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The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers

Carol Rice Andrews
University of Alabama - School of Law, candrews@law.ua.edu

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*Carol M. Rice**

INTRODUCTION

We are in a time when both the legal profession and its critics are calling for enhanced professionalism among lawyers.[1] Professionalism is an elusive concept,[2] but a seemingly integral component

* Assistant Professor of Law, University of Alabama School of Law. The author formerly practiced civil litigation at the Chicago office of Kirkland & Ellis, beginning as a summer clerk and progressing to partner. She served in both subordinate and supervisory lawyer positions, the subjects of this article.
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1. "'Professionalism' is now the accepted allusion to the Bar's ambitious struggle to reverse a troubling decline in the esteem in which lawyers are held—not only by the public but also, ironically, by lawyers themselves." Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 403 (1992). The professionalism outcry became so great that in 1993, the ABA created a special committee, which engaged in a two-year study of professionalism among American lawyers. *See Teaching and Learning Professionalism*, 1996 A.B.A. SEC. OF LEGAL EDUC. & ADMISSION TO THE BAR 1 [hereinafter A.B.A. PROFESSIONALISM REPORT]; *see also id.* at 2-3, nn.5-17 & app. G (listing recent literature on professionalism).

2. *See* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 271-76 (1995) (noting the "[e]lusive [m]eaning of '[p]rofessionalism'" and surveying the different definitions).

of professionalism is individual responsibility. Every lawyer should consider and account for his own professional conduct. Yet, the rules that set the standards for professional conduct do not hold lawyers equally accountable. The rules sometimes excuse misconduct by junior lawyers who act under the direction of other lawyers. This article proposes that the relatively simple step of reforming the rules of professional conduct to hold each lawyer accountable for his own misconduct will help improve the professionalism of all lawyers.[3]

Rule 5.2(b) of the American Bar Association's (ABA) Model Rules of Professional Conduct, adopted by most states,[4] redefines

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3. In August 1996, the ABA Special Committee on Professionalism concluded in its final report "that lawyer professionalism has declined in recent years and that increasing the level of professionalism will require . . . structural changes in the way law firms operate and legal services are delivered." A.B.A. PROFESSIONALISM REPORT, *supra* note 1, at 5. The ABA committee stated:

> Practicing lawyers must become more acutely aware of the need to nurture and to renew their professionalism ideals on a continuing basis .... Lawyers should be willing to share their knowledge and experience through mentoring and teaching other lawyers ....
> Law firms should adopt standards of practice and risk management procedures that enhance the level of competence and efficiency of all the lawyers in their law firms. In-house training programs for associates should include a review of these standards and procedures and the firm's expectations for the ethical standards and professionalism ideals of its lawyers. Ethics and professionalism issues should be included in the agenda for every law firm retreat.
> All law firms should have one or more committees that monitor the firm's compliance with ethical rules .... Associates should serve on these committees and all attorneys and the staff in a law firm should be encouraged to submit issues to these committees ....

Id. at 31-33. Although the committee did not specifically address the proposal of this article—that the rules of conduct should be reformed to hold both junior and senior lawyers accountable for their own conduct—this article advocates that repeal of the Rule 5.2(b) superior orders defense will help promote the ABA's goals of professionalism. *Cf.* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-387 (1994) (McFarlain, dissenting) (noting in another context the inconsistency between the ABA's "expensive campaigns to improve the image of lawyers" and its position on disclosure of statute of limitations, which allowed government lawyers to "hide behind the old excuse [of] 'I was just following orders'").

4. As of the fall of 1995, 38 states and the District of Columbia had adopted all, or significant portions, of the Model Rules. STEPHEN GILLERS & ROY SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS xvii (1996). Of those, 34 states and the District of Columbia adopted Rule 5.2 in its entirety. *See* ALA. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1995); ARIZ. RULES OF PROFESSIONAL CONDUCT ER 5.2 (1997); ARK. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); CONN. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996); DEL. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996); D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996); FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-5.2 (1997); HAW. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); IDAHO RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); ILL. RULES OF PRO-

what constitutes misconduct for a privileged class of young law firm lawyers. Rule 5.2(b) gives them a unique form of the "Nuremberg," or superior orders, defense.[5]

FESSIONAL CONDUCT Rule 5.2 (1997); IND. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); KAN. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996); KY. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); LA. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); MD. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); MICH. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); MINN. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); MISS. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); MO. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996); MONT. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); NEV. RULES OF PROFESSIONAL CONDUCT Rule 186 (1996); N.H. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); N.J. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996); N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-502 (1996); OKLA. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); PA. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); R.I. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1995); S.C. RULES OF PROFESSIONAL CONDUCT Rule 407 ¶ 5.2 (1997); S.D. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996); TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996); UTAH RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996); WASH. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996); W.VA. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); WIS. RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS, LAW FIRMS AND ASSOCIATIONS Rule 20:5.2 (1997); WYO. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1996).

