

**FEDERATION OF DEFENSE
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**FIRM LIABILITY
FOR ASSOCIATE MALPRACTICE**

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FIRM LIABILITY FOR ASSOCIATE MALPRACTICE

I. Vicarious Liability for Legal Work of Associates

- A. General Rule – “A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm’s business or with actual or apparent authority.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 (2000).
- B. Even though a transaction is generally outside the ordinary course of the firm’s business, the firm may be held liable for an attorney’s promise to conduct legal work associated with that transaction.

Kuntze v. Carrane, No. 91-C-6145, 1993 WL 85732 (N.D. Ill. March 22, 1993) – A partner in a law firm sold a 50% beneficial interest in commercial property to plaintiffs. The partner made certain representations regarding expected profits and also promised to prepare and record legal documents necessary to protect the plaintiffs’ interest in the property. While the court held that the firm was not liable for representations related to the business venture and other acts that were outside the ordinary course of the firm’s business, the court denied the firm’s motion for dismissal as to the partner’s failure to file the legal documents.

- C. A law firm may be held liable to clients of whom the firm is unaware or for whom an attorney in the firm intends to represent independent of the firm.

Staron v. Weinstein, 701 A.2d 1325 (N.J. Super. Ct. App. Div. 1997) - Clients brought a legal malpractice action against an attorney (“Weinstein”), listed as "of counsel" on law firm stationery, and his former law firm (“Robert C. Thelander, Esq.”) based on attorney’s failure to file a personal injury complaint within the statute of limitations after he left the law firm. The retainer agreement in the underlying action was executed by the plaintiffs and Weinstein. The first page of the agreement referred to the Weinstein as the "law firm" retained and provided his personal address, but on the second page the law firm was listed as "Robert C. Thelander, Esq." above the attorney’s signature. Although Weinstein sent to letters on firm letterhead on the client’s behalf, Thelander claimed that Weinstein never advised him of the existence of the Starons as clients, nor was he aware of any file kept in his office on their behalf. *Id.* at 1326. The court held that genuine issues of fact existed as to the law firm’s liability for Weinstein’s malpractice—particularly, whether the attorney had apparent authority to act on behalf of law firm, whether the clients knew of dissolution of attorney’s relationship with firm before the alleged malpractice occurred and yet continued to have the attorney represent them, and why the law firm failed to notify clients of the dissolution.

1. The court noted that “[w]hen a client retains a lawyer with [an affiliation with a law firm], the lawyer’s firm assumes the authority and responsibility of representing that client, unless the circumstances indicate otherwise . . . and the firm is liable to the client for the lawyer’s negligence.” *Id.* at 1328 (citing RESTATEMENT OF THE LAW GOVERNING LAWYERS § 79 (Tentative Draft No. 8, 1997) (ellipses in original)).

2. The court noted that the firm had not presented evidence regarding the firm principal's role in the attorney's cases and his entitlement to a share of the proceeds of any recoveries made by the attorney. The court also noted the lack of evidence regarding "what systems [the firm principal] developed, or tried to employ, to assure knowledge of, and proper control over, cases which were retained by Weinstein as 'of counsel' to his firm." *Id.* at 1329.

D. Firm action against associate for outside legal work while employed by firm.

1. General Rule - Accepting legal employment without the consent or knowledge of the firm is a breach of the associate's fiduciary duty to the firm. Unless otherwise agreed, the associate must act in a manner that benefits the firm and does not benefit himself or interests adverse to the firm. RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

2. Disciplinary Action - *The Florida Bar v. Cox*, 655 So. 2d 1122 (Fla. 1995) – The Florida Supreme Court upheld a thirty-day suspension from practice of law for an associate who engaged legal employment not authorized by his law firm. The associate accepted cases without the knowledge or consent of the firm, violating a firm policy against unauthorized outside legal employment; corresponded with clients on these matters; and billed clients on firm stationery. In several cases, he requested in writing that the clients make payments to him personally rather than to the firm.

