

January 2003

Subordinate Lawyers and Insubordinate Duties

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Recommended Citation

Douglas R. Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W. Va. L. Rev. (2003).
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SUBORDINATE LAWYERS AND INSUBORDINATE DUTIES

*Douglas R. Richmond**

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I. INTRODUCTION

Pity poor Tom Hyde. Succumbing “to the undeniable pressures of being a young associate and a father,”¹ he repeatedly lied to his firm’s clients, did not act in accordance with his clients’ directions, and falsely billed clients for work that he did not perform.² The New Mexico Supreme Court suspended him from practice for one year.³ Of course Hyde may have had it better than the associates at the Alabama law firm of Davis & Goldberg, who were assigned unmanageable caseloads of up to 600 files per lawyer; who were given scant staff support; and who labored under policies that further impaired the representation of their clients, such as restrictions on the amount of time they could

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¹ *In re Hyde*, 950 P.2d 806, 809 (N.M. 1997).

² *Id.* at 808.

³ *Id.* at 809-10.

spend with clients and working on cases, a quota system that required them to open a specified number of files in a certain time period, and a policy that forbid them to return existing clients' calls so that they could spend more time seeking and establishing relationships with new clients.⁴

On the senior lawyer side of the coin, it is difficult not to feel some sympathy for Georgia lawyer Larry James Eaton. While Eaton, a paraplegic, was confined to his bed following an accident, his associate neglected to properly serve pleadings and failed to timely propound discovery.⁵ The Georgia Supreme Court reprimanded Eaton for failing to ensure the proper handling of the affected client's case.⁶ While Florida lawyer Kristine Nowacki was out of her office receiving treatment for breast cancer, her associate called the police to deal with a client who had come to the office seeking a refund of his retainer.⁷ Suffice it to say that the associate lacked basic client relations skills. For this and other problems the Florida Supreme Court suspended Nowacki from practice for just over three months.⁸

These cases point out that which should be obvious but all too often escapes attorneys' attention: there are significant professional responsibility issues attending the relationship between supervisory lawyers and their subordinates. Supervisory lawyers are obligated to make reasonable efforts to ensure that their subordinates obey ethics rules.⁹ Subordinate lawyers are bound by applicable ethics rules even when they are acting at a supervisor's direction.¹⁰ Neither supervisory nor subordinate lawyers can avoid ethical obligations by passing responsibility downstream or up. Lawyers' duties under rules of professional conduct are insubordinate.

This article examines the professional duties of supervisory and subordinate lawyers under the *Model Rules of Professional Conduct* and the *Restatement (Third) of the Law Governing Lawyers*. Part II examines the duties of supervisory lawyers, while subordinate lawyers' obligations are discussed in Part III.

⁴ Davis v. Ala. State Bar, 676 So. 2d 306, 307-08 (Ala. 1996).

⁵ See Rachel Reiland, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want to Take a Closer Look at Model Rules 5.1, 5.2 and 5.3*, 14 GEO. J. LEGAL ETHICS 1151, 1154 (2001).

⁶ *Id.*

⁷ Fla. Bar v. Nowacki, 697 So. 2d 828, 831 (Fla. 1997).

⁸ *Id.* at 833.

⁹ MODEL RULES OF PROF'L CONDUCT R. 5.1(b) (2001).

¹⁰ *Id.* R. 5.2(a).

II. THE DUTIES OF SUPERVISORY LAWYERS

A. *Supervisory Duties Under Model Rule 5.1*

The American Bar Association's *Model Rules of Professional Conduct* are the basis for most jurisdictions' ethics rules.¹¹ The version of Model Rule 5.1 presently used in most jurisdictions, entitled "Responsibilities of a Partner or Supervisory Lawyer," provides:

- (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.¹²

Rule 5.1 is intended to encourage lawyer-to-lawyer mentoring,¹³ although its effect is far from certain, and the rule may have the perverse effect of discouraging some attorneys from exercising supervisory authority for fear that their actions may expose them to discipline.¹⁴

One of the chief criticisms of Rule 5.1 is that it makes law firm partners or shareholders and other supervisory lawyers vicariously liable for their subor-

¹¹ At least forty-two states and the District of Columbia have adopted a form of the *Model Rules*. Robert A. Creamer, *Form Over Federalism: The Case for Consistency in State Ethics Rules Formats*, PROF. LAW., Spring 2002, at 23.

¹² MODEL RULES OF PROF'L CONDUCT R. 5.1 (2001).

¹³ Reiland, *supra* note 5, at 1152.

¹⁴ See Robert R. Keatinge, *The Floggings Will Continue Until Morale Improves: The Supervising Attorney and His or Her Firm*, 39 S. TEX. L. REV. 279, 303 (1998).

ordinates' professional misconduct. This criticism is misplaced. Rule 5.1 does not create or impose vicarious liability.¹⁵ The issue when a subordinate lawyer violates ethics rules and consequently subjects his supervisor to scrutiny is whether the supervisory lawyer satisfied his own professional responsibilities under Rule 5.1. A supervisory lawyer who fails to meet his obligations imposed by Rule 5.1 may be sanctioned completely separate from and independent of any sanctions imposed on the subordinate lawyer.¹⁶

Rule 5.1(a) recognizes that all partners or shareholders in a law firm are generally responsible for the conduct of the other lawyers in their firm.¹⁷ Although the rule mandates reasonable efforts to regulate all lawyers in a firm, it is intended to encourage senior lawyers to implement mechanisms designed to prevent junior lawyers from making decisions with ethical implications in isolation.¹⁸ Law firms must have in place procedures whereby junior lawyers can obtain necessary help. This requires a law firm to do more than provide advice on professional responsibility issues.¹⁹ For example, associates who feel overwhelmed by their responsibilities or who are unduly burdened with assignments should be able to effectively address those concerns so that they do not breach their duties to diligently represent the firm's clients.²⁰ Young lawyers who do not understand assignments must be able to obtain clarification so that they do not violate their duty of competence.²¹ Law firms should also implement systems that ensure that junior lawyers are carefully and consistently supervised,²² that provide junior lawyers with a means to report misconduct by colleagues or to report that a colleague is in some way impaired,²³ that allow junior lawyers to

¹⁵ *In re Anonymous Member of the S.C. Bar*, 552 S.E.2d 10, 12 (S.C. 2001). Some states do have rules, other than Rule 5.1, that do create vicarious liability for senior lawyers in private practice. *See, e.g.*, *Cincinnati Bar Ass'n v. Schultz*, 643 N.E.2d 1139, 1141 (Ohio 1994) (discussing law firm shareholder's vicarious liability under Ohio Gov. Bar R. III (3)(c)).

