RESPONSIBILITIES OF PARTNERS, MANAGERS, AND OTHER SUPERVISORY LAWYERS IN ILLINOIS – 2014 UPDATE

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In today's legal and economic climate, there is an ever-increasing emphasis placed on profit, client development, and the billed hour.[1] Associate turnover rates are skyrocketing. In 2008, according to a study by the NALP Foundation, approximately 78 percent of new associates left their firms before the end of their fifth year.[2] When you combine the increased emphasis on the billed hour with increased associate turnover and limited supervision of associate attorneys, you have a recipe for ethical and civil (tort) liability.

It is not surprising then, that Illinois attorneys' failures to supervise comprises one of the most prevalent areas of discipline by the Illinois Attorney Registration and Disciplinary Commission (ARDC). According to the ARDC's Annual Report, attorneys' "failures to supervise" was within the top twenty most common categories of misconduct charged from 2007 through 2013.[3]

Under Rule 5.1 of the Illinois Rules of Professional Conduct of 2010 ("Rules"), supervisory lawyers are subject to professional discipline for failing to maintain supervisory control over subordinate attorneys. This ethical duty is highlighted where the subordinate lawyer mishandles a matter. Although the Rules do not bear directly upon the supervisory attorney's civil tort liability, Illinois courts have held that violations of ethical rules may constitute evidence of a violation of the standard of care. Illinois courts have not addressed the role of Rule 5.1 in the context of legal malpractice lawsuits, but courts in other jurisdictions have consistently held that negligent supervision is a viable basis for a legal malpractice claim under a general negligence theory.

Part I of this article examines the supervisory attorney's ethical responsibilities under Rule 5.1. Part II addresses the role of ethical rules in defining the standard of care applicable to malpractice law in Illinois. Part III contains a discussion of civil liability for a general failure to supervise in the context of legal malpractice.[4] Finally, Part IV provides a brief survey of attorneys' civil supervisory liability in other jurisdictions and an analysis of these matters in the context of Illinois law and Rule 5.1.

I. Rule 5.1: Ethical Responsibilities of the Supervisory Lawyer

The Rules form a basis for disciplinary proceedings, and thus, define the minimum ethical responsibilities of all Illinois lawyers.[5] Rule 5.1, entitled "Responsibilities of Partners, Managers, and Supervisory Lawyers," imposes supervisory duties upon certain members of a law firm.[6] Rather than holding supervisory lawyers vicariously liable for the ethical missteps of their subordinates, Rule 5.1 subjects supervisory lawyers to discipline only for their own failures to take measures to ensure that lawyers within the firm comply with the Rules, or for their ratification of or failure to attempt to remedy the effects of ethical violations committed by subordinate attorneys. Rule 5.1 sets forth the responsibilities of a partner or supervisory lawyer as follows:

> (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 Conduct if:
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> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
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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.[7]

Subsection (a) of Rule 5.1 imposes upon all partners and other lawyers with managerial authority within a firm a duty to establish reasonable measures to ensure the entire firm's reasonable compliance with the Rules.[8] The Committee Comments to Rule 5.1, added in 2010, expand upon the supervisory duties of all firm management. Comment 2 focuses upon the supervisor's role in enacting measures "designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."[9] Comment 2 highlights the intention of Rule 5.1(a) to impose a responsibility not only to supervise subordinate attorneys but to put in place measures that are themselves designed to decrease the likelihood that subordinate attorneys commit ethical violations.

Subsection (b) requires all attorneys with "direct supervisory authority" – whether managers, partners or other attorneys – to ensure that their subordinate attorneys comply with the Rules.[10] Essentially, subsection (b) simply requires that supervisory attorneys act upon the reasonable measures to comply with the Rules put in place pursuant to subsection (a).

Unlike subsections (a) and (b), subsection (c) of Rule 5.1 provides for an attorney's responsibility for another attorney's ethical violation. Subsection (c) is divided into two parts. Under subparagraph (c)(1), an attorney may be disciplined if he orders or ratifies the ethical misconduct of another attorney.[11] Subparagraph (c)(1) does not require that the attorneys are in a supervisor-subordinate relationship. An associate attorney, not in a supervisory role, but responsible for handling a matter along with another associate, could ratify the other's misconduct and subject himself to disciplinary sanctions.

Subparagraph (c)(2) forms the basis for the disciplinary liability of a partner, manager or direct supervisor of an attorney that violates the Rules. Under subparagraph (c)(2), the supervisory attorney may be disciplined if the attorney knows of the subordinate's ethical violation in time to avoid or mitigate the negative consequences of it, but fails to take any such remedial action.[12] As such, subparagraph (c)(2) focuses on the supervisory attorney's responsibility for the subordinate's work itself.[13]

II. The Role of the Rules in Malpractice Law

The Rules set forth the minimum ethical responsibilities of an Illinois lawyer, but a violation of the Rules does not itself form the basis for a legal malpractice lawsuit.[14] The 2010 version of the Rules reaffirms this common law principle. The Preamble to the 2010 Rules explicitly provides that the Rules do not create a basis for professional malpractice against supervisory attorneys.[15] The Preamble to the prior version of the Rules contained no such provision, although such has long been the law in Illinois.[16] There is also no independent civil cause of action for a breach of the Rules.[17] A legal malpractice claim premised solely upon a breach of a rule of professional conduct has no merit.[18]

The standard of care for purposes of legal malpractice litigation is defined as the "reasonable degree of care and skill expected from members of the legal profession."[19] Although the standard of care for purposes of an attorney's tort liability may originate with the principles embodied in the Rules, the standard of care is not based upon the Rules themselves.[20] Nevertheless, a violation of the Rules may be relevant to a legal malpractice claim arising out of the attorney's wrongdoing. The Preamble to Rule 5.1 provides that, because "the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."[21] This is consistent with opinions of the Illinois appellate court, which has held that the Rules are relevant to the standard of care.[22]

Despite the appellate court's willingness, in some instances, to accept the Rules as evidence of the standard of care, it has made clear that it is the legislature's purview to create a cause of action for a lawyer's breach of ethical duties.[23] Nevertheless, in basing the revised Rules on the American Bar Association's Model Rules of Professional Conduct, the Supreme Court of Illinois incorporates the element of reasonableness into Rule 5.1, which suggests a close relationship with the standard of care as defined by Illinois law.

