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### Unsupervised Employee - Lawyer Liability

Court of Appeals Judge Robert McDonald commenced his Opinion in *Attorney Grievance Commission v. Earl Smith*<sup>1</sup> with the observation that disciplinary cases that result in disbarment often find the attorney "committing one of the seven deadly sins – e.g., greed, lust, sloth." *Smith*, however, was not such a case. Rather, the "sin" in that case was "inattention – inattention to clients, inattention to an attorney trust account, and inattention to the activities of a non-lawyer assistant in whom the attorney misplaced his trust and who misused the attorney trust account..." Disbarment was warranted to protect the public from those, like Smith, who "fail to fulfill the routine duties of the profession that serve and safeguard their clients."

Smith's derelictions were anything but routine, indeed, they were extreme, but the case serves as a reminder, nonetheless, of the need for vigilance and real oversight of a law firm's employees. The trial court found that Smith allowed his assistant, Dawn Staley-Jackson, his only employee, "to run his law practice without any meaningful oversight." Not only did she independently send demand letters to defendants in personal injury cases, but among other things, she negotiated settlements, advised clients, drafted pleadings (frequently signing Smith's name), prepared settlement sheets and deposited checks. From not later than 2009, Ms. Staley-Jackson systematically misappropriated funds from the firm's personal injury trust account by forging endorsements and cashing checks made payable to others and by fraudulently creating and cashing checks made payable to herself. The proceeds of her fraud exceeded \$600,000. When Smith realized that there was a shortfall in the account, instead of remediating the problem, he deposited his own or borrowed funds into the account on five separate occasions from December 2010 to June 2012. These deposits totaled tens of thousands of dollars. The hearing judge found that Smith was aware for more than a year and a half that he was out of trust, but because of his "persistent failure over a period of almost four years to comply with the trust account record-keeping requirements of the Maryland Rules," he was unable to detect the source of the shortfall and enabled his assistant to "get away with her theft for as long as she did." When his influx of funds failed to keep pace with her peculations, his bank reported an overdraft to Bar Counsel and the end of Smith's career was preordained.

Judge McDonald discussed at length the issues relating to supervision and called the unsupervised delegation of the lawyer's responsibilities to his legal assistant at the heart of the violations. He noted that attorneys are required to take steps to ensure that their non-lawyer employees act consistently with the lawyer's ethical responsibilities. Not only did Smith permit his assistant to run his practice without ensuring that her delegated tasks were executed consistent with his ethical obligations, his absence of oversight led her to engage in the unauthorized practice of law. By permitting her to send demand letters, to negotiate and settle claims and to advise clients, Smith violated Rule 5.5 of the Maryland Rules of Professional Conduct by assisting another in the unauthorized practice of law.

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<sup>1</sup> 2015 WL 3863638 (June 23, 2015)

As I said, Smith's conduct (or rather, his "inattention") was extreme. But much of the basis for his disbarment and the sanctions of a number of other Maryland attorneys, whose names are mentioned in the Opinion, came as a result of employee misconduct. Attorneys must take reasonable efforts to ensure their employees do not cross ethical or professional lines. New technologies require new approaches to supervision, especially in light of the pervasiveness of telecommuting and social media and the easy loss of privilege or confidentiality. Lawyers are best served by having clear ethical guidelines and training established for their employees and, of course, they must supervise appropriately to ensure conformance with the Rules of Professional Conduct.

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