¹⁶ *In re Anonymous*, 552 S.E.2d at 12.

¹⁷ *See* MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2001) ("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.").

¹⁸ *See In re Anonymous*, 552 S.E.2d at 14.

¹⁹ *See In re Barry*, 447 A.2d 923, 926 (N.J. 1982) (Clifford, J., dissenting) (advocating that law firms should have in place "a systematic, organized routine for periodic review of a newly admitted attorney's files").

²⁰ *See In re Hyde*, 950 P.2d 806, 809 (N.M. 1997).

²¹ *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2001) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

²² *See In re Helman*, 640 N.E.2d 1063, 1065 (Ind. 1994).

²³ For a discussion of the problems facing law firm associates who learn of professional misconduct by other lawyers in their firms, see Douglas R. Richmond, *Associates as Snitches and Rats*, 43 WAYNE L. REV. 1819 (1997).

identify potential conflicts of interest, that assure the proper accounting of client funds and property, and the like. Partners or shareholders in a law firm cannot leave the firm's junior lawyers to "sink or swim."²⁴

An obvious concern is whether Rule 5.1(a) only applies to law firms, as the text of the rule clearly indicates, or whether it applies to in-house legal departments, to prosecutors' offices, and to lawyers working for government agencies generally. The comment to the rule indicates that Rule 5.1(a) is intended to apply to "lawyers having supervisory authority in the law department of an enterprise or government agency," in addition to law firm partners and shareholders.²⁵ The rule and its commentary are thus inconsistent. If Rule 5.1(a) is to be read and enforced literally this discrepancy is unfortunate, because the need to spur senior lawyers to serve as professional mentors is not limited to private practice. Junior lawyers desperately need ethical guidance in other settings, as *United States v. Kojayan*²⁶ illustrates.

In *Kojayan*, an inexperienced Assistant United States Attorney ("AUSA") made several false statements of material fact and otherwise argued improperly in the course of a criminal trial.²⁷ The AUSA's errors were so serious that the Ninth Circuit vacated the defendants' convictions.²⁸ The court saved special criticism for the United States Attorney and his senior deputies, stating: "What we find most troubling . . . is not the AUSA's initial transgression, but that he seemed to be totally unaware he'd done anything at all wrong, and that there was no one in the United States Attorney's office to set him straight."²⁹

Senior lawyers in government service and corporate law departments, like their law firm counterparts, must attempt to establish support systems for their junior lawyers. Senior lawyers in corporate and governmental legal departments must ensure that subordinate lawyers are carefully supervised.³⁰ Junior lawyers charged with representing the public or their organizational employer must be able to check their judgment. Such support is most needed in prosecutors' offices, where the duty to protect the innocent exists side-by-side

²⁴ See *In re Yacavino*, 494 A.2d 801, 803 (N.J. 1985) (quoting *In re Barry*, 447 A.2d at 927).

²⁵ MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 1 (2001).

²⁶ 8 F.3d 1315 (9th Cir. 1993).

²⁷ See *id.* at 1317-21.

²⁸ *Id.* at 1323-25.

²⁹ *Id.* at 1324.

³⁰ See, e.g., *Piotrowski v. City of Houston*, No. Civ. A. 95-4046, 1998 WL 268827, at *2 (S.D. Tex. May 5, 1998) (faulting senior lawyers in the City of Houston Attorney's Office "for their negligence and apparent lack of concern in assigning . . . inexperienced and junior attorneys to a complex and highly-charged federal civil rights case with absolutely no discernable supervision," and describing the professional performance of the "highest ranking attorneys" in the City Attorney's office as "appalling").

with the duty to prosecute the guilty, and where young prosecutors must be ever mindful of their special responsibilities as ministers of justice.³¹

In an attempt to make clear that Rule 5.1(a) applies “to managing lawyers in corporate and government legal departments and legal service organizations” in addition to supervisory lawyers in private law firms, the ABA’s Commission on Evaluation of the Rules of Professional Conduct, better known as the “Ethics 2000 Commission,” recommended that the rule be amended.³² The Ethics 2000 Commission’s amendments were adopted by the ABA’s House of delegates at the ABA’s 2002 Midyear Meeting,³³ and the new Model Rule 5.1(a) provides:

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.³⁴

The question now is whether states will adopt the amended rule.³⁵

The Ethics 2000 Commission’s amendment of Model Rule 5.1(a) can only be described as ineffectual. If the rule is intended to apply to supervisory lawyers in government agencies and corporate law departments, the new language fails to make that clear. The amended rule still applies by its terms only to lawyers in law firms. The new version of Model Rule 5.1(a) says nothing about government agencies, prosecutors’ offices, or in-house legal departments. The Ethics 2000 Commission dropped the ball.

While Rule 5.1(a) makes all partners or shareholders in a law firm indirectly responsible for the conduct of all of the firm’s lawyers,³⁶ but especially junior lawyers, Rule 5.1(b) provides: “A lawyer *having direct supervisory authority over another lawyer* shall make reasonable efforts to ensure that the

³¹ See *Kojayan*, 8 F.3d at 1324 (quoting *United States v. Foster*, 985 F.2d 466, 469 (9th Cir. 1993), and *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992)).

³² ABA, REPORT OF THE COMM’N ON EVALUATION OF THE RULES OF PROF’L CONDUCT 333 (2000).

³³ Memorandum from the Select Committee of the House, to the Members of the House of Delegates (Mar. 18, 2002) (on file with author).

³⁴ MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (2002) (new text in italics); see also ABA Comm’n on Evaluation of the Rules of Prof’l Conduct, Feb. 2002 Report, available at http://www.abanet.org/cpr/e2k-chair_report_202.html.

³⁵ See generally Mark Hansen, *Hot Off the Press*, A.B.A. J., June 2002, at 37; Mark Hansen, *Just in Time*, A.B.A. J., Apr. 2002, at 65.