3. Liability of Associate to Firm - *Kramer v. Nowak*, 908 F. Supp. 1281 (E.D. Pa. 1995) – The court held that a law firm had a cause of action against its associate for losses the firm sustained due to the associate's malpractice. *Id.* at 1292. The court based its decision upon the general rule of agency found in the RESTATEMENT (SECOND) OF AGENCY, which provides that "[u]nless he has been authorized to act in the manner in which he acts, the agent who subjects the principal to liability because of a negligent or other wrongful act is subject to liability to the principal for the loss which results therefrom." *Id.* at 1293-94. (citing RESTATEMENT (SECOND) OF AGENCY § 401 cmt. d (1958)). The court held that Kramer had a cause of action against the associate to recover the amount of the legal malpractice judgment against him if the associate's conduct was not authorized, if the partner did not ratify the associate's conduct, and if the conduct could not have been discovered through reasonable inquiry. *Id.* at 1295.

The malpractice suit in this case did not arise out of a concealed file/client; at issue in *Kramer* was a motion prepared by the associate. The associate signed the partner's name to the motion, and the partner sought recovery of the amount of the resulting legal malpractice judgment against him for the associate's miscalculations within the motion.

II. Vicarious Liability for Associate Conduct "Outside the Ordinary Course of the Firm's Business."

A. Business/Investment Transactions

1. General Rule - "A firm of lawyers is not liable for the acts of one of its members outside the ordinary course of its business." 7 AM. JUR. 2D *Attorneys at Law* § 222 (1997).

2. Investment transaction held to be “outside the ordinary course of its business.”

Sheinkopf v. Stone, 927 F.2d 1259 (1st Cir. 1991) – Sheinkopf, an investor in joint business venture with an attorney, brought suit against the attorney’s former law firm for various causes of action based on theory that law firm was vicariously liable for the acts of the attorney in connection with the investment.

The court found that an attorney-client relationship never existed between Sheinkopf and the attorney and thus the alleged misconduct was outside of the ordinary course of the firm’s business as a law firm. *Id.* at 1269. The court found the following factors to be significant in its determination that an implied attorney-client relationship was absent:

- the lack of a pre-existing attorney-client relationship;
- the lack of a fee arrangement in place or discussions related thereto;
- the lack of a retainer; and
- the lack of discussions regarding the legal ramifications of entering into the transaction. *Id.* at 1266.

The court further held that there was no liability based on apparent authority. The court found that use of a firm office, secretary, and stationery in dealing with Sheinkopf was not sufficient to allow a jury to make a determination of apparent authority. The following facts were significant in the finding of an absence of apparent authority:

- The firm was not in the business of soliciting investments;
- There was no suggestion that the attorney’s acts in regard to the business venture could have benefited the law firm in any significant way;
- There was no evidence that any other member of the firm knew or should have known that the attorney had solicited Sheinkopf to make the investment. *Id.* at 1269.

Rouse v. Pollard, 21 A.2d 801 (N.J. 1941) – The court held a law firm not liable for recovery of money turned over by the plaintiff to a partner of the law firm for future investment in undesignated mortgages and securities at his discretion. *Id.* at 804. Since the practice of receiving funds from clients for investment by members of the firm at their discretion was contrary to the firm practice, the practice of the members of the firm, and to the general practice of law in the state, the members of the firm, who had no knowledge of the money, were not liable to the client for the loss of the money occasioned by misappropriation of a single partner. *Id.* at 804. The court found that the client’s introduction to the partner at the firm for the purpose of obtaining legal service did not justify her reliance on the partner for “any disconnected service assumed by [the partner] outside one that was characteristically within the practice of law.” *Id.*

at 803. The court further held that the individual attorney was not acting within the scope of any apparent authority granted by the firm. *Id.* at 804.

Heath v. Craighill, Rendleman, Ingle & Blythe, P.A., 388 S.E.2d 178 (N.C. Ct. App. 1990), *review denied*, 395 S.E.2d 678 (N.C. 1990)– A former client brought an action to recover damages from a law firm (a professional association) for alleged conversion of investment funds by a former attorney of the firm.

Even though one letter to the client was handwritten on firm stationery and on one occasion a partner in the firm was allegedly present with two staff members and overheard a discussion between the client and attorney regarding the transactions at issue, the court of appeals held that the attorney's actions were without the actual or apparent authority of the law firm where:

- the client was never billed by the firm for the investments;
- a letter from the attorney was written on personal stationery;
- the attorney's secretary did not discuss the attorney's meeting with the client with other members of the firm;
- the attorney gave no assurances that the money invested with him would be handled through the firm;
- the attorney was not the principal stockholder of the professional association, nor in charge of its operations; and
- the firm's charter limited it to rendering legal services. *Id.* at 182.