III. Viability of Civil Supervisory Liability of Illinois Lawyers

The American Law Institute (ALI) has taken the position as stated in the Restatement (Third) of the Law Governing Lawyers that an attorney's failure to supervise a subordinate attorney's work may constitute a violation of the standard of care, and thus, a breach of the duty owed to the client. Comment (a) to the Restatement (Third) of the Law Governing Lawyers states: "[w]ith respect to remedies other than professional discipline, a lawyer is not vicariously liable for the wrongful acts of another lawyer in a firm qualifying as a limited-liability enterprise. Failure to supervise, however, may in an appropriate instance constitute a violation of the duty of care that the individual lawyer with supervisory responsibility owes to a firm client."[24]

Despite the ALI's approval of malpractice claims founded upon attorneys' negligent supervision, Illinois courts have not explicitly recognized such a cause of action. The courts have not addressed a case in which a plaintiff allegedly damaged by an attorney's malpractice claimed that a supervisory attorney was liable by virtue of his negligent supervision of a subordinate's work.

Illinois has addressed some issues that touch on the periphery of malpractice claims based on negligent supervision. The Illinois Appellate Court, Third District, considered the ability of a subordinate attorney to seek contribution from his supervising attorneys for sanctions entered against him as a result of his handling of a litigation matter.[25] In *Levin v. Siegel & Capitel, Ltd.*, a law firm represented an individual and his company in a lender's liability lawsuit against a bank.[26] An associate attorney at the law firm handled the litigation of the matter as the

attorney of record.[27] After the court disposed of the matter via summary judgment in the bank's favor, the bank moved for Supreme Court Rule 137 sanctions against the associate attorney, the law firm, and the law firm's clients, contending that certain pleadings were unfounded and filed in bad faith.[28] Responding to the motion for sanctions, the associate attorney filed a complaint for contribution and indemnity against both the law firm that employed him and certain partners at the law firm.[29] Regarding the latter claims, the associate attorney contended that the partners supervised his handling of the matter and, thus, should be held jointly and severally liable for any sanctions entered against him.[30] The law firm moved to dismiss the associate attorney's complaint, arguing that it failed to state a cause of action for either contribution or indemnification.[31] The trial court agreed and dismissed the associate's complaint.[32]

On appeal, the Third District affirmed the dismissal.[33] The appellate court began its discussion by noting that contribution and indemnity are available only with respect to underlying actions in tort.[34] Because the underlying motion for sanctions was not an action in tort, the firm and partners could not be liable for contribution or indemnity.[35] The court noted, "[Supreme Court] Rule 137 imposes a personal responsibility on the individual signer to validate the truth and legal reasonableness of the pleadings and other documents filed with the court.This responsibility is nondelegable and not subject to principles of agency or joint and several liability." [36] Despite the *Levin* associate's creative and daring assertion of supervisory liability in contribution, the court declined to address the merits of such a claim in a general sense based upon the specific nature of the underlying claim--that of a sanction, not a tort.

Although Illinois courts have not addressed the merits of a legal malpractice claim premised upon negligent supervision, the courts have provided a framework by which to analyze such a claim. In Illinois, a claim arising from a professional's negligent supervision is itself a malpractice claim.[37] In *Childs v. Pinnacle Health Care*, the Illinois Appellate Court, Second District, addressed whether a plaintiff could state a claim for malpractice against a nurse director of a nursing home, premised solely upon her supervisory responsibilities.[38] Citing to the definition of "malpractice" in Black's Law Dictionary as "[a]n instance of negligence or incompetence on the part of a professional" and noting that "'malpractice' includes a professional's 'failure to exercise the degree of care and skill that a [professional] of the same … specialty would use under similar circumstances'" the court held that there existed a tort for healing arts malpractice against a supervisory nurse.[39]

The *Childs* decision indicates that a professional's supervision must be gauged against the standard of care for members of that profession. By extension, a supervisory attorney's liability for failure to supervise a subordinate must be governed by the legal standard of care, which requires that the attorney exercise the reasonable degree of care and skill expected from members of the legal profession.[40]

Although Illinois courts have not explicitly recognized a cause of action for legal malpractice arising out of an attorney's negligent supervision, we can look to the common law elements of claims for negligent supervision and legal malpractice to predict the elements of such a claim under Illinois law.

In Illinois, to establish a claim for legal malpractice the plaintiff must prove: (1) the defendant attorney owed the plaintiff a duty of due care arising from the attorney-client relationship; (2) the defendant breached that duty of care; and (3) the plaintiff suffered actual damages as a proximate result of the attorney's breach.[41]A claim for failure to supervise or negligent supervision also sounds in negligence.[42] As such, to prove a claim for negligent supervision, a plaintiff must establish: (1) the supervisor had a duty to supervise the subordinate,

(2) the supervisor negligently supervised the subordinate, and (3) such negligence proximately caused the plaintiff's damages.[43] Courts have also held that the plaintiff must demonstrate that the supervisor knew or should have known of the subordinate's propensity to act in an incompetent manner.[44]

By combining the elements of legal malpractice claims and negligent supervision claims, one could formulate possible elements for a legal malpractice claim for negligent supervision. First, the plaintiff client must have entered into an attorney-client relationship with both the defendant supervisor and the subordinate attorney. Second, the defendant supervisor must have had a duty to supervise the subordinate attorney. Third, the subordinate attorney must have breached a duty to the plaintiff client, resulting in actual damage to the client. Fourth, the defendant supervisor must have breached his duty to supervise the subordinate attorney. Fifth, the defendant attorney's breach of his duty to supervise must have proximately caused the client's damages.