³⁶ *In re Anonymous Member of the S.C. Bar*, 552 S.E.2d 10, 14 (S.C. 2001).

other lawyer conforms to the Rules of Professional Conduct.”³⁷ Rule 5.1(b) thus applies to law firm associates filling direct supervisory roles, as well as to partners and shareholders.³⁸ The rule clearly applies to supervisory lawyers in corporate law departments and government service.³⁹ In order to sanction a lawyer under Rule 5.1(b), a court must determine (1) that the lawyer charged had direct supervisory authority over the other lawyer whose conduct is at issue; (2) that the subordinate lawyer’s conduct did not conform to applicable ethics rules; and (3) that the supervisory lawyer did not make reasonable efforts to ensure that his subordinate followed applicable ethics rules.⁴⁰

Whether an attorney has direct supervisory authority over another lawyer depends on the facts of the particular case.⁴¹ Rule 5.1(b) does not require that a supervisory lawyer have daily responsibility for a subordinate lawyer charged with misconduct in order to be disciplined.⁴² A supervisory lawyer need not control the details of a subordinate lawyer’s work in order to face discipline connected to the subordinate’s misconduct. The key issue when analyzing the rule’s application is “whether there was *authority* over the violating attorney.”⁴³ Courts have relied on Rule 5.1(b) to discipline lawyers who have turned over all discovery in a case to an associate,⁴⁴ who have sent untrained or unqualified associates to appear for clients in court proceedings,⁴⁵ who have hired inexperienced lawyers to staff satellite or auxiliary offices,⁴⁶ and who have delegated their entire caseloads to new associates.⁴⁷

An important question remains for Rule 5.1(b) purposes: what constitutes “reasonable efforts” by a supervisory lawyer to ensure that subordinates obey ethics rules? The answer to this question also turns on the facts of the par-

³⁷ MODEL RULES OF PROF’L CONDUCT R. 5.1(b) (2001) (emphasis added).

³⁸ See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 16.2.2, at 882 (1986) (stating that “every lawyer who has ‘direct supervisory authority’ over another lawyer has special responsibilities to make ‘reasonable efforts’ to assure that that lawyer conforms to the rules of professional conduct”) (emphasis added).

³⁹ 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 42.4, at 42-5 (3d ed. 2001).

⁴⁰ *In re Anonymous*, 552 S.E.2d at 13.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See, e.g., *In re Moore*, 494 S.E.2d 804, 807 (S.C. 1997).

⁴⁵ See, e.g., *Ky. Bar Ass’n v. Devers*, 936 S.W.2d 89, 91 (Ky. 1997) (involving creditors’ meetings in a bankruptcy case); *Attorney Grievance Comm’n of Md. v. Ficker*, 706 A.2d 1045, 1052 (Md. 1998) (disciplining lawyer for sending inexperienced lawyer to try drunk driving case).

⁴⁶ See, e.g., *In re Farmer*, 950 P.2d 713, 718-19 (Kan. 1997).

⁴⁷ See, e.g., *Fla. Bar v. Nowacki*, 697 So. 2d 828, 831 (Fla. 1997).

ticular case and the nature of the organization in which the lawyers work. As the comment to Rule 5.1 explains:

The measures required to fulfill the responsibilities required in [Rule 5.1(a) and (b)] can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary.⁴⁸

Regardless, the rule requires that supervisory lawyers do more than simply make themselves "available" to subordinate lawyers.⁴⁹

Rule 5.1(c)(1) essentially codifies prevailing law by subjecting a lawyer to liability for ordering or ratifying another lawyer's misconduct.⁵⁰ In this way Rule 5.1(c)(1) closely tracks Model Rule 8.4(a), which provides that it is professional misconduct for a lawyer to "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."⁵¹ Thus, a lawyer who violates Rule 5.1(c)(1) also violates Rule 8.4(a). Rule 5.1(c)(2), on the other hand, operates on a different plane. It does this by establishing an enhanced standard for law firm partners and lawyers with direct supervisory responsibilities.⁵² Rule 5.1(c)(2) goes beyond simple principles of accessory liability to make lawyers within its scope liable for other lawyers' misconduct if they learn of the misconduct in time to prevent it or to mitigate its consequences, but fail to do so.⁵³

A lawyer's liability under Rule 5.1(c) is not vicarious; it does not arise by virtue of the relationship between the attorneys involved.⁵⁴ A supervisory lawyer's exposure to discipline under Rule 5.1(c) is the product of his involvement in the misconduct at issue, or his failure to prevent or mitigate its harmful

⁴⁸ MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 2 (2001).

⁴⁹ See *In re Ritger*, 556 A.2d 1201, 1203 (N.J. 1989).

⁵⁰ MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(1) (2001).

⁵¹ *Id.* R. 8.4(c).

⁵² Model Rule 5.1(c)(1) provides that a lawyer is liable for another lawyer's ethics violation if "the lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved." *Id.* R. 5.1(c)(1). Model Rule 5.2(c)(2) provides that a lawyer is liable for another lawyer's ethics violation if "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." *Id.* R. 5.2(c)(2).

⁵³ *Id.* R. 5.1(c)(2).

⁵⁴ *In re Anonymous Member of the S.C. Bar*, 552 S.E.2d 10, 13 (S.C. 2001).

consequences.⁵⁵ This obviously requires that the lawyer to be disciplined under Rule 5.1(c) know of the misconduct at issue. If a supervisory lawyer does not know of a subordinate's misconduct, he is not subject to discipline under this rule.

As Rule 5.1(c)(2) makes clear, a partner or other supervisory lawyer who knows of a subordinate's misconduct in time to prevent or remedy it may be subject to discipline even if he did not actively participate in the offense. *Florida Bar v. Hollander*⁵⁶ is an illustrative case. *Hollander* arose out of a personal injury action. Attorney Bruce Hollander entered into a contingency fee agreement with Lygia Tschirgi to represent her in a personal injury action. Hollander ultimately decided to terminate Tschirgi's representation because he thought it would be neither successful nor profitable. He directed one of his associates, Scott Jontiff, to handle the termination.⁵⁷ Jontiff mailed Tschirgi a letter requesting that she execute a document terminating her representation by the firm of Hollander and Associates. Tschirgi declined to do so. Hollander successfully moved to withdraw from Tschirgi's representation and, upon doing so, placed a lien on Tschirgi's file for unpaid fees in the amount of \$6,000.⁵⁸ Tschirgi could not find another attorney to represent her and a disciplinary action against Hollander followed.