Three states—Georgia, North Dakota, and Oregon—adopted paragraph (a) but not (b) of Rule 5.2. *See* GA. RULES AND REGULATIONS FOR THE ORGANIZATION AND GOVERNMENT OF THE STATE BAR Rule 4-102, Standard 72 (1996); N.D. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1997); OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(C) (1997). North Carolina considered and rejected all of Model Rule 5.2. *See* Letter from Alice Neece Moseley, Assistant Executive Director, North Carolina State Bar, to Carol M. Rice, Assistant Professor of Law, University of Alabama School of Law (June 11, 1996) (on file with author) ("When the North Carolina State Bar adopted our Rules of Professional Conduct in 1985 . . . it was determined that ABA Model Rule 5.2 would not be included . . . ."). New York originally rejected Rule 5.2(b) in 1990, but in May 1996 the state bar changed its position and recommended adoption of both paragraphs of Rule 5.2 as part of a sweeping overhaul of its professional code of conduct. That proposal still is pending. *See generally* Letter from Kathleen R. Mulligan Baxter, Counsel, Executive Offices of the New York State Bar Association, to Carol M. Rice, Assistant Professor of Law, University of Alabama School of Law (May 16, 1996) (on file with author) (explaining the history of the New York Rules of Professional Conduct); Anthony E. Davis, *Proposed Changes to the New York Lawyers' Code—Part I*, N.Y.L.J., May 6, 1996, at 3. A few states continue to follow the Model Code approach, *see infra* notes 69-76, and do not recognize a superior orders defense. *See, e.g.*, Letter from James M. McCauley, Ethics Counsel for the Virginia State Bar, to Carol M. Rice, Assistant Professor of Law, University of Alabama School of Law (May 14, 1996) (on file with author) (declaring that "[in] the absence of a 'superior orders' provision as in Model Rule 5.2(b), I am of the opinion that an associate or junior lawyer must follow any applicable disciplinary rules despite whatever instructions he or she might receive from a senior attorney in the law firm").

5. The defense of superior orders attempts to excuse an otherwise improper act on the ground that the actor did so at the direction of a superior to which he is accountable (i.e., "I was just following orders"). The defense commonly is associated with the World War II war crime trials in Nuremberg, Germany, in which the allied forces tried certain German officers for their participation in Hitler's atrocities. The defense was rejected in those proceedings.

> 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.[6]

The rule is unsound for a number of reasons, but the real danger of Rule 5.2(b) is that it sends the wrong message to the lawyers it seeks to protect. 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.

So, although the superior orders defense is often called a "Nuremberg defense," the principle of the Nuremberg proceedings was just the opposite; it was one of individual accountability in which superior orders were *not* a defense to criminal conduct. For a discussion of the military superior orders defense, see *infra* notes 47-51 and accompanying text.

6. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b) (1995). The full text of Rule 5.2 of the Model Rules of Professional Conduct, "Responsibilities of a Subordinate Lawyer," 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.

Id. Rule 5.2.

The official comment to both paragraphs of Rule 5.2 states:

> 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 the 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.
> 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. 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.

Id. Rule 5.2 cmt.

Now is the time to reevaluate Rule 5.2(b). The ABA not only is taking steps to improve professionalism among lawyers generally,[7] it also is reexamining its rules of conduct.[8] The ABA has just "launched a comprehensive study" to determine whether it can improve its Model Rules.[9] Repeal of Rule 5.2(b) will help achieve both goals.

This article explains why both the ABA and the states should abolish Rule 5.2(b). Part I examines the meaning of Rule 5.2(b)—the source of some confusion. The rule does not state mitigating factors nor define the subordinate lawyer's state of mind. It merely imparts to junior lawyers a defense to behavior that otherwise violates the rules of conduct.

Part II explores the faults of the Rule 5.2(b) defense. The defense departs from traditional standards of individual responsibility, and does so based on policy grounds that are weak at best—better law firm management and protection of associates. Any marginal benefits that the rule may achieve are outweighed by the rule's negative impact on ethical debate and compliance.

Finally, Part III proposes how the disciplinary scheme can better address the concerns of junior lawyers and their supervisors. Rather than totally excusing the subordinate because he acted at the direction of another lawyer, the disciplinary scheme should focus on the relative knowledge of the junior lawyer and whether he considered and attempted to comply with the ethical rules. The proposed system will give the subordinate lawyer some relief, but also will give him an affirmative incentive to fully participate in ethical decision-making.

I. THE CONFUSED MEANING OF RULE 5.2

An analysis of the policy and effects of Rule 5.2 first requires an understanding of its terms. This is no easy task. The rule is confusing at best.[10] The first paragraph of Rule 5.2 purports to make subordinate lawyers responsible for their own misconduct, regardless of superior orders.[11] Rule 5.2(b) then retreats from that proposi-

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7. *See supra* notes 1, 3.

8. *ABA Starts "Ethics 2000" Project for Sweeping Review of Rules*, ABA/BNA LAWYERS' MANUAL OF PROFESSIONAL CONDUCT: CURRENT REPORTS, May 28, 1997, at 140. ("The ambitious initiative, bearing the visionary moniker . . Ethics 2000,' calls for the creation of a special committee to undertake an in-depth review and assessment of ethics rules during the final years of the second millennium.").

9. *Id.*

10. *See, e.g.*, Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility and Competent Representation*, 1982 WIS. L. REV. 473, 514 n.172 (noting that the meaning of Rule 5.2 (b) is one of the "unanswered questions" of the new Model Rules). Indeed, during the development of the Model Rules, some critics complained that Rule 5.2(b) was confusing. *See, e.g., infra* note 24.

11. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(a).

tion and excuses a junior lawyer from at least some violations of the rules if he acted pursuant to the instruction of a supervising attorney.[12] An understanding of Rule 5.2(b) is complicated further by the varying types of rules of conduct. The majority of rules state outright prohibitions, but some require actual knowledge or use a reasonableness standard. Rule 5.2(b) purports to apply equally to all three types of rules. In reality, however, the application and impact of a supervising lawyer's order and Rule 5.2(b) differ for each type of rule.