Illinois attorneys should consider: When does an attorney owe a duty to supervise another attorney? To establish the scope of the attorney's duty for the purposes of a legal malpractice claim, the plaintiff must produce evidence of the applicable standard of care. In Illinois, the standard of care generally requires that an attorney exercise a reasonable degree of care and skill,[45] and the standard of care must typically be established via expert testimony.[46] To prevail on a malpractice claim, the plaintiff must not only establish a breach of the standard of care via expert testimony, but also must demonstrate that the breach of duty proximately caused actual damage to the client.[47]

As discussed in Section II, the Rules may play a role in establishing the standard of care. Although some of the ethical responsibilities set forth in Rule 5.1 can be reconciled with a common-sense notion of the reasonable degree of care and skill required of Illinois attorneys, others cannot.

As discussed above, Rule 5.1 imposes different ethical duties under subsections (a), (b) and (c).[48] Subsection (a) applies to all law firm management and imposes an ethical duty to establish reasonable firm-wide measures to ensure compliance with the Rules. Although the standard of care may require that firm management establish such measures, Rule 5.1(a) does not require that the manager ensure subordinates' compliance with the Rules and it is unlikely the standard of care dictates that management should be held to such a high standard. Even if all firm management were held to such a standard, it is similarly unlikely that a breach of this standard could proximately cause damages to a client of the firm. In sum, Rule 5.1(a) provides little, if any, practical foundation for a legal malpractice claim.

Subsection (b) applies to attorneys with "direct supervisory authority" and requires that they ensure that the subordinate attorney complies with the Rules. Unlike subsection (a)'s application to all firm management, subsection (b) is limited in scope to only those with direct supervisory authority. Consequently, subsection (b) creates a more common-sense basis for the standard of care. A violation of subsection (b) could proximately cause damages to a client of the firm.

For example, the Rules require an attorney to keep information relating to the representation of a client confidential.[49] Suppose, for instance, that a supervisory attorney knows that his or her associate has a blog pertaining to a given area of the law. That supervisory attorney should ensure that the information contained on the blog would not assist the reader to learn confidential client information regardless of whether the case was still pending. There have been several instances where attorneys have blogged about cases without revealing the name of

the case and/or the client, believing such omissions were sufficient to maintain confidentiality. Yet, attorneys may not realize that providing such information could breach client confidentiality and therefore result in a violation of the Rules regardless of whether the client's name is referenced or the case is still pending.

Subsection (c)(1) provides that any attorney is subject to discipline for ratifying or ordering the ethical misconduct of another attorney. There is little question that either instance of misconduct would be considered malpractice and would likely bear a causal relationship to any damages resulting from the subordinate's misconduct. For example, a supervisory attorney who knows that his or her subordinate is having relations with a client, yet looks the other way and fails to take steps to stop such conduct, could be considered to have ratified the subordinate's misconduct.

Subsection (c)(2) provides that it is an ethical violation for a supervising attorney to know of a subordinate's ethical violation in time to avoid or mitigate the negative consequences of it and to fail to take any remedial action. There can be little question that the standard of care mandates that a supervising attorney attempt to avoid or mitigate a subordinate's negligent or intentional ethical violation and that a breach of such a duty could cause damages to a client.

Although Illinois courts have provided little guidance with respect to an attorney's civil liability for the negligent supervision of subordinate attorneys, Illinois law does provide some guidance as to what elements could form the basis of such an action. The elements of legal malpractice and negligent supervision claims provide Illinois attorneys guidance as to what may constitute a claim for civil liability due to negligent supervision of subordinate attorneys. Further, Rule 5.1 provides a rough framework through which to analyze the merits of these claims.

IV. Survey of Attorneys' Civil Supervisory Liability

Although Illinois courts have not addressed negligent supervision in the partner-associate context, courts from around the country have considered the unique issues presented in such cases, often with divergent results.[50] Through an analysis of these cases, we are able to present a clearer picture of the viability of supervisory malpractice claims under Illinois law.[51]

A South Carolina court, while implicitly acknowledging the viability of legal malpractice claims premised upon a failure to supervise, highlighted the importance of focusing not only upon a partner's supervisory role for a clearly-wrongdoing associate, but also upon whether the partner knew or had reason to know of the necessity for exercising supervision over the associate regarding the particular matter at issue. In *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*,[52] an associate attorney concurrently performed professional work for the defendant law firm and for the plaintiff business venture.[53] Prior to joining the law firm, Barker obtained a one-half ownership interest in the plaintiff, a business that organized and sold golfing trips ("the golfing venture").[54] To obtain his interest in the golfing venture, the associate agreed to perform all of the golfing venture's legal, accounting, and bookkeeping work.[55]

Upon joining the law firm as an associate attorney, the firm's managing partner and the associate's supervising partner both informed the associate that he should feel free to come to them with any questions related to his employment at the law firm.[56] The law firm's policy required the associate to document for the firm all time spent engaged in professional activities, including those not associated with the firm.[57] Despite this policy, the associate continued to

perform services for the golfing venture without disclosing any such work to the law firm.[58] He used the law firm's letterhead when corresponding as the golfing venture's counsel.[59] He sent a letter to the co-owner of the golfing venture insinuating that the co-owner had absconded with certain accounting records and demanding that the co-owner maintain the corporation's records.[60] This correspondence began a sequence of events that ultimately led to the golfing venture's co-owner accusing the associate of misappropriation of corporate funds and professional malpractice.[61] Only then did the associate inform his superiors of his work for the golfing venture.[62]