Hollander's fee agreement was oppressive and unfair to Tschirgi; among other things, it penalized her for Hollander's termination of the relationship, and discouraged new counsel from taking her case. The referee hearing Hollander's disciplinary case found that Hollander violated the Florida versions of Rule 8.4(a) (providing that a lawyer shall not violate the Rules of Professional Conduct) and 8.4(c) (stating that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).⁵⁹ Hollander challenged the referee's findings based on the fact that it was his associate, Jontiff, and not he, who terminated Tschirgi's representation.⁶⁰ The Florida Supreme Court made short work of this argument, finding that under Rule 5.1(c)(2), Hollander was responsible for the ethical violations resulting from the mailing of the termination notice.⁶¹ The *Hollander* court affirmed the referee's recommendation that Hollander be publicly reprimanded and placed on probation for six months.⁶²

⁵⁵ *Id.*

⁵⁶ 607 So. 2d 412 (Fla. 1992).

⁵⁷ *Id.* at 413.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 415.

⁶¹ *Id.*

⁶² *Id.* at 416.

Finally, it bears mention that Rule 5.1 speaks of supervisory lawyers' responsibilities with respect to other "lawyers" and "another lawyer."⁶³ Law school graduates who are working at law firms after taking the bar examination but who have yet to receive their scores may be considered "lawyers" for Rule 5.1 purposes.⁶⁴ Of course, even if such lawyers-in-waiting are not considered to be "lawyers" under Rule 5.1, a lawyer's failure to supervise them can still lead to discipline under Model Rule 5.3, entitled "Responsibilities Regarding Non-lawyer Assistants."⁶⁵ True law clerks – law students who are employed by firms while still attending law school – clearly are not "lawyers" for Rule 5.1 purposes. Law clerks are considered to be non-lawyer assistants, and lawyers who fail to supervise their law clerks will face discipline under Rule 5.3 rather than Rule 5.1.⁶⁶

B. *Supervisory Duties Under Restatement Section 11*

Section 11 of the *Restatement (Third) of the Law Governing Lawyers* closely tracks the 2001 version of Model Rule 5.1, and provides in pertinent part:

(1) A lawyer who is a partner in a law-firm partnership or a principal in a law firm organized as a corporation or similar entity is subject to professional discipline for failing to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to applicable lawyer-code requirements.

(2) A lawyer who has direct supervisory authority over another lawyer is subject to professional discipline for failing to make reasonable efforts to ensure that the other lawyer conforms to applicable lawyer-code requirements.

(3) A lawyer is subject to professional discipline for another lawyer's violation of the rules of professional conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

⁶³ MODEL RULES OF PROF'L CONDUCT R. 5.1 (2001).

⁶⁴ See, e.g., *In re Wilkinson*, 805 So. 2d 142 (La. 2002) (relying on Rules 5.1 and 5.3 to suspend supervisory lawyer for actions of subordinate who had taken Louisiana bar examination but who had yet to receive results).

⁶⁵ MODEL RULES OF PROF'L CONDUCT R. 5.3 (2001); see also, e.g., *In re Wilkinson*, 805 So. 2d at 146-47.

⁶⁶ See, e.g., *Attorney Grievance Comm'n of Md. v. Jaseb*, 773 A.2d 516, 524 (Md. 2001) (reprimanding lawyer for violating Rule 5.3(b)).

(b) the lawyer is a partner or principal in the law firm, or has direct supervisory authority over the other lawyers, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial measures.⁶⁷

While Section 11 is stated in terms of the remedy of professional discipline, a lawyer's failure to supervise subordinate lawyers can, in the right circumstances, violate the supervisory lawyer's duty of care owed to a client.⁶⁸ In *Federal Deposit Insurance Corp. v. Nathan*,⁶⁹ for example, the FDIC sued the law firm of Lackshin & Nathan and its partners and associates in connection with the failure of Continental Savings Association. One of the partners, Bernard Fischman, argued that the plaintiff's complaint failed to state a claim against him because he did none of the transactional work at issue.⁷⁰ The court rejected Fischman's argument as meritless because the complaint alleged that he was directly liable for failing to supervise the other attorneys in his law firm, and for failing to deter their negligent and unethical conduct.⁷¹

*Gautam v. De Luca*⁷² is another case in which a supervisory lawyer faced malpractice liability for a subordinate lawyer's negligence. The plaintiffs in *Gautam* retained Dominick Conte, then a sole practitioner, to represent them in connection with a medical malpractice action and a workers' compensation claim sometime prior to 1977. Conte thereafter joined Samuel De Luca's law firm as an associate.⁷³ Conte began experiencing disabling headaches shortly after joining De Luca's law firm. These headaches caused him to miss work for substantial periods of time. Conte was unable to effectively represent many of his clients because of his illness. While he was away from work, the Gautams' cases were dismissed. The Gautams were not able to get their medical malpractice case reinstated.⁷⁴ They then sued De Luca and Conte for malpractice.

The plaintiffs prevailed at trial and De Luca appealed. The appellate court reversed the trial court's judgment for the plaintiffs based on error in the

⁶⁷ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 11 (2000) [hereinafter RESTATEMENT].

⁶⁸ See, e.g., *Fed. Deposit Ins. Corp. v. Nathan*, 804 F. Supp. 888, 897-98 (S.D. Tex. 1992); *Anderson v. Hall*, 755 F. Supp. 2d 5 (D.D.C. 1991); *Gautam v. De Luca*, 521 A.2d 1343, 1347 (N.J. Super. Ct. App. Div. 1987).

⁶⁹ 804 F. Supp. 888 (S.D. Tex. 1992).

⁷⁰ *Id.* at 897.

⁷¹ *Id.* at 898.

⁷² 521 A.2d 1343 (N.J. Super. Ct. App. Div. 1987).

⁷³ *Id.* at 1344.

