

**ETHICAL ISSUES FOR NEW PUBLIC SECTOR LAWYERS:
RELIANCE ON A SUPERVISOR'S RESOLUTION OF A
QUESTION OF PROFESSIONAL DUTY**

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PICTURE THIS: You are nearing the end of your first year of practicing law, working diligently in a law firm that represents municipalities, or in an in-house legal department in a city, county, town or school district. Things are going well; you are happy with the feedback and mentoring that is provided by your supervisors. You are beginning to see it not just as the first of several jobs, but as a long-term career commitment.

You are assigned to an interesting case defending a municipal employee, the named defendant in a civil lawsuit for damages, pursuant to statutory indemnification provisions that require the municipality to indemnify and provide a defense in a claim arising from the employee's actions taken within the scope of his employment. You want to take the deposition of a third-party witness, but the lawyer who supervises your work directs you not to. You feel that taking the deposition is necessary in order for the defendant to be represented diligently, but your boss says the potential benefits from a deposition do not outweigh the financial cost. You recently saw your boss having a drink with the lawyer for the plaintiffs in the case, and overheard your boss say that the employee-defendant was acting like an ass and that he hopes the plaintiffs win.

WHAT SHOULD YOU DO?

This hypothetical implicates several of New York's Rules of Professional Conduct.¹ The subordinate lawyer's view of the importance of conducting the third-party deposition falls within the general duty to represent a client diligently. N.Y. Rules of Prof. Conduct Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client," and, according to the Comment, the lawyer:

. . . should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must

¹ The relevant rules and official comments are set forth at the end of this paper.

also act with commitment and dedication to the interests of the client and in advocacy upon the client's behalf.²

At least arguably, conducting the third-party deposition is required in order to vindicate the client's cause, in which case the supervising lawyer's decision to forego the deposition could conceivably amount to a violation of Rule 1.3. Further, the interactions of the supervising lawyer with opposing counsel at the restaurant could implicate Rule 1.7, relating to conflicts of interest. That Rule provides in relevant part that a lawyer shall not represent a client if a reasonable lawyer would conclude that either the representation will involve the lawyer in representing differing interests, or there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property "or other personal interests."³

I. Rules of Professional Conduct Rule 5.2

There is a specific rule that addresses the subordinate lawyer's duties in circumstances like these, where an ethical question arises in connection with a directive from a supervising lawyer involving representation of a client.

Rule 5.2(a), entitled "Responsibilities of a Subordinate Lawyer," states that "[a] lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person."⁴ In other words, the subordinate lawyer has his or her own obligation to adhere to the Rules of Professional Conduct, independent of what the supervising lawyer directs. If a subordinate lawyer acts in a manner that violates the Rules, that lawyer is subject to potential discipline even though the lawyer was acting pursuant to the orders of a supervising lawyer. As the Comment to Rule 5.2 states, "a lawyer is not relieved of responsibility for a violation by the fact that the

² N.Y. Rules of Prof. Conduct Rule 1.3, and Rule 1.3 Comment [1].

³ N.Y. Rules of Prof. Conduct Rule 1.7(a)(2).

⁴ N.Y. Rules of Prof. Conduct Rule 5.2. Rule 5.2 is substantively identical for our purposes, to the former Disciplinary Rule 1-104(E) and (F). *See also*, ABA Model Rules of Prof. Conduct Rule 5.2.

lawyer acted at the direction of a supervisor,”⁵ and if the question of professional duty “can reasonably be answered only one way, the duty of both lawyers is clear, and they are equally responsible for fulfilling it.”⁶

There are nuances of course. Comment [1] to Rule 5.2 states that the fact that the action taken by the subordinate lawyer was directed by a supervisor “may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of these Rules.” The Comment cites an example: “[I]f a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document’s frivolous character.”⁷

More relevant to the scenario presented at the beginning of this paper, paragraph “b” to Rule 5.2 protects the subordinate lawyer who “acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”⁸

In our scenario, the apparent decision of the supervising lawyer that conducting a third-party deposition is not required in order for the office to represent the defendant diligently in accordance with Rule 1.3, could be deemed a reasonable resolution of an arguable question of professional duty. However, the subordinate lawyer in our scenario may believe that taking the third-party witness’ deposition is so critical to the client’s defense that failing to do so would violate the duty of diligent representation. The subordinate lawyer is also concerned that the decision not to conduct a deposition reflects a conflict of interest on the part of the supervisor,

⁵ Rule 5.2, Comment [1].

⁶ *Id.*, Comment [2]. Conversely, a lawyer who orders or directs another lawyer to engage in conduct that violates the Rules is also in violation. Rule 5.1(d)(1).