This inconsistency has caused Rule 5.2(b) to attract disparate labels. Although the rule has inspired little academic attention, commentators have described Rule 5.2(b) as both rejecting and endorsing the defense of superior orders.[13] Some view Rule 5.2(b) as

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12. *Id.* Rule 5.2(b). Neither Rule 5.2 nor its official comment defines "supervisory lawyers" or "subordinate lawyers." The comment to Rule 5.1, which addresses the "Responsibilities of a Partner or Supervisory Lawyer," *see infra* note 83, however, adds some insight: "[A supervisory lawyer] includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1, cmt. 1. The official comment to the Texas version of Rule 5.2 defines the supervisory attorney as follows:

> "Supervising lawyer" as used in Rule 5.02 should be construed in conformity with prevailing modes of practice in firms and other groups and, therefore, should include a senior lawyer who undertakes to resolve the question of professional propriety as well as a lawyer who more directly supervises the supervised lawyer.

TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 5.02, cmt. 3 (1996).

13. Most of the "discussion" of Rule 5.2(b) has been in some other context, where the author merely notes or briefly describes the rule. *See* Irwin D. Miller, *Preventing Misconduct by Promoting Ethics of Attorney's Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 296-97 (1994) (recognizing that while Rule 5.2(a) "unequivocally disposes of any 'Nuremberg' defense in which a subordinate lawyer attempts to deny responsibility because he or she was merely acting in accordance with the orders of a superior," the rule also "does provide a subordinate lawyer with a limited 'following orders' defense"); Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761 (1990) (noting that "[t]he junior lawyer thus is offered the defense in any subsequent disciplinary proceeding that she 'was simply following orders' (and ethical rules!)"); George W. Overton, *Supervisory Responsibility: A New Ball Game for Law Firms and Lawyers*, 78 ILL. B.J. 434 (1990) (observing that Rule 5.2(b) "gives our troubled associate an escape"); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985) (reporting that the new Rule 5.2 "rejects a 'following orders' defense to a charge of unprofessional conduct" but recognizing that "[i]t provides a complete defense . . . if the subordinate acted 'in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty'"). A few authors have attacked Rule 5.2(b) directly, but their criticisms have gone unanswered. *See* Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 297-302, 310 (1985) (analyzing a broad range of ethical issues facing associates, including a supervising lawyer's unethical directions,

merely stating a mitigating factor to consider when sanctioning the underlying violation or determining whether the junior lawyer has the requisite intent to violate the rules.[14] Others claim that Rule 5.2(b) is meaningless because it purports to excuse behavior that is itself proper.[15] In other words, they argue that a reasonable interpretation of an arguable question does not violate the rules of conduct, regardless of who the actor is. In fact, an analysis of the literal language of Rule 5.2(b) in the context of the entire disciplinary scheme confirms that the rule provides a defense to otherwise improper conduct.

A. Rule 5.2(b) Sets Forth a Defense and Not a Statement of Mitigation

One view of the effect of "superior orders" in legal ethics is that a young lawyer who violates the rules of professional conduct at the direction of his supervisor deserves a more lenient punishment than had he acted independently. But this is not what Rule 5.2(b) does. The rule does not merely state that a supervisor's order is a mitigating factor in determining the appropriate sanction for the associate's violation of the rules. Rather, Rule 5.2(b) excuses the subordinate altogether by saying that he does not violate the rules if he acts pursuant to a supervisor's direction.

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and arguing that "Model Rule 5.2(b) is troublesome for several reasons"); L. Harold Levinson, *To a Young Lawyer: Thoughts on Disobedience*, 50 MO. L. REV. 483, 523 (1985) (encouraging associates to consider insubordination, analyzing its legal and moral consequences, and questioning whether Model Rule 5.2(b) should be repealed).

14. *See, e.g.*, Mary C. Daly, *Ethical Challenges for Law Departments in the Twenty-First Century*, *in* SEVENTH ANNUAL INSTITUTE ON CORPORATE LAW DEPARTMENT MANAGEMENT: CONTROLLING AND REDUCING COSTS 227, 239 (PLI Corp. Law & Practice Course Handbook Series No. 833, 1993) ("There is no Nuremberg defense to a charge of professional misconduct. On the other hand, that a subordinate lawyer acted at the direction of a senior lawyer will be relevant in determining if the subordinate lawyer possessed the requisite degree of knowledge and in mitigation.").

15. Ann B. Stevens, *Wyoming Rules of Professional Conduct: A Comparative Analysis*, 23 LAND & WATER L. REV. 463, 509 n.329 (1988) (noting as to Wyoming's adoption of Rule 5.2(b): "Neither [supervising nor subordinate] lawyer should be disciplined for a reasonable interpretation of an arguable question. Therefore, this exception is not significant to this author."); Gillers, *supra* note 13, at 265-66 ("If the resolution was indeed 'reasonable,' and the question 'arguable,' it is hard to imagine how even the supervisor would be culpable. The Rules are inclined to defer to a lawyer's reasonable resolution of hard questions, and simple ones are unlikely to admit of more than one solution."); N.Y. CODE OF PROFESSIONAL RESPONSIBILITY Rules 1-104, 1-105 (Proposed Official Draft 1996) (Goldblum, dissenting) (unpublished report, on file with author) (Rule 5.2 "applies to 'a reasonable resolution of an arguable question of professional duty' but such resolutions are never an occasion for professional sanctions and such dispensation should not be limited to supervised lawyers. The entire provision is unnecessary.").