The golfing venture and its co-owner filed suit against the law firm, alleging that the law firm was liable for negligent supervision due to its failure to monitor the associate's work with the corporation.[63] The law firm obtained summary judgment as to this claim, and the plaintiffs appealed.[64]

On appeal, the court upheld judgment in favor of the law firm.[65] Under South Carolina law, a negligent supervision claim such as this must be supported with evidence that the supervisor knew or should have known of the necessity for exercising control over its subordinate.[66] The court found that the law firm had no reason to know of the associate's outside work.[67] The firm enacted policies and procedures to monitor its employees' outside professional work. The associate, despite the firm's policies, actively hid his interest in and work for the golfing venture.[68] Thus, there was no reason for the firm or partners to believe that they needed to supervise the associate for the particular matters.[69]

The *Charleston* opinion suggests that Rule 5.1(a), requiring a supervisory attorney to have policies in place to ensure compliance with the Rules, could provide a basis for supervisory liability.[70] Extrapolating from the *Charleston* court's opinion, one can surmise that the firm may have been susceptible to a legal malpractice claim had it failed to enact policies and procedures to maintain oversight over associate attorneys. On the other hand, the *Charleston* court's opinion suggests that a firm can limit its potential supervisory liability where it enacts policies and procedures designed to maintain some degree of oversight over an associate's work. In such a situation, where the associate's failure to comply with the policies and procedures leads the supervisor to be unaware of the potential for harm, the firm cannot be liable for a failure to supervise.

In contrast, a New Jersey court acknowledged the validity of a legal malpractice lawsuit premised upon a partner's failure to recognize a subordinate's particular inability to perform legal work even though the partner had no knowledge of the plaintiffs' claims. In *Gautam v. De Luca*, a supervisory law partner faced malpractice liability stemming from a subordinate associate's negligent work.[71] The plaintiffs hired an attorney to represent them in independent medical malpractice and workers' compensation claims.[72] At the time, the attorney was a sole practitioner, but he soon joined the defendant law firm as an associate.[73] The associate continued to represent the plaintiffs in both matters and filed a complaint in the medical malpractice suit.[74] Around the same time, the associate began experiencing debilitating headaches that caused him to miss significant time from work.[75] As a result, he experienced difficulties complying with the court's discovery orders, and after repeated motions, the court dismissed the medical malpractice complaint due to the discovery violations.[76] Although the plaintiffs had repeatedly requested that the associate provide status updates, he never informed them of the dismissal.[77]

Approximately ten months after the dismissal of the medical malpractice action, the associate wrote to the plaintiffs and informed them that his illness would prevent him from continuing to handle the workers' compensation claim.[78] This aroused the plaintiffs' curiosity

and they later learned that the court had dismissed their medical malpractice action.[79] The plaintiffs sued both the law firm's managing partner and the associate for malpractice.[80]

At trial, the partner testified that he lacked familiarity with the plaintiffs' case.[81] He spoke with the plaintiffs on only one occasion – to take a telephone message for the associate – and the medical malpractice case was not listed on the partner's active case registry.[82] Although the partner was aware of the associate's medical problems, he never believed it necessary to supervise the associate's handling of his cases, believing that the associate was able to handle matters for himself.[83] He was not aware that the medical malpractice action had been dismissed until the legal malpractice trial, at which both the associate and the partner were found liable for the plaintiffs' damages.[84] The partner appealed.[85]

The *Gautam* court vacated the judgment against the partner for reasons related to deficiencies in proof as to damages, but held that the partner could have borne liability for his failure to adequately supervise the associate.[86] Noting the dearth of published opinions on the subject, the court was nevertheless "convinced that an attorney's failure to properly supervise the work of his associate may constitute negligence, particularly where . . . the associate is hindered or disabled by virtue of an illness."[87] The court noted that "a reasonable trier of fact could conclude that the supervising partner was guilty of malpractice because he took no action to safeguard the rights of his law firm's clients despite his knowledge of [the associate's] disabling sickness."[88]

Although the *Gautam* court seems to have properly focused upon a supervisory partner's knowledge of the subordinate associate's particular inability to do the necessary legal work, its ignorance of the particulars of the partner-associate relationship is troubling. By its omission from the court's opinion, the court apparently found no relevance in that the partner had no reason to know of the associate's representation of the plaintiffs. The court's holding that the standard of care required that the partner owed a duty to supervise his associate even as to matters of which he had no knowledge effectively defined a standard of care with which a supervisory attorney cannot hope to comply.

A supervisory attorney may even be held liable for failure to supervise where a non-client is damaged by a subordinate attorney's intentional acts.[89] In *Madden v. Aldrich*, the Supreme Court of Arkansas addressed a tort suit against a law firm partner and a subordinate attorney arising from the subordinate's alleged conversion.[90] The subordinate, ostensibly without knowledge of the partner, made representations to an individual seeking a child for adoption and represented that he had a client who desired to place her baby for adoption.[91] The other attorney obtained $5,000 from the prospective adoptive couple and delivered it to the subordinate attorney.[92] The subordinate took the money but never provided the other attorney with anything.[93] Later, it was discovered that the birth mother and baby were a fiction.[94] They had never existed.