The court also refused to find liability on a theory of breach of fiduciary duty, opining, “[P]laintiff would have to show that defendants owed a duty to detect and supervise [the attorney's] activities which were outside the practice of law, which he had no authority to take, and of which defendants had no reason to know. As a matter of law, no such duty exists.” *Id.* at 183 (citations omitted).

3. Investment transactions found to be in the ordinary course of the firm's business.

Zimmerman v. Hogg & Allen, Prof'l Ass'n, 209 S.E.2d 795 (N.C. 1974) - Greene, who was a principal shareholder in Hogg & Allen, a professional association for the practice of law, represented Zimmerman, who was an officer and employee of a company which had engaged Hogg & Allen as its general counsel, in some personal legal matters. Zimmerman sent Greene \$24,000 to be used in the purchase of shares of Kentucky Fried Chicken. Zimmerman sued Greene and Hogg & Allen for misappropriation of his money. Reversing the trial court's summary judgment in favor of Hogg & Allen, the North Carolina Supreme Court held that there was a fact question whether, in accepting Zimmerman's money, Greene was acting within the normal scope of business of the professional association. The court held that it was reasonable

for the investor to believe the firm had conferred authority on Greene to receive funds for investment.

Cook v. Brundidge, Fountain, Elliott and Churchill, 533 S.W.2d 751 (Tex. 1976) – A partner, who represented the plaintiff in a divorce action and other matters, advised the plaintiff to invest \$60,000 in his fast food franchise business. When the business filed for bankruptcy, the plaintiff brought an action against the law firm seeking to recover actual and exemplary damages arising from alleged breaches of fiduciary duties of the attorney-client relationship and from alleged fraudulent acts of the partner. The court held that summary judgment was precluded by existence of fact issues as to whether lawyer was acting in ordinary course of partnership business in providing investment advice to the client.

4. Conduct undertaken as officer or director of unrelated business entity held to be outside the course of the firm's business.

Resolution Trust Corp. v. Bonner, Civ. A. No. H-92-430, 1993 WL 414677 (S.D. Tex. June 3, 1993) – The receiver of a savings and loan association brought suit against a law firm, the individual partners, and a former partner of the law firm who had also served as a director of the savings and loan association. *Id.* at *1. The receiver alleged breach of fiduciary duty, professional malpractice, aiding and abetting breach of fiduciary duty, and vicarious liability. The claims were based on fourteen specific transactions which the former partner in his capacity as director had entered into on behalf of the savings and loan association. *Id.* The court held that the firm could only be liable for the former partner/director's actions if they occurred within the ordinary course of the business of the partnership. *Id.* The court thus granted summary judgment in favor of the former partners of the law firm (in dissolution at the time of the decision) as to twelve of the fourteen transactions on which the law firm did no work. The court found the following factors significant in its decision:

- The firm did no legal work and did not authorize any work on the transactions at issue.
- The responsibilities of a director of a savings and loan association are not within the scope of the business of a law firm.
- The plaintiff presented no evidence to show a grant of actual authority to the former partner to work on the transactions at issue, either in his capacity as a director of the savings and loan association or in his capacity as a partner of the law firm. *Id.* at *2.

Douglas Reservoirs Water Users Ass'n v. Maurer & Garst, 398 P.2d 74 (Wyo. 1965) – The Supreme Court of Wyoming held that a dissolved law partnership and its surviving partner were not liable to the plaintiff association for sums which a deceased partner embezzled from it while acting as secretary-treasurer of the plaintiff association. “Neither a partnership nor its innocent partners are liable for a conversion which is not effected in the course of the firm's business. This is commonly held to be true even though the converted property is subsequently used in the business of the partnership, if the other partners had no actual knowledge of the unlawful origin of the property.” *Id.* at 76 (citations omitted).

5. Client loan to attorney held to be outside the course of the firm’s business.

Drew v. Stanton, 603 N.W.2d 79 (S.D. 1999) – The court held that a law firm was not liable to former client for \$500,000 she lent to an attorney in the firm and his wife for their personal investment in a casino. Relying on agency principles, the court found that the attorney’s acts were not sufficiently connected with the law firm’s business to impose liability on the firm and the law firm did not give the attorney the authority to do business with the client nor ratify the same. *Id.* at 83.