⁷ A related principle, not specifically addressed here, is that the fact that a lawyer’s employer caused him or her to engage in misconduct, can be a mitigating factor in a disciplinary proceeding. *E.g.*, *In re Tustaniwsky*, 758 F.3d 179, 182 (2d Cir. 2014); *In re Hemlock*, 52 A.D.2d 248, 250-51 (1st Dep’t 1976).

⁸ Rule 5.2(b).

given the supervisor's apparently friendly relationship with opposing counsel, and his expressed hostility toward the client.

Comment [2] to Rule 5.2 describes actions that might be taken by a subordinate lawyer in such circumstances. Comment [2] starts by acknowledging that "the supervisor may assume responsibility" for making the judgment on a matter of professional duty, noting that this ensures that the office acts in a consistent manner.⁹ This responsibility is of a piece with the duty imposed by Rule 5.1(b) on a lawyer with direct supervisory authority over another lawyer, "to ensure that the supervised lawyer conforms" to the Rules of Professional Conduct.¹⁰

Comment [2] goes on to say that "if the question [of professional duty] is reasonably arguable, someone has to decide upon the course of action", and that "[t]hat authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly."¹¹

However, consistent with the fact that a subordinate lawyer has an independent responsibility to act in accordance with the Rules, Comment [2] states that in order to "evaluate the supervisor's conclusion that the question is arguable and the supervisor's resolution of it is reasonable in light of applicable law",

. . . it is advisable that the subordinate lawyer undertake research, consult with a designated senior partner or special committee, if any (see Rule 5.1, Comment [3]), or use other appropriate means. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.¹²

Depending upon the size of the office, a subordinate lawyer may very well have to raise his or her questions about the supervisor's resolution of the question with the very supervisor whose judgment is at issue. The workplace challenges this could present are obvious.

⁹ Rule 5.2, Comment [2].

¹⁰ Rule 5.1(c).

¹¹ Rule 5.2, Comment [2].

¹² *Id.*

II. A Pair of Ethics Opinions Discussing Rule 5.2

A. Ethics Opinion 751¹³

In this inquiry, a staff lawyer employed by a governmental social services department asserted that lawyer caseloads were so excessive that it breached the duty of competent representation found in former DR 6-101, the predecessor of Rule 1.3. The employing agency was required by statute to participate in various legal proceedings, but budget considerations prevented the hiring of more staff lawyers to ease the burden on existing lawyers.

The opinion concludes that indeed, a lawyer who represents a government agency may not undertake more matters than the lawyer can competently handle. In reaching that conclusion, the opinion addresses the fact that a staff lawyer's caseload is imposed by the employing agency, and that case assignments implicate the professional duties of both supervising and subordinate lawyers.

Citing the predecessor to Rule 5.2,¹⁴ the opinion notes that the mere fact that caseloads are assigned by a supervisor does not absolve the staff lawyer from adhering to the rule requiring competent representation. While a subordinate may act in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty (in this case the supervisor's conclusion that taking on an additional case or cases would not result in a violation of the duty to provide competent representation), the subordinate lawyer "has an independent obligation to determine whether. . . the lawyer is competent to handle the cases the lawyer has been assigned."¹⁵

¹³ N.Y. State 751 (2002).

¹⁴ As noted, there is no substantive difference between Rule 5.2 and its predecessor DR 1-104(E) and (F) with regard to the topic of this paper.

¹⁵ *Id.*

The opinion also discusses various ethical implications of the fact that in the case of a staff lawyer who is assigned to represent a public agency in legal matters, the agency is both the employer of the staff lawyer, and his or her client. Because there is a lawyer-client relationship, the opinion addresses whether the staff lawyer may avoid an ethical problem by obtaining the consent of the agency-client, as it were, to provide what is in fact incompetent representation.

In this regard the opinion mentions the possibility that the agency would seek to assuage the staff lawyer's ethical concerns by telling him or her to " 'just show up' or 'just do the best you can' without preparation."¹⁶ The opinion expressly rejects this notion, citing the principle that a lawyer and client may not limit the scope of representation "in a manner that . . . will compel the lawyer to neglect the matter, prepare inadequately, or otherwise represent the client incompetently."¹⁷

Also, because the agency is a client, the opinion states that a staff lawyer who is asked to take on an overwhelming number of matters "must consult with the client (through a supervising lawyer or officials in the agency)" about the excessive caseload.¹⁸

The opinion concludes with the observation that a subordinate lawyer who after consultation with the supervising lawyer or agency determines that he or she must nonetheless decline to handle cases that cannot be handled competently, will have to "deal with whatever employment consequences may follow."¹⁹

¹⁶ *Id.*

¹⁷ *Id.*, citing ABA Model Rules of Prof. Conduct Rule 1.2, Comment (*cf.*, NY Rules of Prof. Conduct Rule 1.2, Comment [7]).