The prospective adoptive parents sued both the subordinate attorney and the employing attorney.[95] Among other claims, the parents claimed that the employing attorney was negligent in supervising the subordinate's work.[96] The lawsuit went to trial and a jury found in favor of the parents and against both attorneys.[97] The employing attorney appealed, contending primarily that (1) she could not be held liable because neither she nor the subordinate represented the plaintiffs and (2) the evidence was insufficient upon which to find that she was negligent in her supervision of the subordinate.[98]

The Supreme Court of Arkansas rejected both of the employing attorney's arguments.[99] As to the former issue, the court pointed out that the requirement of privity in a suit against an

attorney applied only where the attorney was sued for legal malpractice.[100] However, in *Madden*, the employing attorney was sued not for negligence in rendering professional services, but for negligence in performing the supervisory duties of an employer.[101] As a result, the parents could pursue the claim against the attorneys despite the lack of an attorney-client relationship.[102]

The court found the evidence of negligent supervision to be substantial and more than sufficient to uphold the jury's verdict.[103] The employing attorney knew, upon hiring the subordinate, that his law license had previously been suspended for unethical conduct.[104] During his employment, the employing attorney received numerous complaints from clients unhappy with the subordinate attorney's work.[105] One client told her that the subordinate had taken money from her for an adoption but had produced nothing.[106]

Although the *Madden* opinion involved supervisory liability relating to a damaged non-client, its rationale applies equally to the supervisory responsibilities relating to law firm clients. As did the *Gautam* court, the *Madden* court made little of the fact that the supervisory attorney ostensibly had no knowledge of the work performed by the subordinate attorney and, instead, focused on the subordinate's shortcomings and the supervisor's right and ability to control the subordinate's work. As does the *Gautam* decision, the *Madden* opinion supports the imposition of a standard of care in exercising supervisory control that is nearly impossible to meet under some circumstances.

The *Gautam* and *Madden* opinions are in direct conflict with the *Charleston* decision. The *Charleston* court held that the standard of care requires only that a supervisory attorney institute measures designed to maintain oversight over a subordinate's work, as Rule 5.1 would suggest. The *Gautam* court, however, held that institituting such measures is not enough; the standard of care requires that the supervisory attorney actively investigate the subordinate's compliance with such measures. Although the *Madden* decision involved more egregious conduct by the supervisory attorney in her failure to take action despite knowledge of the employed attorney's particular unfitness for the job, the opinion nevertheless supports the imposition of a duty to not only supervise but to discover a subordinate's intentional wrongdoing.

As noted above, an Illinois court has held that a supervisor's liability for a failure to supervise a subordinate may turn upon the supervisor's knowledge of the subordinate's propensity to act in an incompetent manner.[107] Based upon this requirement, Illinois courts are more likely to follow the *Charleston* court's logic than to require the degree of oversight that the *Gautam* and *Madden* courts found necessary.

Although supervisory liability may turn on the supervisor's knowledge of the subordinate's inability to perform the work, the supervisor's own inability to perform the work may be immaterial to the supervisor's potential liability. A District of Columbia court highlighted the distinction between a partner's liability for the failure to adequately supervise a subordinate's work for the client and his liability for the failure to perform the legal work for the client. In *Anderson v. Hall*, the court held that partners have a duty to supervise associates even where the partners are not licensed to practice in the jurisdiction where the wrongdoing occurred.[108] The plaintiff retained the defendant law firm through one of its associates to pursue a personal injury lawsuit on her behalf.[109] Two partners in the law firm informed their subordinate attorneys to inform the plaintiff that the law firm would not pursue the personal injury claim and to advise the plaintiff of the pertinent one-year statute of limitations.[110]

When the law firm failed to file a timely lawsuit on her behalf, the plaintiff sued the law firm as well as the associate attorney and the law partners.[111] The plaintiff alleged the partners

were liable for their failure to supervise the associate attorney.[112] The partners moved to dismiss the negligent supervision claim, arguing that it failed to state a claim upon which relief could be granted.[113] They argued that, as District of Columbia lawyers, they could not be held liable for a failure to supervise the associate attorney, who was licensed to practice in Maryland.[114] After acknowledging the validity of a cause of action for an attorney's negligent failure to supervise, the court discounted the partners' argument that they practiced in a different jurisdiction than their subordinate and denied the partners' motion to dismiss the negligent supervision claim.[115]

Anderson signifies that supervisory liability is based solely upon the supervisor's responsibility to oversee or monitor the subordinate attorney. As this case suggests, an attorney may be liable for a failure to supervise even if he or she was unable to perform the subordinate's tasks. In *Anderson*, this inability took the form of the supervisors' inability to practice law in the jurisdiction at issue.

Supervisory liability may also occur in the referral context.[116] In *Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey*, a New York state court addressed an attorney's civil liability for failing to supervise attorneys to whom the defendants referred a matter.[117] In *Whalen*, the plaintiff retained the defendant law firm to recover her interest in a partnership from Julius Gerzof.[118] The law firm succeeded in obtaining a judgment on the plaintiff's behalf, but its attempt to collect the judgment was frustrated when Gerzof passed away as a resident of Florida.[119] The law firm, without the plaintiff's knowledge, enlisted the assistance of a Florida attorney and law firm to protect the plaintiff's rights in Gerzof's estate.[120] The Florida attorney was initially asked only to determine whether an estate had been opened and consulted as to the method of bringing a claim against the estate.[121] Because no estate had been opened, the law firm retained the Florida attorney to pursue claims once the estate was opened.[122] The law firm informed the plaintiff that it had retained the Florida attorney for this purpose.[123]

In early 1996, the law firm began to negotiate a potential settlement with the estate.[124] Once Gerzof's estate was opened, the law firm instructed the Florida attorney to file a claim against the estate.[125] Approximately two years later, the estate's attorneys informed the law firm that the Florida attorney had not filed a claim against the estate and the deadline for doing so had passed.[126] As a result, the estate withdrew all offers of settlement and cut off settlement negotiations.[127]

The plaintiff filed suit against the law firm alleging, among other things, the law firm was liable for a failure to supervise the Florida attorney.[128] The plaintiff and law firm filed opposing motions for summary judgment as to the failure to supervise claim.[129] The court denied the plaintiff's cross-motion for summary judgment on the failure to supervise claim and the plaintiff appealed.[130]