6. Client loan to attorney held to be in the course of the firm’s business.

Phillips v. Carson, 731 P.2d 820 (Kan. 1987) - A client, who had loaned her attorney \$270,000, brought a professional negligence action against the attorney and his firm when the mortgage securing the loan proved to be worthless. The court applied a broad concept of apparent authority in finding it sufficient that legal services the attorney performed incident to loans were within scope of general practice of law. The court thus held that summary judgment for the law firm was precluded by existence of fact issues as to whether the attorney, in advising and performing services for client from who he was securing the loan, was apparently carrying on usual law business of professional partnership, or whether his wrongful acts or omissions were in usual course of business or with the consent of his partners.

7. Malicious prosecution held to be “outside the course of the firm’s business.”

Jackson v. Jackson, 201 S.E.2d 722 (N.C. Ct. App. 1974) – The court held that other partners in law firm were not liable for malicious prosecution instituted on advice of one of the partners without the participation, authorization, knowledge or approval of the other partners. The court identified the question at issue as whether a lawyer who engages in malicious prosecution is acting in the ordinary course of his firm’s business. The court reasoned that although “[a]dvising the initiation of a criminal prosecution is clearly within the normal range of activities for a typical law partnership, . . . taking such action maliciously and without probable cause is quite a different matter.” *Id.* at 723.

B. Firm liability for acts outside the course of the firm’s business, but undertaken with apparent authority.

1. General Rule – “Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.” RESTATEMENT (THIRD) OF AGENCY § 2.03 (Tentative Draft No. 2, 2001).

2. South Carolina Rule – “The doctrine of ‘apparent authority’ causes a principal to be bound by the acts of its agent when the principal has placed the agent in such a position that persons of ordinary prudence, and reasonably knowledgeable with business usages and customs, are led to believe that the agency has certain authority and they in turn deal with the

agent based on that assumption.” *McAllister v. Graham*, 287 S.C. 455, 458, 339 S.E.2d 154, 156 (Ct. App. 1986).

“Apparent authority must be established based upon manifestations by the principal, not the agent.” *Shropshire v. Prahalis*, 309 S.C. 70, 71, 419 S.E.2d 829, 829-30 (Ct. App. 1992). “An agency may not be established solely by the declarations and conduct of an alleged agent.” *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244, 473 S.E.2d 865, 868 (Ct. App. 1996).

“Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.” *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244-45, 473 S.E.2d 865, 868 (Ct. App. 1996) (citations omitted) (emphasis in original).

Elements of Apparent Authority – “In order for a third party to recover against the principal based upon [the theory of apparent authority], it must be shown that he reasonably relied on the indicia of authority *originated by the principal* and such reliance must have effected a change of position by the third party.” *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996). To establish an apparent agency relationship, a third party must prove:

- that the purported principal consciously or impliedly represented another to be his agent;
- that there was a reliance upon the representation; and
- that there was a change of position to the relying party's detriment. *Shuler v. Tuomey Reg'l Med. Ctr., Inc.*, 313 S.C. 225, 227, 437 S.E.2d 128, 129-30 (Ct. App. 1993) (citations omitted).

3. Trappings of Office

Kanavos v. Hancock Bank & Trust Co., 439 N.E.2d 311 (Mass. App. Ct. 1982) – The court held that evidence would have supported a finding that bank's executive vice president had apparent authority to amend repurchase option in such a manner. However, the court noted that “[t]rappings of office, *e.g.*, office and furnishings, private secretary, while they may have some tendency to suggest executive responsibility, do not without other evidence provide a basis for finding apparent authority.” *Id.* at 315.

Sheinkopf v. Stone, 927 F.2d 1259 (1st Cir. 1991) – The court held that a partner's use of his law firm's office, secretary, telephone, and stationery in transacting a real estate deal for his own benefit was not enough to make out a jury question on apparent authority under Massachusetts law. *Id.* at 1269.

