supervisory authority" over a subordinate attorney to read the affidavits the principal himself signed. The Court ordered the firm to disgorge $42,483 which was the balance of the retainer. The Court also denied the firm's fee application requesting compensation for 487.83 hours of work billed.

The Lesson: The failure to supervise a junior associate in connection with the employment of professionals can lead to violations of 11 U.S.C. § 327. The remedies for such violations, including disgorgement of fees and denial of fee applications, can be substantially more costly than Rule 9011 sanctions and can be imposed without Rule 9011 grounds and without following Rule 9011's procedures.

III. The Supervision of Non-Attorney Staff (Nancy)

a. Concerns re: delegation of responsibility

b. Balancing act of the Trustee and staff

11 U.S.C. 1320

(b) The trustee shall—

(4) advise, other than on legal matters, and assist the debtor in performance under the plan;

c. Rule 5.3 of the Model Rules of Professional Conduct – Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance

that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(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 on Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and

maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; 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. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Concerns Related to the Unauthorized Practice of Law

ABA Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law: Law Firms And Associations

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is

assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.
(e) For purposes of paragraph (d):
(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,
(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

Comment on Rule 5.5

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not

assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any

state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice.

Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration,

mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also Model Rule on Temporary Practice by Foreign Lawyers. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer

who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.
[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.
[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See Model Rule for Registration of In-House Counsel.
[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., Model Rule on Practice Pending Admission.
[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).
[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).
[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

d. Case Summaries:

***In re Whatley, VI.* 279 Ga. 867 (2005)**

Key statutes and rules: Georgia State Bar Rules and Regulations 1.15, 5.3-5.5 (Equivalent to ABA Model Rules)

Noteworthy Issue: Disbarment was appropriate for violations of the Rules of Professional Conduct. Attorney failed to keep client's property safe, allowed a non-lawyer to engage in in the practice of law, and entered into a partnership with a non-lawyer.

Facts: Debtor hired Mr. Whatley's law firm for a Chapter 13 case. Debtor was behind on her mortgage. Debtor remitted $4350 to Mr. Whatley, but Mr. Whatley never turned the money over to Debtor's mortgage company. After subsequent motions and orders, the stay was lifted and the Debtor filed a grievance against Mr. Whatley. She hired a new lawyer to file a motion to impose the stay. When the Bankruptcy Court heard the facts of the case, the Bankruptcy Judge issued a show cause order. The Bankruptcy Judge found not only did Mr. Whatley violate Rule 1.15 but other rules as well. In the grievance investigation, it was found that Mr. Whatley set up a law firm with an individual that took the Georgia Bar Exam but never passed. This individual set up the law firm, opened and maintained bank accounts, controlled the mail, maintained client files and conducted the business of the firm. A fee arrangement was made between the lawyer and non-lawyer on sharing Chapter 13 fees. Mr. Whatley contended that business slowed down and the non-lawyer shut down the firm and stole the client's funds. He asserted the grievance should be against the non-lawyer and not himself.

Holding: Disbarment was appropriate even though Mr. Whatley did not have any prior disciplinary proceedings. He failed to respond timely, he had a cavalier and arrogant attitude toward the proceedings and failed to understand his responsibilities under the Bar Rules.

The Lesson: Do not fail to supervise a non-lawyer or turn over your practice to a non-lawyer. If you have bar compliant, answer it timely and be repentant of any wrong doing.

***In re Tucker,* 295 Ga. 357 (2014), 759 S.E. 2d 854 (2014), 14 FCDR 1520**

Key statutes and rules: Georgia State Bar Rules and Regulations Rule 4-102(d), Rules 5.3(d), 5.5(a) (Equivalent to ABA Model Rules)

Noteworthy Issue: Six month suspension for allowing a disbarred lawyer to represent clients.

Facts: Attorney, Mr. Tucker, filed 26 Bankruptcy cases and in each case a disbarred lawyer, Samuel Brantley, was allowed to have contact with clients in person, by telephone, and in writing and was allowed to meet with clients. No disclosure was made to the clients that he was disbarred and even held himself out as a lawyer. Mr. Tucker knew that Mr. Brantley was a disbarred lawyer. The Bankruptcy Court suspended Mr. Tucker from practicing bankruptcy for six months and he agreed to cooperate with the State Bar of Georgia. The Supreme Court of Georgia refused to use the time bar from federal court as a "mitigating factor" to reduce his sanction by the Supreme Court.

Holding: Six month suspension was appropriate even though Mr. Tucker had been sanctioned by the Bankruptcy Court and that he was remorseful and cooperative. However his conduct was "knowing and intentional violation of the rule and not merely a mistake." Id. 358

The Lesson: Be very careful when employing a disbarred lawyer. Having a strong professional reputation, being remorseful and cooperative may help in preventing disbarment.

Other cases:

***Disciplinary Bd. v. Kellington (In re Kellington)*, 2014 ND 168, 852 N.W.2d 395, 2014 N.D. LEXIS 177, 2014 WL 4243743 (N.D. 2014)**

Attorney suspended for 30 days for charging unreasonable attorney's fees in a divorce case. She charged the wrong rate for worked performed by legal assistants and non-legal work performed by her. She had 2 non-lawyers working for her but failed to give proper training and evaluations.
The lawyer failed to oversee their work and failed to train them on proper billing procedures.

***In re Cater*, 887 A.2d 1, 2005 D.C. App. LEXIS 627 (D.C. 2005)**

Attorney suspended for 180 days for failure to supervise her secretary. The secretary embezzled over $47,000 from two estates in which the attorney served as a court appointed guardian and conservator. The attorney failed to review bank accounts and relied solely on the secretary accounting.