On appeal, the court held that the plaintiff did not enter into a retainer agreement with the Florida attorney; thus, the Florida attorney was the defendant's subagent.[131] As a result, the law firm owed the plaintiff a duty to supervise the Florida attorney in his work on the matter.[132] Not only did the court hold that the law firm owed a duty to supervise the Florida attorney, but it held that the law firm breached that duty as a matter of law.[133] Although expert testimony as to the standard of care is typically necessary under New York law to establish an attorney's standard of care, the court held that it was unnecessary in such a case.[134] The court relied upon the fact that the defendant did nothing to satisfy its duty to supervise.[135] It "took no steps whatsoever to even inquire as to the status of [the deadline for filing a notice of the claim] between February 1996 and January 1998."[136]

As *Whalen* highlights, supervisory responsibility is not limited to attorneys within the same law firm nor limited to subordinate attorneys. An attorney may have supervisory responsibility for outside attorneys he or she hires to perform work for the client regardless of the outside attorneys' years of experience. The New York court refused to draw a clear distinction between the roles of a supervisory lawyer with respect to a subordinate colleague and a referring attorney with respect to the lawyer to whom he referred a matter. *Whalen* raises questions about how Illinois would treat a case involving the legal and ethical supervisory responsibilities of a referring attorney. Although Rule 5.1(a) relates to a supervisor's responsibilities with respect to others at the same law firm, Rules 5.1(b) and (c) apply to anyone with "supervisory authority" over another lawyer. Thus, Illinois courts could rule consistently with *Whalen* when faced with similar facts.

Conclusion

As a partner, manager, or other supervisory attorney it can become too easy to focus one's time and effort upon legal matters directly at hand and ignore one's supervisory responsibilities. Rule 5.1's prophylactic goals play a role in the prevention of attorney misconduct; however, law firm culture is often at odds with the ethical and moral principles that underpin the Rules. The threat of punishment is often not enough to curtail ethical violations. Nevertheless, as a potential basis for civil supervisory liability, Rule 5.1's impact is magnified significantly. The threat of personal professional liability – and not just professional *sanctions* – should highlight the importance to law firm partners, managers, and other supervisory attorneys of instituting policies and procedures to ensure subordinate attorneys adhere to the Rules, as well as maintaining oversight over subordinates' work and potentially attorneys to whom a matter has been referred.

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[1] *See A Look at Associate Hours and at Law Firm Pro Bono Programs*, NATIONAL ASSOCIATION OF LEGAL PROFESSIONALS, http://www.nalp.org/july2009hoursandprobono (last visited Feb. 25, 2011) (noting that "billable hours expectations have inched up over the years"); Judith N. Collins, *Findings from the NALP Workplace Questionnaire*, NATIONAL ASSOCIATION OF LEGAL PROFESSIONALS, 2005, available at http://www.nalp.org/uploads/193_05wqweb.pdf (last visited August 27, 2014) (in chart reflecting findings of survery of law firms, stating that a greater percentage of firms reward associates for hours billed than for the quality of their work or their contributions to the law firms).

[2] *Update on Associate Attrition*, NATIONAL ASSOCIATION OF LEGAL PROFESSIONALS (2008). The rate of associate turnover within the first five years increased from 60 percent in 2000 to 78 percent in 2008.

[3] *2013 Annual Report of Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, Section IV. Report on Disciplinary and Non-Disciplinary Matters, "Chart 9 Classification of Charges Docketed in 2013 by Violation Alleged," https://www.iardc.org/AnnualReport2013.pdf (last visited August 27, 2014); *2012 Annual Report of Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, Section III. Report on Disciplinary and Non-Disciplinary Matters, "Chart 9 Classification of Charges Docketed in 2012 by Violation Alleged," https://www.iardc.org/AnnualReport2012.pdf (last visited August 27, 2014); *2011 Annual Report of Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, Section III. Report on Disciplinary and Non-Disciplinary Matters, "Chart 9 Classification of Charges Docketed in 2011 by Violation Alleged," https://www.iardc.org/AnnualReport2011.pdf (last visited August 27, 2014); *2010 Annual Report of Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, Section III. Report on Disciplinary and Non-Disciplinary Matters, "Chart 9 Classification of Charges Docketed in 2010 by Violation Alleged," https://www.iardc.org/AnnualReport2010.pdf (last visited August 27, 2014); *2009 Annual Report of Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, Section IV. Report on Disciplinary and Non-Disciplinary Matters, "Chart 9 Classification of Charges Docketed in 2009 by Violation

Alleged," https://www.iardc.org/AnnualReport2009.pdf (last visited August 27, 2014); *2008 Annual Report of Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, Section II. Report on Disciplinary and Non-Disciplinary Matters, "Chart 9 Classification of Charges Docketed in 2008 by Violation Alleged," https://www.iardc.org/AnnualReport2008.pdfhttps://www.iardc.org/AnnualReport2008.pdfhttps://www.iardc.org/AnnualReport2008.pdfhttps://www.iardc.org/AnnualReport2008.pdfhttps://www.iardc.org/AnnualReport2008.pdf (last visited August 27, 2014); *2007 Annual Report of Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, Section III. Report on Disciplinary and Non-Disciplinary Matters, "Chart 9 Classification of Charges Docketed in 2007 by Violation Alleged," https://www.iardc.org/AnnualReport2007.pdfhttps://www.iardc.org/AnnualReport2007.pdfhttps://www.iardc.org/AnnualReport2007.pdfhttps://www.iardc.org/AnnualReport2007.pdfhttps://www.iardc.org/AnnualReport2007.pdf (last visited August 27, 2014).