A statement of mitigation in Rule 5.2(b) would be out of place and unnecessary.[16] No other Model Rule states mitigating or aggravating factors. The Model Rules of Professional Conduct establish guidelines for attorney behavior, not the procedure for disciplining violations of those guidelines. Other parts of the disciplinary scheme address sanctions and mitigating factors. The ABA has proposed, and most states have adopted, separate "Standards for Imposing Lawyer Sanctions" that list aggravating and mitigating factors disciplinary bodies should consider in punishing a violation of the rules.[17] These factors account for the lawyer's degree of knowledge and experience in the practice of law, but only come into play after the attorney is found to be in violation of the rules.[18]

More fundamentally, the express terms of Rule 5.2(b) establish that the rule is more than just a statement of mitigation. The rule defines when a violation occurs, not just what the sanction should be for a violation. At one stage of the development of Model Rule 5.2, the drafters proposed that a superior order act only as a mitigating factor; however, the drafters rejected this approach and changed the rule to its current form.[19] Paragraph (b) now states

16. That Rule 5.2(b) was a misplaced concept was one criticism raised during the development of the rule. *See* Bar Association of San Francisco, Legal Ethics Committee, Report Concerning the ABA Proposed Model Rules of Professional Conduct, at 78 (Sept. 25, 1980) (Kutak Box 44, Doc. 0314) (unpublished papers on file with the ABA Center for Professional Responsibility) ("We do not believe that, as a disciplinary rule, it would be enforceable .... However, if the rule were proposed as an aspirational concept of legal ethics, we believe that it, in substance, would be acceptable if it were reworded.").

17. AMERICAN BAR ASSOCIATION, STANDARDS FOR IMPOSING LAWYER SANCTIONS: BLACK LETTER RULES AND COMMENTARY (1991) [hereinafter STANDARDS FOR IMPOSING LAWYER SANCTIONS]. For a discussion of the standards for sanctions, see *infra* notes 134-39 and accompanying text.

18. *Id.* § 1.3 ("These standards are designed for use in imposing a sanction or sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Model Rules of Professional Conduct. ... The Standards for Imposing Lawyer Sanctions are guidelines which are to be used by courts or disciplinary agencies in imposing sanctions *following* a finding of lawyer misconduct.") (emphasis added).

19. The drafters of Rule 5.2 vacillated between the mitigation and complete defense approaches. An initial draft of the rule proposed a broad defense that included excusing a subordinate from a violation of the rules where "he or she acted at the direction of the supervisor and the conduct was neither illegal nor manifestly in violation of the Rules of Professional Conduct." MODEL CODE OF PROFESSIONAL RESPONSIBILITY § 10.5 (Proposed Official Draft Sept. 24, 1978) (Kutak Box 4, Doc. 0011) (unpublished papers on file with the AEA Center for Professional Responsibility). A year later, the drafters toned down the rule to provide only that a supervising lawyer's orders were to be considered in determining the degree of violation and the sanction for the violation: "A lawyer acting under the supervisory authority of another person is not relieved of responsibility for disciplinary purposes by the fact that the lawyer's conduct was ordered by the supervisor, but that fact may be relevant in determining the degree of violation and the sanction to be imposed." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (Proposed First Pre-Circulation Draft, Aug. 2,

that the "subordinate lawyer *does not violate* the Rules of Professional Conduct" if he follows the supervising lawyer's decision.[20] Thus, if Rule 5.2(b) applies, the junior lawyer has not violated the rules, and the court or disciplinary body will never reach the question of sanctions and mitigation.

B. Rule 5.2(b) Provides a Defense Regardless of the Subordinate's State of Mind

Another view of the effect of superior orders is that an order from a supervisor defines whether the subordinate lawyer had the intent to violate a rule of conduct. In fact, the lead sentence to the official comment to Rule 5.2 recognizes the potential connection between a supervisor's order and the subordinate's knowledge: "[a]lthough 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 the Rules."[21] The comment, however, merely notes that the supervisor's order *may* be relevant in determining knowledge. This statement is correct, but this principle of knowledge applies regardless of Rule 5.2(b). Knowledge or intent is irrelevant to the application of Rule 5.2(b).[22]

Rule 5.2(b) imposes only two conditions on the application of its defense: an arguable question of professional duty and a reasonable resolution of that question. The comment to Rule 5.2 does not explicitly define an "arguable question," but it does describe what is *not* an arguable question: one that "can reasonably be answered

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1979) (Kutak Box 8, Doc. 0022) (unpublished papers on file with the ABA Center of Professional Responsibility). This proposed "mitigation" version of the rule was short-lived. As part of a January 1980 discussion draft of the Model Rules, the drafters revived the defense approach and amended the rule to almost its current form. For a discussion of the January 1980 discussion draft, see *infra* note 85.

20. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b) (1995) (emphasis added).

21. *Id.* Rule 5.2 cmt. 1.

22. The next sentence in the comment to Rule 5.2 suggests that the associate's knowledge of the violation is relevant and precludes application of the paragraph (b) defense: "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." *Id.* (emphasis added). As explained more fully in the text, Rule 5.2(b) does not have a knowledge requirement, so this sentence misstates the application of the defense. For further discussion of the application of the defense to frivolous pleadings, see *infra* notes 120-23 and accompanying text. Nevertheless, some courts have followed this view. *See* McCurdy v. Kansas Dep't of Transp., 898 P.2d 650, 652 (Kan. Ct. App. 1995) (citing the comment and stating that "the rule will not protect a subordinate lawyer for a violation committed at the direction of a supervisor if the subordinate *knew* beforehand that his or her conduct was a violation") (emphasis added).

only one way"[23] and one where the duty of the lawyer is "clear."[24] The comment also fails to define "reasonable resolution." The terminology section of the Model Rules, however, states that "[r]easonable . . . when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."[25] Thus, a "reasonable resolution" is an interpretation of a rule that a prudent and competent attorney could form. The actual individual viewpoint of the associate is irrelevant.