***In re PRB,* Docket No. 2016-042, 2016 VT 94, 2016 Vt. LEXIS 93 (Vt. 2016)**

Attorney admonished for having non-lawyer employees handle client funds and failed to provide appropriate oversight and adopting reasonable internal controls. Employee embezzled $2,020.18. Attorney had a satellite office and attorney hired a non-lawyer to handle the operating account and client trust accounts. Attorney maintained limited oversight but when embezzlement was discovered, the employee was immediately terminated.

***Official Committee of Unsecured Creditors of Motors Liquidation Company v. JP Morgan Chase Bank*, Case 13-2187 (2nd Cir. Jan. 21, 2015)**

Key statues and rules:

Facts: In 2001, General Motors obtained $300 million in financing from JP Morgan Chase Bank N.A. (JP Morgan) secured by liens on multiple assets, with JP Morgan again serving as administrative agent. JP Morgan and the other lenders took security interests in multiple General Motors assets, the most substantial of which was dubbed the Main Term Loan UCC-1. In September 2008, the initial $300 million loan was nearing maturity. General Motors requested that its counsel, Mayer Brown LLP, prepare documents allowing JP Morgan to be repaid and the security interest to be released. A Mayer Brown associate and paralegal prepared a closing checklist identifying the UCC-1s to be terminated. The checklist erroneously included the $1.5 billion Main Term Loan UCC-1. Mayer Brown subsequently prepared UCC-3 statements to terminate all the UCC-1s. Review copies of the documents were provided to JP Morgan and its attorneys, Simpson Thatcher & Bartlett LLP, as well as to General Motors. Nobody commented on or addressed the erroneous inclusion of a UCC-3 termination statement for the $1.5 billion Main Term Loan. All the UCC-3 termination statements were consensually filed.

The matter came before the Second Circuit on appeal from a bankruptcy court decision in the 2009 General Motors bankruptcy case. The bankruptcy court determined that the UCC-3 filing was unauthorized and that the Main Term Loan UCC-1 was not terminated. The General Motors' creditors committee brought at action declaring that the UCC-3 termination statement effectively terminated the security interest granted by the $1.5 billion Main Term Loan UCC-1, thereby rendering JP Morgan an unsecured creditor on par with other general unsecured creditors of General Motors. JP Morgan asserted that it was ineffective, as termination of the Main Loan UCC-1 was not authorized or intended by JP Morgan, its attorneys or any other party.

Holding: A UCC-3 termination statement was effective to extinguish a security interest of up to as much as $1.5 billion, notwithstanding that the secured lender erroneously authorized the filing of the termination statement and did not intend to extinguish the security interest.

The Lesson: While not an ethical opinion, the mistakes of a Mayer Brown associate and paralegal were unbelievably costly for the client. The Second Circuit found that although JP Morgan may not have intended the termination, it did authorize the filing of the UCC-3 termination. The Court noted that JP Morgan and Simpson Thatcher had ample opportunities to correct the error, but failed to do so. This case serves as a lesson for the importance of properly supervising and double-checking work assigned to subordinates – especially when $1.5 billion is on the line.

IV. Ethical Concerns Related to New Lawyers

a. Concerns re: authorized practice/ authority/ scope of what new lawyers can do

V. The Junior Associate's Duty to Disclose

a. Duty of partners does not relieve more junior attorneys of their own obligations – Rule 5.2(a) – simply following orders is not a defense to unethical conduct.
b. Despite this rule – it's not necessarily easy for an associate to challenge a partner on a specific issue or strategy – especially given the fact that, according to psychologist, we tend to follow orders.

c. Duty to disclose omissions or errors

   i. If an attorney believes that another attorney may have failed to abide by the Rules of Professional Conduct, the first attorney may have an obligation to disclose such facts to the client or the bar.
   ii. All attorneys have an obligation in applying for or renewing insurance coverage to disclose all claims or potential claims.
   iii. This duty of disclosure generally extends to all law firm attorneys who are aware of any claim or facts that might give rise to a claim, even if the error or potential error was made by another attorney.
      1. The situation is often the most complicated in the context of an associate who is aware of a partner's malfeasance, but unaware as to whether the partner has fully disclosed the issue to the client and/or his or her firm. In this circumstance, an associate who fails to disclose to the insurance carrier (or his or her firm if the firm is responding on behalf of all lawyers) that he or she is aware of certain facts that might give rise to a claim. Failure to disclose could result in lack of malpractice insurance coverage if the firm, partner or associate is ever sued in

connection with the error – even if the error was not committed by the associate.

d. Associates are not necessarily immune from liability for legal malpractice merely because they were following the orders of a supervising attorney. Restatement (Second) of Agency §387 (1958).

e. Examples:
    i. Georgia Rule of Professional Conduct 5.2 – subject to certain limitations, a lawyer is bound by the rules of professional conduct "notwithstanding that the lawyer acted at the direction of another person."

f. Navigating the perceived dynamics of "tattling" on supervising partner
    i. State Bar Obligations to Report
    ii. Impacts of non-disclosure on malpractice insurance
    iii. Law firm general counsel
    iv. Duty to report errors/ omissions to client – Rule 1.4 – "a lawyer shall … keep the client reasonably informed about the status of the mater," and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

VI. Conclusion

DON'T PUT YOUR HEAD IN THE SAND AND DO NOTHING!!!