[4] This Article addresses only civil liability of supervisory attorneys in supervising other attorneys. Supervisory liability may also lie in the failure to properly supervise non-attorneys. See, *e.g.*, *Rodriguez v. Bank Of The West*, 162 Cal. App. 4th 454, 75 Cal. Rptr. 3d 543 (2008); *CenTrust Mortgage Corp. v. Smith & Jenkins, P.C.*, 220 Ga.App. 394, 469 S.E.2d 466 (1996).

[5] Ill. Sup. Ct. R. Prof'l Conduct of 2010, Preamble (2010).

[6] The Illinois Supreme Court adopted the current Rules in July of 2009 (effective in July of 2010), modifying the previous version of the state's ethical rules, including Rule 5.1. Ill. Sup. Ct. R. Prof'l Conduct of 2010, Rule 5.1 (1992). The modification of Rule 5.1 expanded the application of portions of the rule to apply not only to "partners" but to also include other lawyers with comparable management authority, *e.g.*, members of professional corporations.

[7] Ill. Sup. Ct. R. Prof'l Conduct of 2010.

[8] Ill. Sup. Ct. R. Prof'l Conduct of 2010 , Rule 5.1(a) (2010).

[9] Ill. Sup. Ct. R. Prof'l Conduct of 2010 , Rule 5.1, cmt 2 (2010).

[10] Ill. Sup. Ct. R. Prof'l Conduct of 2010 , Rule 5.1(b) (2010).

[11] Ill. Sup. Ct. R. Prof'l Conduct of 2010 , Rule 5.1(c)(1) (2010).

[12] Ill. Sup. Ct. R. Prof'l Conduct of 2010 , Rule 5.1(c)(2) (2010).

[13] Ill. Sup. Ct. R. Prof'l Conduct of 2010, Rule 5.1, cmt 2 (2010) (creating in a lawyer "in charge of a particular matter … supervisory responsibility for the work of other firm lawyers engaged in the matter").

[14] *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill. App. 3d 467, 473, 392 N.E.2d 1365, 1371 (3d Dist. 1979), aff'd on other grounds, 81 Ill.2d 201, 407 N.E.2d 47 (1980) (holding that the rules of legal ethics may be relevant to the standard of care in a legal malpractice action but are not an independent font of tort liability.).

[15] Ill. Sup. Ct. R. Prof'l Conduct of 2010, Preamble (2010) ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. [The Rules] are not designed to be a basis for civil liability."). Compare, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2)(c) (2000) ("Proof of a violation of the Rules of Professional Conduct may be considered by a trier of fact as an aid in understanding duty of care 'to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim.'").

[16] See *supra*, Note 9 and accompanying text.

[17] *Universal Mfg. Co. v. Gardner, Carton & Douglas*, 207 F. Supp. 2d 830, 833 (N.D. Ill. 2002); *Dahlin v. Jenner & Block, L.L.C.*, 2001 U.S. Dist. LEXIS 10512, 2001 WL 855419, at *7-8 (N.D. Ill. July 26, 2001); *Scheib v. Grant*, 22 F.3d 149, 156 (7th Cir.1994), cert. denied, 513 U.S. 929, 115 S. Ct. 320 (1994); *Zanders v. Jones*, 680 F. Supp. 1236, 1239 (N.D. Ill.1988), aff'd, 872 F.2d 424 (7th Cir. 1989).

[18] *Nagy v. Beckley*, 218 Ill. App. 3d 875, 881, 578 N.E.2d 1134, 1137-38 (1st Dist. 1991).

[19] *Gray v. Hallett*, 170 Ill. App. 3d 660, 663, 525 N.E.2d 89, 91 (5th Dist. 1988).

[20] *Nagy*, 218 Ill. App. 3d at 881.

[21] Ill. Sup. Ct. R. Prof'l Conduct of 2010, Preamble (2010).

[22] See, *e.g.*, *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 353, 736 N.E.2d 145, 157 (1st Dist. 2000); *Nagy*, 218 Ill. App. 3d at 881; *Rogers*, 74 Ill. App. 3d at 473 (3d Dist. 1979).

[23] *Suppressed v. Suppressed*, 206 Ill. App. 3d 918, 926, 565 N.E.2d 101, 106 (1st Dist. 1990) (expressing an agreement with the plaintiff that "there should be a separate cause of action for a lawyer's breach of the ethical duty to conduct himself in accordance with the rules of professional responsibility. However, we feel that it should be left

to the legislature to address this matter. Perhaps it would be appropriate for the legislature to create, statutorily, a new cause of action to specifically address this type of situation….").

[24] Restatement (Third) of the Law Governing Lawyers §11 cmt. a. (2000).

[25] *Levin v. Siegel & Capitel, Ltd.*, 314 Ill. App. 3d 1050, 1052, 733 N.E.2d 896, 898 (3d Dist. 2000).

[26] *Levin*, 314 Ill. App. 3d at 1050-51.

[27] *Id*. at 1050.

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] *Id*. at 1052.

[35] *Id*.

[36] *Id*. at 1053-54.

[37] *Childs v. Pinnacle Health Care*, 399 Ill. App. 3d 167, 181-82, 926 N.E.2d 807, 819-20 (2d Dist. 2010).

[38] *Id*.

[39] *Id*. at 182, quoting Black's Law Dictionary 971 (7th ed. 1999).

[40] *Cf. Madden v. Aldrich*, 58 S.W.3d 342, 349 (Ark. 2001) (holding that a statute barring a nonclient from recovery against a lawyer with whom the nonclient was not in privity did not apply to a claim for negligent supervision against such a lawyer because the supervising lawyer's alleged negligent supervision was not itself a "professional service" to which the statute applied)."

[41] *Sexton v. Smith*, 112 Ill. 2d 187, 193, 492 N.E.2d 1284, 1286-87 (1986).