The confusion concerning Rule 5.2(b) and the subordinate's state of mind stems in part from the fact that the Rules of Professional Conduct use different cognitive standards to define proscribed attorney behavior. The relevance of an order from a superior depends on which rule the associate's conduct allegedly violates. Some, but not all,[26] of the other Rules of Professional Conduct use a knowledge standard for determining when a violation occurs.[27] Under these rules, a lawyer who has no actual knowledge of wrongdoing is not guilty of professional misconduct, regardless of whether he is a subordinate or supervisor. Whether the associate had the requisite knowledge depends on the circumstances.[28] What

23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 cmt. 2.

24. *Id.* During the development of the Model Rules, some lawyers criticized this "arguable question" standard as unworkable. *See* Letter from Luther Avery, Partner, Bancroft, Avery & McAlister, to Geoffrey Hazard, Professor, Yale Law School (Apr. 18, 1980) (Kutak Box 52, Doc. 0577) (on file with the ABA Center for Professional Responsibility). ("I am not happy with the absence of any consideration of how to get a ruling on questionable conduct. I can see this as an area of great difficulty in the future.").

25. MODEL RULES OF PROFESSIONAL CONDUCT terminology ¶ 7. The comment to the Texas version of the Rule 5.2 specifically defines the "reasonable resolution" standard which mirrors the general definition of "reasonable" in the Model Rules: "The resolution is a reasonable one, even if it's ultimately found to be officially unacceptable, provided it would have appeared reasonable to a disinterested, competent lawyer based on the information reasonably available to the supervising lawyer at the time the resolution was made." TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 5.02 cmt. 3 (1996).

26. The majority of the rules do not contain a knowledge requirement. The other rules either state outright prohibitions or use a reasonableness standard. For a discussion of the effect of superior orders and Rule 5.2(b) as to absolute prohibitions, see *infra* notes 31-35 and accompanying text, and to reasonableness rules, see *infra* notes 36-37 and accompanying text.

27. Rule 1.2(d), for example, prohibits a lawyer from assisting a client in "conduct that the lawyer *knows* is criminal or fraudulent." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (emphasis added). *See also id.* Rules 1.2(e), 1.8(a), 1.8(i), 1.9(b), 1.10(a), 1.11, 1.12(c), 1.13(b), 3.3, 3.4(c), 4.1, 4.2, 5.1(c), 5.3(c), 7.3(c) & (d), 8.1, 8.2(a), 8.3 and 8.4; 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 401, at lxxiv-vi (2d ed. Supp. 1997) (surveying the "cognitive standards" in the Model Rules).

28. "'Knowingly,' 'Known,' or 'Knows' denotes actual knowledge of the fact in question" and that a "person's knowledge may be inferred from [the] circumstances." MODEL RULES OF PROFESSIONAL CONDUCT terminology ¶ 5.

a supervisor told the associate certainly is relevant to this inquiry, but Rule 5.2(b) does not make it so.

For example, under Rule 3.3, which mandates candor toward the court, a lawyer may not "knowingly . . . make a false statement of material fact or law to a tribunal."[29] Assume that a partner orders an associate to object to evidence offered at trial and gives the associate a false legal basis for the objection. If the associate follows the instruction, there is no violation of Rule 3.3 so long as the associate believes the objection properly states the law. That belief may result in part from his supervisor's instruction, but it is the associate's belief, not Rule 5.2(b) that saves his conduct from the prohibition of Rule 3.3. Since the associate is not knowingly misstating the law, his conduct does not rise to the level proscribed by Rule 3.3. Rule 5.2(b) never comes into play.

On the other hand, if the associate knows that the objection is improper, Rule 5.2(b) may apply. Here, the order from the partner takes on a different significance. Under this scenario, the associate believes that his supervisor is wrong and that the objection misstates the law. Absent Rule 5.2(b), the associate would violate Rule 3.3 if he made the objection upon a false legal basis because he would knowingly be misstating the law to the tribunal. The supervisor's instruction might still excuse the associate, but not by defining the associate's knowledge. Rather, pursuant to Rule 5.2(b), the supervisor's order will excuse the associate if the order meets the "arguable question" and "reasonable resolution" requirements.

Admittedly, application of Rule 5.2(b) to this scenario is a bit of a stretch. It is difficult to conceive of an objection that is both a knowing misstatement of the law and a reasonable interpretation of the issue.[30] However, such an interpretation is theoretically possible. The senior lawyer's decision to object could be a reasonable interpretation of an arguable evidentiary question, yet the court still could overrule the objection. The associate could share the court's view of the law and firmly believe that the objection misstates the law. Without Rule 5.2(b), the associate would violate Rule 3.3 if he makes the objection anyway. He would knowingly be making an objection that both he and the court perceive as a misstatement of the law. Rule 5.2(b), however, would excuse the associate because the supervisor's instruction to object was reasonable.

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29. *Id.* Rule 3.3(a)(1).