4. Use of Partnership Name.

Boyd v. Leasing Assoc., Inc., 516 S.W.2d 485 (Tex. Civ. App. 1974) – While upholding finding of apparent authority for third party operating partnership business after dissolution, the court noted that “a transaction with a partner that is outside the scope of the partnership enterprise is deemed personal to him, even though the use of the firm name led the other party to believe he was dealing with the partnership.”

5. Use of Firm Letterhead.

Homa v. Friendly Mobile Manor, Inc., 612 A.2d 322 (Md. Ct. Spec. App. 1992) – Plaintiff Friendly brought a suit against an attorney and the law firm with which he has associated for fraud, breach of contract, and breach of fiduciary duty. The lawyer had prepared an agreement with the plaintiff for specific legal and consulting services on the letterhead of the law firm to which he was of counsel. The specific services described were obtaining and producing a qualified purchaser for two mobile parks and then negotiating the terms of sale, preparing the real estate contract, attending the closing, and cooperatively working with the seller's accountant-tax adviser to effect the most favorable tax treatment for the seller. A dispute arose following the sale of one of the mobile parks, and in the subsequent lawsuit, the court entered judgment against the attorney for breach of fiduciary duty and breach of his legal services contract. The court granted summary judgment for the law firm, finding that the attorney had neither actual nor apparent authority to bind the firm as to the transaction at issue. The court held that the law firm would be liable merely because the letterhead of the law firm was used in the retention agreement.

In concluding that the attorney had no *actual* authority to bind the firm, notwithstanding that the engagement letter was prepared on the firm stationery with his name listed as “Of Counsel,” the court considered the proofs regarding the nature of the services to be rendered, the reasons why plaintiff selected Homa personally to do the work and Homa's personal involvement as a consultant in the underlying transaction, plaintiff's lack of knowledge of Homa's “affiliation with [the firm] until he received the engagement letter” and the lack of remuneration to be paid to the firm. *Id.* at 334.

With respect to the claim of apparent authority, the court noted that the party seeking to rely on the agency relationship based upon apparent authority must establish:

- that the principal has manifested his consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority;
- that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and
- that the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal. *Id.* at 335.

III. Violation of Rules of Professional Conduct as Basis or Evidence of Civil Liability

A. Relevance of evidence of violation of Rules of Professional Conduct in determining lawyer's standard of care.

1. 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.”

2. South Carolina - *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 472 S.E.2d 612 (1996) – The court held that violation of the Rules of Professional Conduct may be evidence of a breach of duty in a malpractice action if the rule is “intended to protect a person in the plaintiff’s position of be addressed to the particular harm.” *Id.* at 437, 472 S.E.2d at 614. The court further held that a violation of the Rules of Professional Conduct is not negligence *per se* under South Carolina law. *Id.* at n. 6.

3. Other States

Michigan - *Lipton v. Boesky*, 313 N.W.2d 163 (Mich. Ct. App. 1981) – The court held that violation of the Code of Professional Responsibility creates a rebuttable presumption of legal malpractice.

California - *Day v. Rosenthal*, 217 Cal. Rptr. 89 (Cal. Ct. App. 1985) – The court held that expert testimony was not necessary to establish an attorney’s breach of duty in a legal malpractice action where the alleged misconduct was a matter of common knowledge. The court stated that the standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct and “cannot be changed by expert testimony.” *Id.* at 102.

Florida - *Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.*, 655 F. Supp. 1571 (S.D. Fla. 1987) - The plaintiff relied on the Rules of Professional Conduct to state a cause of action against the defendant lawyer. The court, noting that the preamble to the Florida Rules of Professional Conduct expressly provides that the rules are not “designed to be a basis for civil liability,” held that the rules impose no legal duty for which the breach thereof can support tort liability. *Id.* at 1573. *See also Pressley v. Farley*, 579 So. 2d 160 (Fla. Dist. Ct. App. 1991) (holding that violation of the Rules of Professional Conduct is not negligence *per se*, but violation may be used as some evidence of negligence).

Montana - *Carlson v. Morton*, 745 P.2d 1133 (Mont. 1987) - The court held that a violation of a professional conduct rule “should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.” *Id.* at 1136 (quoting from the Preamble to the Model Rules of Professional Conduct).