⁷⁴ *Id.* at 1345.

jury instructions.⁷⁵ In discussing its decision not to remand the case for a new trial, the *Gautam* court had occasion to discuss Conte's negligence in allowing the dismissal of the plaintiffs' cases, and De Luca's alleged negligence in allowing it to happen.⁷⁶ De Luca had testified at trial that he was "totally unfamiliar" with the plaintiffs' cases.⁷⁷

[De Luca] pointed out that Conte had been retained by plaintiffs prior to his association with his office. Although [De Luca] maintained a "case registry" with appropriate references to all active files, plaintiffs' medical malpractice action had never been listed. With one minor exception, [he] never communicated with the Gautams. It is undisputed that on one occasion defendant answered the telephone and left a message for Conte at plaintiffs' request. Apparently, this was an extremely brief conversation. Plaintiffs' medical malpractice case was not discussed.

[De Luca] testified that he was aware of Conte's medical problems, but never felt it necessary to review or otherwise supervise his case load. Despite Conte's illness, [De Luca] believed that he was fully able to accord proper attention to his cases. [He] further testified that he first saw the order dismissing plaintiffs' [medical malpractice] complaint at the trial.⁷⁸

The *Gautam* court succinctly rejected De Luca's views. The court was "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."⁷⁹

Like Rule 5.1(a), section 11(1) is intended to apply to lawyers in organizations' legal departments, the legal offices of government agencies, and prosecutors' offices.⁸⁰ Unfortunately, this intent is not clear from the text of the section. Section 11(1) refers to "a law-firm," "a law firm," and "the firm" in discussing lawyers' responsibilities. Even the use in section 11(1) of the term "similar entity" appears to refer to a private law firm.

⁷⁵ *Id.* at 1346.

⁷⁶ *See id.* at 1347.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1347.

⁷⁹ *Id.*

⁸⁰ *See* RESTATEMENT, *supra* note 67, § 11 cmt. g.

III. THE DUTIES OF SUBORDINATE LAWYERS

A. *Duties of Subordinate Lawyers Under Model Rule 5.2*

All lawyers must consider, understand, and account for their own professional conduct.⁸¹ Model Rule 5.1 is thus complemented by Model Rule 5.2, which addresses subordinate lawyers' professional responsibilities. Model Rule 5.2 provides:

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.⁸²

Rule 5.2(a) is intended to make clear that subordinate lawyers are accountable for their own ethical violations.⁸³ Subordinate lawyers need not and cannot automatically defer decisions involving issues of professional responsibility to their superiors,⁸⁴ as *McCurdy v. Kansas Department of Transportation*⁸⁵ illustrates.

Claire McCurdy was an attorney employed by the Kansas Department of Transportation ("KDOT"). Her supervisor, Michael Rees, gave her an assignment to investigate a landowner's claim in a KDOT condemnation case. McCurdy discovered that the landowner's attorney was employed by the same law firm that she had previously consulted about a personal legal matter.⁸⁶ McCurdy told Rees that she had an attorney-client relationship with the landowner's law firm. Rees told McCurdy that he needed more information about her perceived ethical problem before he would accept her explanation for declining the assignment.⁸⁷ McCurdy responded by citing what she believed to be the ethics rules applicable to her situation.⁸⁸ Rees, and later KDOT,

⁸¹ Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 888 (1997).

⁸² MODEL RULES OF PROF'L CONDUCT R. 5.2 (2001).

⁸³ Reiland, *supra* note 5, at 1158.

⁸⁴ *McCurdy v. Kan. Dep't of Transp.*, 898 P.2d 650, 653 (Kan. Ct. App. 1995); *see also In re Howes*, 940 P.2d 159, 164 (N.M. 1997); *Wieder v. Skala*, 609 N.E.2d 105, 108-09 (N.Y. 1992).

⁸⁵ 898 P.2d 650 (Kan. Ct. App. 1995).

⁸⁶ *Id.* at 651-52.

⁸⁷ *Id.* at 652.

the ethics rules applicable to her situation.⁸⁸ Rees, and later KDOT, concluded that McCurdy was insubordinate for declining the assignment and suspended her for five days without pay.⁸⁹ A trial court reversed McCurdy's suspension and KDOT appealed.⁹⁰

KDOT argued on appeal that McCurdy was required to disclose to Rees the exact nature of her conflict so that Rees could determine if a "valid conflict" existed.⁹¹ The Kansas Court of Appeals disagreed, stating:

As the trial court correctly pointed out, although MRPC 5.2 permits subordinate attorneys to rely on the judgment of their superior, this rule, however, does not require a subordinate attorney to defer all questions of ethical conduct to his or her superior. . . . Accordingly, the trial court correctly concluded that McCurdy did not have to reveal the exact nature of her conflict to properly decline the work assignment, nor did she have to transfer to Rees the responsibility for determining if she had a conflict of interest.⁹²

The *McCurdy* court thus affirmed the trial court's reversal of McCurdy's suspension.⁹³

It is important to note that Rule 5.2(a) states that a lawyer is bound by applicable ethics rules notwithstanding the fact that he acted at the direction of another *person*, as compared to another *lawyer*.⁹⁴ Thus, while the rule applies where a supervisory lawyer gives direction, it is not so limited. Even the most junior law firm associate cannot be ethically bound by the directions of a non-lawyer manager, and an in-house lawyer cannot set aside his ethical obligations at the direction of a non-lawyer company executive to whom he reports.

Rule 5.2(a) arguably is superfluous, because subordinate lawyers would still be bound by their states' rules of professional conduct in its absence.⁹⁵ The rule does, however, serve an independent purpose. Disciplinary authorities sometimes hold that a lawyer's subordinate status is a mitigating factor when deciding on any punishment to be imposed.⁹⁶ Similarly, the fact that a subordi-

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 653 (citation omitted).

⁹³ *Id.*

⁹⁴ See MODEL RULES OF PROF'L CONDUCT R. 5.2(a) (2001).

⁹⁵ 2 HAZARD & HODES, *supra* note 39, § 43.4, at 43-4.