30. Part of this quandary derives from the "knowing" requirement and the definition of knowledge. An argument could be made that if the question as to the propriety of the objection is indeed arguable, then no lawyer, subordinate, supervisor or even judge, will "know" that the objection is wrong. Very few matters in the law are "known," but Rule 3.3 likely would prohibit a lawyer from stating an objection that the lawyer honestly believes misstates the law. This debate as to what a lawyer "knows" is not unique to this scenario and arises whenever a knowledge-based rule is applied to lawyer conduct. *See* 1 HAZARD & HODES, *supra* note 27, § 400, at lxxiv ("What does a lawyer know?").

In sum, there are two distinct levels of analysis to determine whether an associate, who acted under another lawyer's instructions, violated a rule with a knowledge requirement. First, the associate's actual state of knowledge concerning the conduct at issue must be considered. His supervisor's order to do the act may bear on his state of mind, but does not necessarily define the associate's knowledge. If the associate does not have the requisite knowledge based on the facts of the particular case, he does not violate the underlying rule and Rule 5.2(b) is never invoked.

On the other hand, if the associate knows or believes that the conduct violates the underlying rule, then Rule 5.2(b) comes into play. This second line of analysis does not focus on the associate's state of mind, but rather the reasonableness of the supervisor's order. If the order reasonably resolves an arguable question of professional duty, the associate is not guilty of misconduct, regardless of his state of mind.

The analysis differs for rules with no knowledge requirement. Most of the Model Rules prohibit certain behavior regardless of the lawyer's knowledge.[31] For example, Model Rule 1.8(e) bars a lawyer from providing a client with financial assistance except for court costs and litigation expenses.[32] When a lawyer gives money to his client, he violates the rule regardless of whether he appreciates that the loan is improper. Unlike the prior example under Rule 3.3, the associate who heeds his supervisor's instruction to lend the client money violates the underlying rule even if the instruction causes him to believe that the loan is proper. The associate must rely on Rule 5.2(b) for the superior order to provide any relief. Rule 5.2(b) may offer a defense, but the defense depends on the reasonableness of the supervisor's order, not the state of mind of the associate.

Suppose that a personal injury plaintiff seeks a loan from his lawyers for the expenses of treating his injury. The senior lawyer broadly interprets Rule 1.8(e) and considers medical expenses part of the "expenses of litigation" that a lawyer may properly advance. This interpretation is a plausible, though not a settled, view of Rule

31. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) ("A lawyer shall not reveal information relating to the representation .. . . "); *id.* Rule 1.15(a) ("A lawyer shall hold property of clients . . . that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.").

32. Rule 1.8(e) provides:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Id. Rule 1.8(e).

1.8(e).[33] Assume that the associate disagrees with the partner and believes that the loan is improper, but nevertheless follows the order to lend the client money. Even if the disciplinary authorities agree with the associate and hold that Rule 1.8(e) does not allow loans for medical expenses, the associate would not be in violation of Rule 1.8(e). The associate would be excused under Rule 5.2(b), not because his supervisor's order affected his state of mind, but rather because the order was a reasonable interpretation of an arguable question under Rule 1.8(e). Thus, the associate may disagree with his supervisor and believe that the loan is improper, but still have the protection of Rule 5.2(b).

On the other hand, if the senior lawyer's instruction is unreasonable, the associate is not protected regardless of whether he knows that the loan was improper. Assume that the partner instructs the associate to lend the client money for rent rather than medical costs. Almost every interpretation of Rule 1.8(e) forbids a lawyer from paying the ordinary living expenses of his client.[34] Because the senior lawyer's instruction to pay the client's rent is not a reasonable resolution of an arguable question of professional duty,[35]

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33. What constitutes the "litigation expenses" that a lawyer may advance under Rule 1.8(e) is an unsettled question. A treating physician often will be a trial expert witness, so his fees arguably may be advanced by the lawyer. *Cf.* Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437, 445 (La. 1976) (refusing on public policy grounds to apply the ban to living expenses unrelated to litigation where the client is indigent, but also suggesting that a lawyer's payment of expenses related to litigation, including "[the] expenses of medical examination for purposes of trial," is unquestionably proper). However, under some views, other medical expenses, even those arguably related to the matter at issue, may not be advanced. *See, e.g.*, Mississippi Bar v. Attorney HH., 671 So. 2d 1293 (Miss. 1996) (reprimanding a lawyer for advancing to his personal injury client, among other things, the cost of his prothesis and other medical expenses); *In re* Mountain, 721 P.2d 264 (Kan. 1986) (holding that lawyer improperly advanced costs of prenatal care to a client whom the lawyer was representing in an effort to seek adoptive parents for her child).

34. *See generally Attorney HH.*, 671 So. 2d at 1296-98 (Miss. 1996) (surveying cases prohibiting payment of living expenses). A proposed draft of Model Rule 1.8 would have allowed a lawyer to advance living expenses to his client, but the ABA House of Delegates rejected the proposal. *See* 1 HAZARD & HODES, *supra* note 27, § 1.8:602, at 274-75. Some states modified the rule to allow a lawyer to advance living expenses under specified circumstances. *See, e.g.*, ALA. RULES OF PROFESSIONAL CONDUCT Rule 1.8(e)(3) (1995) (allowing a lawyer to advance or guarantee any type of financial assistance in emergency situations so long as no such agreement or assurance was made prior to the client's employment of the lawyer).