¹⁸ *Id.*, citing DR 7-101(a)(3). *Cf.*, Rules of Prof. Conduct Rule 1.4(a)(5) and (b).

¹⁹ N.Y. State 751 (2002). The opinion notes that the question whether a subordinate lawyer may be fired for declining to accept matters that the lawyer cannot competently handle is "a question of employment law that is beyond this Committee's jurisdiction." *Id.*

B. Ethics Opinion 1120²⁰

A lawyer employed by a government agency believed that another lawyer in the same agency had committed a violation of the Rules of Professional Conduct. The lawyer reported the other lawyer's conduct to the government agency's internal ethics office. That office had not made a determination on the report as of the time that the complaining lawyer requested an opinion from the NYSBA Ethics Committee about the matter.

The opinion does not resolve the issue whether the internal ethics office constitutes a proper tribunal or other authority (e.g., a grievance or disciplinary committee), to which a report of a violation of the Rules by a lawyer must be made pursuant to Rule 8.3. If a lawyer in such circumstances concludes that the agency's internal ethics office is *not* such a tribunal or other authority (which is the likely conclusion), then the lawyer "may" initially report the alleged misconduct to the internal ethics office, at which point Rule 5.2 applies.²¹

That means that if the internal ethics office eventually determines not to report the other lawyer to a proper authority under Rule 8.3, the lawyer may defer to that determination pursuant to Rule 5.2, but only if the decision not to report is a reasonable resolution of an arguable question of professional duty. In other words, the internal ethics office is treated like a supervisory lawyer under Rule 5.2. If the lawyer concludes that the decision of the internal ethics office not to report the matter does not meet the test of reasonableness, the lawyer is required to make a report to a proper authority under Rule 8.3.²²

²⁰ N.Y. State 1120 (2017).

²¹ *Id.*

²² *Id.*

III. Conclusion

Questions of professional duty and the proper application of the Rules of Professional Conduct to real life situations arise frequently in the course of practicing law. If such questions arise in connection with a directive given to a subordinate lawyer by a supervising lawyer, each has an independent duty to comply with the Rules. However, Rule 5.2 protects a subordinate lawyer who acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. The best approach is to maintain a work environment in which lawyers feel free to air any issues of professional duty as they arise, and in which such issues are candidly discussed and carefully resolved.

APPLICABLE RULES AND COMMENTS

Rules of Professional Conduct Rule 1.3 – Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

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Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued . . .

Rules of Professional Conduct Rule 5.1 – Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules. (2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if: (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the

other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Comment

[1] Paragraph (a) applies to law firms; paragraph (b) applies to lawyers with management responsibility in a law firm or a lawyer with direct supervisory authority over another lawyer.

[2] Paragraph (b) requires lawyers with management authority within a firm or those having direct supervisory authority over other lawyers to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to these Rules. Such policies and procedures include those designed (i) to detect and resolve conflicts of interest (see Rule 1.10(e)), (ii) to identify dates by which actions must be taken in pending matters, (iii) to account for client funds and property, and (iv) to ensure that inexperienced lawyers are appropriately supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (b) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and lawyers with management authority may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (d) expresses a general principle of personal responsibility for acts of other lawyers in the law firm. See also Rule 8.4(a).

[5] Paragraph (d) imposes such responsibility on a lawyer who orders, directs or ratifies wrongful conduct and on lawyers who are partners or who have comparable managerial authority in a law firm who know or reasonably should know of the conduct. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Partners and lawyers with comparable authority, as well as those who supervise other lawyers, are indirectly responsible for improper conduct of which they know or should have known in the exercise of reasonable managerial or supervisory authority. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the

seriousness of the misconduct. A supervisor is required to intervene to prevent misconduct or to prevent or mitigate avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (a), (b) or (c) on the part of a law firm, partner or supervisory lawyer even though it does not entail a violation of paragraph (d) because there was no direction, ratification or knowledge of the violation or no violation occurred.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by these Rules. See Rule 5.2(a).

Rules of Professional Conduct Rule 5.2 – Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of these Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise, a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear, and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. To evaluate the supervisor's conclusion that the question is arguable and the supervisor's resolution of it is reasonable in light of applicable law, it is advisable that the subordinate lawyer undertake research, consult with a designated senior partner or special committee, if any (see Rule 5.1, Comment [3]), or use other appropriate means. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Rules of Professional Conduct Rule 8.4 – Misconduct

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability: (1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or (2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on their behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take. . .

Rules of Professional Conduct Rule 1.7 -- Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.