⁹⁶ See, e.g., *In re Helman*, 640 N.E.2d 1063, 1065 (Ind. 1994).

nate lawyer attempted to bring an ethical problem to a supervisory lawyer's attention in the hope of obtaining guidance may be a mitigating factor when discipline is to be imposed.⁹⁷ Rule 5.2(a) thus serves to caution junior lawyers not to misread such cases as establishing a defense of excuse rather than a principle of occasional mitigation.⁹⁸

Model Rule 5.2(b) has proven to be somewhat controversial.⁹⁹ Critics of the rule contend that it provides junior lawyers with a unique form of the "superior orders" defense, sometimes known as the "Nuremberg" or "good soldier" defense.¹⁰⁰ According to its critics, the rule sends the wrong message to young lawyers. As one scholar has argued:

At this time of rising concern about professionalism, the rules should inspire every lawyer to stop and consider the propriety of his actions. Rule 5.2(b) does just the opposite. It tells the subordinate lawyer that he may sit back and let his supervisor make the decision on close ethical questions. Because the senior lawyer takes the responsibility for any misjudgment, the junior lawyer has little incentive to even consider tough ethical issues, let alone raise them. In sum, Rule 5.2(b) singles out precisely the issues that need ethical debate — the arguable questions — and chills that debate.¹⁰¹

Such criticisms are not well taken. First, the rule does not allow subordinate lawyers to avoid professional discipline simply by claiming that they followed a superior lawyer's orders.¹⁰² The rule only protects a subordinate lawyer where there is an arguable question of professional duty and the supervisory lawyer's resolution of the issue is reasonable. Even in that situation, a subordinate lawyer may be required to conduct legal research or to otherwise probe for information to determine whether the ethics question truly is open, or whether the supervisory lawyer's intended resolution is in fact reasonable.¹⁰³

⁹⁷ *People v. Casey*, 948 P.2d 1014, 1017 (Colo. 1997).

⁹⁸ 2 HAZARD & HODES, *supra* note 39, § 43.4, at 43-4.

⁹⁹ Model Rule 5.2(b) provides: "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2001).

¹⁰⁰ *See, e.g., Rice, supra* note 81, at 888-89 (arguing that Rule 5.2(b) gives "a privileged class of young law firm lawyers" a "unique form of the 'Nuremberg,' or superior orders, defense").

¹⁰¹ *Id.* at 890.

¹⁰² RONALD D. ROTUNDA, LEGAL ETHICS § 36-1, at 584 (2002); *see also* *Roberts v. Lyons*, 131 F.R.D. 75, 84 (E.D. Pa. 1990) ("Associates may not blindly follow commands of partners they know to be wrong.").

¹⁰³ *See In re Ockrassa*, 799 P.2d 1350, 1353 (Ariz. 1990) (stating that had the subordinate

Where the potential ethics violation is clear, or where the supervisory lawyer's resolution is unreasonable, Rule 5.2(b) provides a subordinate lawyer no shelter from discipline.

In *In re Ockrassa*,¹⁰⁴ for example, a prosecutor who prosecuted a former client from his earlier days as a public defender was charged with violating Rule 1.9, which governs conflicts of interest in successive representations.¹⁰⁵ The prosecutor, Steven Ockrassa, had discussed the case with the County Attorney and his chief criminal deputy before taking on the case, and neither believed that the situation presented an ethical problem.¹⁰⁶ The Arizona Supreme Court was unimpressed when Ockrassa relied on that consultation in an attempt to avoid discipline, reasoning that any question of his professional duty should have been clearly answered in his former client's favor.¹⁰⁷

Respondent attempts to minimize the gravity of his conduct by placing blame "higher up the ladder." The fact that respondent's superiors did not believe that respondent's prosecution of Mr. Otto presented an ethical problem does not weigh heavily in respondent's favor. *Even minimal research would have disclosed that this court and the State Bar Committee on the Rules of Professional Responsibility have consistently found ethical violations in similar circumstances.*¹⁰⁸

The court suspended Ockrassa from practice for 90 days as a sanction for his misconduct.¹⁰⁹

The associate whose conduct was challenged in *Kelley's Case*¹¹⁰ also attempted to invoke Rule 5.2(b) as a defense. In *Kelley*, New Hampshire lawyer Edgar Kelley and his associate, Philip Cahalin, faced discipline for a conflict of interest in a probate matter. The potential conflict of interest should have been clear: the lawyers represented two competing beneficiaries of a trust.¹¹¹ In his defense, Cahalin relied on Rule 5.2(b). The *Kelley* court rejected Cahalin's ar-

attorney conducted "[e]ven minimal research," he would have learned that his intended conduct was unethical); *In re Rivers*, 331 S.E.2d 332, 333 (S.C. 1984) ("It is the duty of attorneys to discover and comply with the rules of practice and professional responsibility governing the profession.") (emphasis added).

¹⁰⁴ 799 P.2d 1350 (Ariz. 1990).

¹⁰⁵ *Id.* at 1350-51.

¹⁰⁶ *Id.* at 1351.

¹⁰⁷ *See id.* at 1353.

¹⁰⁸ *Id.* (emphasis added).

¹⁰⁹ *Id.* at 1353-54.

¹¹⁰ 627 A.2d 597 (N.H. 1993).

¹¹¹ *See id.* at 598-99.

gument because on the facts of the case “there could have been no ‘reasonable’ resolution of an ‘arguable’ question of duty.”¹¹² The potential conflict was “so clearly fundamental” that Rule 5.2(b) was no defense to Cahalin’s conduct.¹¹³ The New Hampshire Supreme Court publicly censured both Kelley and Cahalin.¹¹⁴

In *People v. Casey*,¹¹⁵ Colorado Springs lawyer William Casey misrepresented his client’s identity to the court hearing her criminal trespass case. The client had given the police her friend’s drivers license at her arrest. She was arrested and jailed under her friend’s name, and Casey perpetuated that fraud. Casey consulted with the senior partner at his law firm about his conduct, although the details of the conversation were never revealed.¹¹⁶ The fraud ultimately came to light and Casey was charged with violating several Colorado Rules of Professional Conduct. Casey invoked Rule 5.2(b), and claimed that he had been caught in a close question between his duty of loyalty to his client and his duty of candor to the trial court.¹¹⁷ The Colorado Supreme Court disagreed.