35. This example may fail to meet both standards of Rule 5.2(b) or just the reasonable resolution standard, depending on how broadly one states the question of professional duty. On the one hand, the question of professional duty in the example of the client loan could be the generic question of what expenses may be advanced under Rule 1.8(e). Under this broad statement of the question, only the reasonable resolution standard fails. The broad question is arguable, *see supra* notes 23-24 and accompanying text, but the specific conclusion that the lawyer may advance rent is not reasonable. On the other hand, the

Rule 5.2(b) does not provide any excuse. The associate would be guilty of misconduct if he gives the client the money even if he is unaware that the payment violates Rule 1.8(e). The associate's state of knowledge is irrelevant.

C. Rule 5.2(b) Provides a Defense to Conduct That Otherwise Violates the Rules

The fact that Rule 5.2(b) depends on the reasonableness of the supervising lawyer's order raises the question of whether the rule is meaningless in actual operation. In other words, can a reasonable interpretation of an arguable question of duty ever violate the rules of conduct?[36] The answer depends on the type of underlying rule at issue.

This question implicates the third type of rule, those with a reasonableness requirement. Rule 5.2(b) has no effect on these rules because it uses its own reasonableness standard. For example, Rule 1.4 requires a lawyer to keep his client "reasonably informed."[37] Suppose that a senior lawyer orders his associate to write or call their mutual client every two months to update him about his case. If this order satisfies the "reasonable resolution" requirement of Rule 5.2(b), then by definition it also meets the "reasonably informed" standard of Rule 1.4. Because the associate has complied with Rule 1.4, he need not resort to the defense of Rule 5.2(b). On the other hand, if the order is unreasonable, the associate who follows it violates Rule 1.4, and Rule 5.2(b) provides no defense.

However, this principle is true only with respect to rules that use reasonableness standards, and not to rules that use actual knowledge standards or state absolute prohibitions. As to these rules, Rule 5.2(b) potentially supplies a defense if the underlying

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question could be more narrowly drawn to ask only if Rule 1.8(e) allows a lawyer to advance rent. Under this narrow statement of the issue, the two standards ask the same question—may the lawyer advance rent—and this example fails to meet either test. The question is not arguable and the resolution not reasonable. *See* George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415, 426 (1990/1991) (describing both the arguable and reasonable resolution standards together as satisfied when the supervisory and subordinate lawyers "reach conflicting good faith conclusions as to the requirements of professional conduct").

36. *See supra* note 15 (listing the criticisms of Rule 5.2(b) as meaningless).

37. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 ("(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). Indeed, because Model Rule 5.2(b) does not specifically define its reasonableness standard, it uses the same generic definition of reasonableness used in Rule 1.4—what a prudent and competent lawyer would do. *See supra* note 25.

rule is subject to several reasonable interpretations, as evidenced by the client loan issue under Rule 1.8(e).[38]

Rule 4.2, with its long history of interpretative debate, provides another example. Former Model Rule 4.2 seemingly was simple: it forbade a lawyer from talking to another party he knew to be represented by a lawyer in a matter.[39] But the definition of "party" spawned a great deal of debate. The Alabama Supreme Court, for instance, held that the rule's prohibition does not attach until a lawsuit is actually filed and the opponent becomes a formal party.[40] Other jurisdictions interpret the rule more broadly and forbid a lawyer from talking to any person, party or not, whom the lawyer knows to be represented by counsel in a particular matter.[41] Both views are presumably reasonable, thereby potentially implicating the defense of Rule 5.2(b).

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38. For a discussion of the client loan issue, see *supra* notes 33-35 and accompanying text.

39. Until 1995, Model Rule 4.2 stated that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." In 1995, the ABA amended the model rule to "clarify" that it bars communications with a "person" not just a "party" whom the lawyer knows to be represented by counsel in the matter. *See* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. and legal background at 391-94 (1996); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (noting the "controversy" concerning the use of the term "party" and reporting a proposed clarification of the rule). However, most states still use the former version of the rule.

40. *See* Gaylard v. Homemakers of Montgomery, Inc., 675 So. 2d 363, 367 (Ala. 1996) (holding that plaintiff lawyer's contact with an employee of corporation was not an improper contact under Rule 4.2 in part because plaintiff had not yet filed suit against the corporation: "[t]he rules do not require an attorney to immediately file an action at law before communicating with the person with whom the attorney's client has a dispute."); *see also* United States v. Ryans, 903 F.2d 731, 740 (10th Cir. 1990) (holding that Model Code provision, DR 7-104(A)(1), which barred contact with a "party" known to be represented by counsel did not apply until criminal proceedings began).

41. For example, the ABA recently issued an ethics opinion which attempted to end the debate by broadly defining "party" within the meaning of Rule 4.2. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (surveying authorities that define "party" and concluding that if "[Rule 4.2] is to serve its intended purpose, it should have broad coverage, protecting not only parties to a negotiation and parties to formal adjudicative proceedings, but any person who has retained counsel in a matter and whose interests are potentially distinct from those of the client on whose behalf the communicating lawyer is acting"). This ethics opinion also purported to quell the controversy arising from the United States Department of Justice's liberal internal policy with regard to federal prosecutors' communications with criminal defendants. *Id. See generally* Neals-Erik William Delker, Comment, *Ethics and the Federal Prosecutor: The Continuing Conflict over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AM. U. L. REV. 855 (1995) (critiquing the Justice Department's anti-contact rule).

Suppose that a senior lawyer for a plaintiff asks his associate to talk to a potential defendant who has engaged counsel in the matter, although no formal complaint has been filed. The associate carries out the interview, and then the state's disciplinary authorities subsequently decide to broadly interpret Rule 4.2 as prohibiting an attorney from contacting any person, not just a formal party. If the state bar pursues disciplinary charges, the associate would have a defense under Rule 5.2(b). The duty under Rule 4.2(b) was an arguable question, and the senior lawyer's instruction was reasonable. After all, he took the same position as at least one state's highest court. The senior lawyer, however, would be subject to discipline. His reasonable, but "wrong," interpretation of Rule 4.2 excuses only the junior lawyer. Any lawyer acting on his own initiative would be in violation of Rule 4.2 and potentially subject to discipline.