[42] *Mueller by Math v. Community Consol. Sch. Dist. 54*, 287 Ill. App. 3d 337, 341-43, 678 N.E.2d 660, 664-64 (1st Dist. 1997) (addressing negligent supervision in the context of school employees).

[43] *Mueller*, 287 Ill. App. 3d at 342-343, 678 N.E.2d 660.

[44] *Doe v. Brouillette*, 389 Ill. App. 3d 595, 606, 906 N.E.2d 105, 115-16 (1st Dist. 2009).

[45] *Smiley v. Manchester Insurance & Indemnity Company of St. Louis*, 71 Ill.2d 306, 313, 375 N.E.2d 118, 122 (1978).

[46] *Practical Offset, Inc. v. Davis*, 83 Ill. App. 3d 566, 572, 404 N.E.2d 516, 521 (1st Dist. 1980)

[47] *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306-07, 837 N.E.2d 99, 107 (2005) ("Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client.").

[48] *See supra*, Sec. I.

[49] Ill. Sup. Ct. R. Prof'l Conduct of 2010, Rule 1.6(a) (2010).

[50] *See, e.g., Federal Deposit Insurance Corp. v. Nathan*, 804 F. Supp 888, 897-898 (S.D. Tex. 1992) (denying a partner's motion to dismiss a complaint contending that he could not be liable for malpractice where he performed none of the work at issue in the client's complaint and holding that he owed a duty to the firm's client and noting that "the complaint alleges he is directly liable because he failed to supervise attorneys in his firm and to deter unethical and negligent conduct…."); *Burnap v. Linnartz*, 38 S.W.3d 612, 622 (Tex. App. San Antonio 2000) (holding that a partner could be held liable for failure to supervise an associate's work drafting an agreement per the partner's request).

[51] Other courts have recognized that an attorney may be responsible for failing to appropriately supervise a subordinate attorney, although with little discussion of the issue. See, *e.g.*, *BCCI Holdings (Luxembourg), S.A. v. Clifford*, 964 F. Supp. 468, 482 (D.D.C. 1997) (refusing to dismiss a claim premised upon a partner's alleged failure to supervise subordinate attorneys and noting that "negligent supervision is a cognizable claim in the District of Columbia" but not addressing the claim in further depth); *Bill Parker & Associates v. Rahr*, 216 Ga. App. 838, 456 S.E.2d 221 (1995) (upholding jury verdict in favor of plaintiff-client and rejecting supervisory attorney's argument that the only basis by which it could have been held liable was through respondeat superior, noting that the supervisory attorney may have had a duty to maintain and enforce office policies and procedures which, if not followed, could lead to his own liability); *Busch v. Flangas*, 108 Nev. 821, 837 P.2d 438 (1992) (holding that an attorney may owe a duty to supervise a law clerk's work).

[52] *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635 598 S.E.2d 717 (S.C. Ct. App. 2004).

[53] *Charleston*, 359 S.C. at 637.

[54] *Id.* at 638.
[55] *Id.*
[56] *Id.* at 639.
[57] *Id.*
[58] *Id.* at 639.
[59] *Id.* at 640.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 640.
[64] *Id.*
[65] *Id.* at 644.
[66] *Id.* at 645.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Gautam v. De Luca*, 521 A.2d 1343, 1344 (N.J. Super. Ct. App. Div. 1987).
[72] *Gautam*, 521 A.2d at 1344.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 1345.
[76] *Id.* at 1344.
[77] *Id.* at 1344-45.
[78] *Id.* at 1345.
[79] *Id.*
[80] *Id.* at 1344.
[81] *Id.* at 1345.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at 1346.
[87] *Id.* at 1347.
[88] *Id.*
[89] *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (Ark. 2001)
[90] *Id.*
[91] *Id.* at 411.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* Although the subordinate attorney worked for the partner as an "independent contractor," the court held that he was, in fact, an employee of the partner.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 411-414.
[99] *Id.* at 413, 419.
[100] *Id.* at 413.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 415-419.
[104] *Id.* at 413.
[105] *Id.* at 416.
[106] *Id.*
[107] *Doe* 389 Ill. App. 3d at 606.

[108] *Anderson v. Hall*, 755 F. Supp. 2, 3 (D.D.C. 1991).
[109] *Anderson*, 755 F. Supp. at 3.
[110] *Id.* at 4.
[111] *Id.* at 3.
[112] *Id.* at 4.
[113] *Id.* at 7-8.
[114] *Id.* at 8.
[115] *Id.*
[116] *See*, *e.g.*, *Tormo v. Yormark*, 398 F. Supp. 1159, 1173 (D.N.J. 1975) (holding that referring lawyer could be liable for a breach of duty to supervise co-counsel if the referring lawyer made representations to the client about the progress of the case being handled by the co-counsel and then failed to monitor progress of case). *But see Broadway Maint. Corp. v. Tunstead & Schecter*, 487 N.Y.S.2d 799, 801 (N.Y. App. Div. 1985) (holding that outside general counsel owed no duty to supervise local counsel, despite the fact that general counsel occasionally acted as liaison to client); *Wilderman v. Wachtell*, 267 N.Y.S. 840, 842 (N.Y. Sup. Ct. 1933), aff'd, 271 N.Y.S. 954 (N.Y. App. Div. 1934) (noting that to impose a duty to monitor on the defendant referring lawyer would subject him to "hazards which he is not qualified either to anticipate or to prevent.").
[117] *Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey*, 863 N.Y.S.2d 100 (N.Y. App. Div. 2008).
[118] *Whalen*, 863 N.Y.S.2d at 101.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.* at 102.
[130] *Id.* at 101-102.
[131] *Id.* at 102.
[132] *Id.* (relying upon Restatement (Third) of Agency, § 3.15; Restatement (Second) of Agency, §§ 5, 406).
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*