Rule 3.3(b), which requires a lawyer to be truthful to a court even if doing so requires the disclosure of otherwise confidential information, “clearly” resolved Casey’s “claimed dilemma.”¹¹⁸ Thus, it was not arguable that Casey’s duty to his client prevented him from honoring his duty of candor to the court.¹¹⁹ Casey was not protected by Rule 5.2(b).¹²⁰ The court briefly suspended him from practice and imposed other sanctions.¹²¹

In short, Rule 5.2(b) does not immunize subordinate lawyers against accountability for their professional misconduct.¹²² *In re Ockrassa, Kelley, Casey*, and similar cases ought to make that clear. Where both a supervisory lawyer and a subordinate lawyer are involved in misconduct, their “degrees of culpability may vary but ultimate responsibility does not.”¹²³

¹¹² *Id.* at 600.

¹¹³ *Id.*

¹¹⁴ *Id.* at 601.

¹¹⁵ 948 P.2d 1014 (Colo. 1997).

¹¹⁶ *Id.* at 1015.

¹¹⁷ *Id.* at 1016.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1017.

¹²¹ *Id.* at 1018.

¹²² *In re Howes*, 940 P.2d 159, 164 (N.M. 1997).

¹²³ *Roberts v. Lyons*, 131 F.R.D. 75, 84 (E.D. Pa. 1990). *But see Trout v. O’Keefe*, 144 F.R.D. 587, 595 (D.D.C. 1992) (declining to sanction a young Assistant United States Attorney who was “largely dependent” upon his superiors, stating that it would be “inequitable” to sanction him “while those who formulated the . . . policy [which occasioned the young lawyer’s misconduct] . .

Furthermore, nothing in Rule 5.2(b) chills ethical debate between subordinate lawyers and their supervisors. Rule 5.2(a) should guarantee debate on the subordinate lawyer's part. Rule 5.2(b) simply suggests that once such debate is exhausted and a decision needs to be made, a subordinate lawyer may defer to his supervisor's reasonable determination.¹²⁴ The rule thus reflects the reality of the workplace. Indeed, the commentary to Rule 5.2 provides:

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.¹²⁵

In most instances there is nothing wrong with letting senior lawyers make the truly close ethical calls. Courts and disciplinary authorities arguably expect as much. Additionally, the law often permits more than one seemingly ethical resolution of an issue,¹²⁶ and in such circumstances it generally seems reasonable to trust the determination of the best approach to the supervisory lawyer.¹²⁷ Lawyers filling supervisory roles generally have more experience and greater professional knowledge on which to draw. They presumably know how and from whom to seek guidance when necessary. While this may not always be true, that does not mean that Rule 5.2(b) is flawed.

B. *Duties of Subordinate Lawyers Under Restatement Section 12*

Just as section 11 of the *Restatement* is a close paraphrase of the 2001 version of Model Rule 5.1, so is section 12 a close paraphrase of Model Rule 5.2. Section 12 provides:

. . . went scot free”).

¹²⁴ Subordinate lawyers who, after responsible debate and affording their superiors reasonable deference, remain convinced that a proposed course of action is unethical, may (1) be required to ask to withdraw from the particular matter and be reassigned to other matters in the firm; or (2) in extreme cases, be required to resign from the firm. See WOLFRAM, *supra* note 38, § 16.2.2, at 883.

¹²⁵ MODEL RULES OF PROF'L CONDUCT R. 5.2 cmt. 2 (2001).

¹²⁶ 2 HAZARD & HODES, *supra* note 39, § 43.5, at 43-5.

¹²⁷ See WOLFRAM, *supra* note 38, § 16.2.2, at 883 (“A decision within the firm must be made one way or another and it is certainly appropriate to have the lawyer-in-charge call the shots on debatable questions.”).

§ 12. Duty of a Lawyer Subject to Supervision

(1) For purposes of professional discipline, a lawyer must conform to the requirements of an applicable lawyer code even if the lawyer acted at the direction of another lawyer or other person.

(2) For purposes of professional discipline, a lawyer under the direct supervisory authority of another lawyer does not violate an applicable lawyer code by acting in accordance with the supervisory lawyer's direction based on a reasonable resolution of an arguable question of professional duty.¹²⁸

Section 12(2) differs from Rule 5.2(b) in that section 12(2) protects a subordinate lawyer only when he acts "under the direct supervisory authority of another lawyer," as compared to acting at the direction of a "supervisory lawyer," as Model Rule 5.2(b) provides.¹²⁹

While section 12, like section 11, is stated in terms of the remedy of professional discipline, subordinate lawyers who do not meet their independent professional duties may face malpractice liability. In *Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin*,¹³⁰ a junior associate, Jane Seidl, botched the preparation of franchising documents. She had no experience in franchising law or the law of business opportunities.¹³¹ She defended herself by arguing that she submitted the documents she drafted to the responsible partner, Goldman, and another more senior lawyer, Dansky, for their review. She assumed that "somebody was . . . watching, taking care of looking at my work."¹³² In fact, no one was keeping an eye on her or her work. Despite the fact that the subject representation spanned six months, Goldman billed a mere two hours on the matter.¹³³

The client sued the law firm and the individual lawyers involved, including Seidl. The client prevailed in a bench trial and the defendants appealed. The Connecticut Supreme Court affirmed the trial court's judgment that Seidl had committed malpractice.

The *Beverly Hills* court held that the trial court reasonably could have found that Seidl committed legal malpractice "because, in her position as a jun-

¹²⁸ RESTATEMENT, *supra* note 67, § 12.

¹²⁹ 2 HAZARD & HODES, *supra* note 39, § 43.3, at 43-4.

¹³⁰ 717 A.2d 724 (Conn. 1998).

¹³¹ *Id.* at 728.

¹³² *Id.* at 730 (quoting Seidl's trial testimony).

¹³³ *Id.* at 728.

ior associate, she failed to seek appropriate supervision.”¹³⁴ Had she sought appropriate supervision she could have competently represented the client, and thus satisfied her duty of competence under Rule 1.1.¹³⁵ She failed to do so. Her pursuit of supervision went no further than giving copies of her work to Goldman and Danský. Seidl’s “passivity” was a breach of the standard of care.¹³⁶

Subordinate lawyers are responsible for their own misconduct in situations where Model Rule 5.2 may not apply, such as cases where sanctions under Federal Rule of Civil Procedure 11 or similar sanctions may issue.¹³⁷ Inexperience is no excuse for unprofessional behavior.¹³⁸ *Levin v. Seigel & Capitel, Ltd.*,¹³⁹ is a recent case in which an associate attempted to pass his professional responsibility for litigation sanctions upstream to the partners of his law firm. While practicing lawyers reading *Levin* probably will marvel at the associate’s chutzpah, the case illustrates nicely the principle that even subordinate lawyers generally are responsible for their own actions.