New Jersey - *Baxt v. Liloia*, 656 A.2d 835 (N.J. Super. Ct. App. Div. 1995) – The court held that although a violation of ethical standards does not *per se* give rise to negligence, such standards do set forth a minimum level of competency for all attorneys and an appropriate

standard of care by which to measure an attorney's conduct. Where an attorney fails to meet such minimum standards of competency, such failure can be considered evidence of malpractice.

Massachusetts - *Fishman v. Brooks*, 487 N.E.2d 1377 (Mass. 1986) – The court held that the violation of a canon of ethics or a disciplinary rule is not actionable breach of duty to client, but it may be “some evidence of the attorney's negligence” to the extent that the rule was intended for the protection of persons in the position of the plaintiff.

Washington - *Hizey v. Carpenter*, 830 P.2d 46 (Wash. 1992) – The Supreme Court of Washington held that in a legal malpractice action, the jury may not be informed of the defendant's violation of the Code of Professional Responsibility or Rules of Professional Conduct, either directly through jury instructions or through testimony of an expert who refers to a breach of those rules.

B. Violation of Rule 5.1

1. Rule 5.1 of the South Carolina Rules of Professional Conduct sets forth the responsibilities of a partner or supervisory lawyer as follows:

- (a) A partner 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:
 - (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) The lawyer is a partner 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.

S.C. App. Ct. Rule 407, Rules of Prof'l Conduct, Rule 5.1.

2. *In Re Anonymous Member of South Carolina Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001) – The South Carolina Supreme Court noted that “[a]ttorneys in South Carolina do not have ‘vicarious liability’ for the ethical violations of other attorneys.” *Id.* at 182, 552 S.E.2d at 12. However, the court did not address whether a supervising attorney's violation of

Rule 5.1 could be offered as evidence of negligent conduct of the part of the supervising attorney.

3. Other States

Virginia – *Lockney v. Vroom*, No. L02-1709, 2003 WL 22382577 (Va. Cir. Ct. March 21, 2003) – The court held that the defendant law firm could not be held liable for negligent supervision of an associate’s acts and omissions during his employment with the firm. While the plaintiff argued that the Virginia Rules of Professional Conduct impose on partners and attorneys with supervisory authority responsibility for the work of other attorneys in the law firm, the court held that this rule did not give rise to an independent cause of action and that no action for negligent supervision is recognized under Virginia law.

IV. Liability for Negligent Supervision

A. RESTATEMENT (SECOND) OF TORTS § 317 (1965) – “A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.”

B. Elements of Negligent Supervision under South Carolina law – *Moore v. Berkeley County Sch. Dist.*, 326 S.C. 584, 486 S.E.2d 9 (Ct. App. 1998) – An employer may be held liable for negligent supervision if:

- an employee intentionally harms another during the time that the employee is upon the premises of the employer or is using chattel of the employer;
- the employer knows or has reason to know that he has the ability to control his employee; and
- the employer knows or should know of the necessity and opportunity for exercising such control. *Id.* at 590, 486 S.E.2d at 12.

C. Civil Liability for Failure to Supervise Subordinate Attorney

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §11 cmt. a. (2000) – “With 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.”

F.D.I.C. v. Nathan, 804 F. Supp. 888 (S.D. Tex. 1992) – The F.D.I.C. brought for an action against a law firm, its partners, and its associates for legal malpractice for alleged

misconduct relating to the firm's representation of a savings and loan association, which was later declared insolvent. The court found that a partner was directly liable for failure to supervise attorneys in his firm and for failure to deter negligent and unethical conduct even though he personally did none of the transaction work in dispute.

Gautum v. De Luca, 521 A.2d 1343 (N.J. Super. Ct. App. Div. 1987) – Clients brought a legal malpractice action against an attorney and an associate for negligent prosecution of a medical malpractice claim and for failure to advise clients of the dismissal of the medical malpractice claim. The court found the supervising attorney's failure to properly supervise the work of his associate may constitute negligence, particularly where the associate is hindered or disabled by illness.

Anderson v. Hall, 755 F. Supp. 2 (D.D.C. 1991) – A client brought a negligence and breach of contract action against a law firm, alleging that failure to supervise attorney resulted in the expiration of the limitations period before an action could be filed. The court denied the law firm's motion for summary judgment, finding that the plaintiff sufficiently pleaded claim that the law firm improperly supervised associate.