In *Levin*, the law firm of Seigel & Capitel represented Bill Spivey and his company, Spivey Marine and Harbor Service (“Spivey”), in the prosecution of a lender’s liability action against First Midwest Bank (“First Midwest”). Seigel & Capitel associate Samuel Levin was the attorney of record in the case and signed all substantial pleadings.¹⁴⁰ First Midwest won at summary judgment and then sought sanctions against Spivey, Seigel & Capitel, and Levin for filing a frivolous action. In response, Levin filed a complaint for contribution or indemnity against Seigel & Capitel. He alleged that the law firm’s partners supervised his handling of Spivey’s lawsuit, and that he was acting in the course and scope of his duties as an associate attorney at the time. Thus, he contended, under agency law principles Seigel & Capitel should be held jointly and severally liable for any sanctions imposed against him.¹⁴¹ The law firm succeeded in having Levin’s complaint dismissed and Levin appealed.

The *Levin* court held that contribution and indemnity were not available to Levin. First Midwest’s sanctions motion was not an action in tort. The motion was premised on Illinois Supreme Court Rule 137, which has the specific purpose “of preventing the abuse of the judicial process by punishing individuals who sign pleadings bringing vexatious or harassing litigation based upon

¹³⁴ *Id.* at 730.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See, e.g., *Roberts v. Lyons*, 131 F.R.D. 75, 83-84 (E.D. Pa. 1990).

¹³⁸ *Piotrowski v. City of Houston*, No. Civ. A. 95-4046, 1998 WL 268827, at *2 (S.D. Tex. May 5, 1998).

¹³⁹ 733 N.E.2d 896 (Ill. App. Ct. 2000).

¹⁴⁰ *Id.* at 897.

¹⁴¹ *Id.*

unfounded statements.”¹⁴² Rule 137 imposes a personal responsibility on the person who signs a pleading to validate its truth and legal reasonableness.¹⁴³ “This personal responsibility is nondelegable and not subject to principles of agency or joint and several liability.”¹⁴⁴ It was Levin’s responsibility – not that of his superiors – to ensure that the allegations made in the pleadings he signed were in all ways proper.¹⁴⁵

C. *Youth and Inexperience Versus Subordinate Status as a Disciplinary Factor*

While a young lawyer who acts at a superior’s direction may avoid discipline in the right situation, a lawyer’s mere youth or inexperience provides no defense to misconduct charges. A lawyer’s youth or inexperience is at most a mitigating factor to be taken into account when weighing sanctions,¹⁴⁶ and even then it merits little consideration if the lawyer’s misconduct is perceived to be serious. *In re Disciplinary Action Against Ward*¹⁴⁷ is an illustrative case.

In *Ward*, the young lawyer facing discipline, Damon Ward, had lied in a deposition, allowed a client to testify falsely in a deposition in the same case, and represented that client despite a clear conflict of interest.¹⁴⁸ The disciplinary referee considered as a mitigating factor Ward’s “youth and inexperience,” and further weighed the strong character testimony of the partner who supervised Ward at the law firm where he worked at the time of his misconduct.¹⁴⁹ Based on these factors and others, the referee recommended that Ward be suspended from practice for 90 days. The Minnesota Supreme Court rejected the referee’s recommendation.¹⁵⁰

In departing from the referee’s recommendation, the *Ward* court focused on the seriousness of Ward’s misconduct: lying under oath and allowing a witness to lie under oath.¹⁵¹ While agreeing that Ward should be suspended, the court was troubled by the referee’s reliance on Ward’s youth and inexperience

¹⁴² *Id.* at 898.

¹⁴³ *Id.* at 899.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (quoting *Pavelic & LeFlore v. Marvel Entm’t Group*, 493 U.S. 120, 125 (1989)).

¹⁴⁶ *See, e.g., Attorney Grievance Comm’n of Md. v. Jaseb*, 773 A.2d 516, 526 (Md. 2001) (taking young lawyer’s inexperience into account when deciding on reprimand as an appropriate sanction).

¹⁴⁷ 563 N.W.2d 70 (Minn. 1997).

¹⁴⁸ *Id.* at 71.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 72.

¹⁵¹ *Id.*

as mitigating factors, because “youth and inexperience do not mitigate acts of dishonesty.”¹⁵² The court thus imposed more serious discipline, suspending Ward for six months and requiring him to successfully complete the professional responsibility portion of the Minnesota bar examination within a specified time.¹⁵³

IV. CONCLUSION

It is perhaps tempting in these days of astronomical law firm associate salaries for partners and other senior lawyers to assume that such compensation ought to purchase lawyers who can function without careful supervision. Senior lawyers in government service and corporate law departments may think that their junior lawyers – many of whom are hired after some experience in private practice – have the judgment and skills to work independently. These assumptions are risky in light of Model Rule 5.1, which should signal to supervisory lawyers that they have no right to assume that subordinate lawyers are competent.¹⁵⁴ Rule 5.1 imposes a number of serious responsibilities on law firm partners and other supervisory lawyers. The bottom line is that supervisory lawyers must supervise, or risk professional discipline for their failure to do so.

Subordinate lawyers are not shielded from professional responsibility by their youth or inexperience. Rule 5.2(a) makes clear what law firm associates and subordinate lawyers in other environments should know anyway: they are bound to act ethically even when acting at a superior lawyer’s direction. While Model Rule 5.2(b) may provide a defense to a subordinate lawyer who follows a supervisory lawyer’s reasonable directions in the case of an unclear ethical question, such situations are quite rare. Young lawyers must reasonably and responsibly assert themselves on issues of professional responsibility.

¹⁵² *Id.*

¹⁵³ *Id.* at 72-73.

¹⁵⁴ *See, e.g.,* Attorney Grievance Comm’n of Md. v. Ficker, 706 A.2d 1045, 1050-52 (Md. 1998).