To be sure, there is a difference (particularly to the lawyers involved) between being potentially subject to discipline and being actually disciplined. This difference may prompt some observers to say that Rule 5.2(b) is meaningless. Rule 5.2(b) applies to close cases, and state disciplinary authorities usually do not use their limited resources to prosecute close cases. They generally focus on violations far more egregious than a "reasonable resolution of an arguable question of professional duty."[42] Thus, as a practical matter, the two limitations of Rule 5.2(b) hinder its use in actual disciplinary proceedings. In fact, no lawyer has ever successfully used Rule 5.2(b) as a defense in a reported disciplinary proceeding. In the very few instances where a junior lawyer has asserted Rule 5.2(b), the disciplinary authority found that the ordered conduct clearly violated the rules and did not trigger the Rule 5.2(b) defense.[43]

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42. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b).

43. Rule 5.2(b) is the subject of only seven published opinions by a court or by a state bar ethics commission. Three cases were disciplinary proceedings in which the court or grievance committee rejected the Rule 5.2(b) defense because the violation of the rules was "clear." Interestingly, the most recent case involved the debate over the application of Rule 4.2 to a federal prosecutor's communication with a criminal defendant, *see supra* note 41, but the court held that the impropriety of the contact was "not subject to argument." *In re* Howes, 940 P.2d 159, 164 (N.M. 1997) (holding that Rule 5.2(b) did not provide a defense despite the fact that "debate currently rages regarding the applicability of ABA Model Rule 4.2 to federal prosecutors" in part because that debate arose after the communication in question); *see also* Kelley & Calahin, 627 A.2d 597, 319 (N.H. 1993) (rejecting an associate's invocation of the Rule 5.2(b) defense to a finding that the associate and senior lawyer violated the conflict of interest rules by their dual representation of two beneficiaries to a trust: "[t]he potential conflict in this case would be so clearly fundamental to a disinterested attorney that undertaking the joint representation was per se unreasonable"); Statewide Grievance Comm. v. Glass, No. CV95 01442585, 1995 WL 541810, at *2 (Conn. Super. Ct. Sept. 6, 1995) (reprimanding a junior lawyer for submitting a false loan application even though he followed superior orders and did not believe that he was committing a criminal act: Rule 5.2(b) "does not excuse

Nevertheless, the junior lawyer may assert the defense if the state bar decides to prosecute.[44] The comment to Rule 5.2 contemplates just such a proceeding. It cites as an example a case where a junior and senior lawyer violate the rule against conflicts of interest: "[I]f 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.*"[45] The senior lawyer still would be held accountable for the conflict. The junior lawyer alone gets the defense of Rule 5.2(b).

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respondent's behavior on the basis of his discussions with supervisory lawyers . . . ").

Likewise, two prospective ethics advisory opinions addressed the Rule 5.2(b) defense, but rather than merely stating that the young lawyer may defer to his supervisor, the bar committees went to the heart of the matter and addressed the propriety of the underlying conduct. *See* State Bar of Michigan Standing Comm. on Professional and Judicial Ethics, Informal Op. RI-92 (1991) (advising that a legal aid organization's policy for handling client funds violated Rule 1.15 and that Rule 5.2(b) did not allow the staff attorney to follow the office's policy: "if [t]he question . . . can be reasonably answered only one way . . . ; [the subordinate's] responsibility, therefore, is not to follow this policy."); Philadelphia Bar Ass'n Professional Guidance Comm., Guidance Op. 94-25 (1994) (advising that Rule 5.2(b) does not allow an associate to follow a supervising attorney's direction to continue negotiating a settlement without informing the client because "the refusal to communicate the settlement offer is unreasonable"). Another case found that the defense did not apply because the associate was not involved in the firm's imposition of the excessive fee. Athanson v. Statewide Grievance Comm., No. CV92-0515693, 1993 WL 57652, at *8-*9 (Conn. Super. Ct. Feb. 22, 1993) (holding that "the subordinate lawyer, did not even do any of the acts which violated the rules" so he "cannot be held responsible, therefore, either directly under Rules 1.5 and 1.4 or indirectly under Rule 5.2"). The last case was an unusual use of the defense. McCurdy v. Kansas Dep't of Transp., 898 P.2d 650 (Kan. Ct. App. 1995). A supervising lawyer raised Rule 5.2(b) to justify his suspension of a state civil service attorney, but the court held that Rule 5.2(b) "does not require a subordinate attorney to defer all questions of ethical conduct to his or her superior." *Id.* at 653.

44. The possibility of disciplinary charges in cases of differing, but presumably reasonable, views is sufficiently great that the rules of some states provide an express immunity from prosecution where the lawyer has followed the advice of the state's ethics committee. Alabama, for example, provides that:

> [i]f, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, in writing, to the General Counsel, and receives therefrom a written opinion, concurred in by the Disciplinary Commission, that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action.

ALA. RULES OF DISCIPLINARY PROCEDURE Rule 18 (1995). The concern that the state bar might change its own interpretation of a rule of professional conduct and later initiate disciplinary charges is a sufficient threat to warrant express immunity. It is even more likely that the state would disagree with an individual lawyer's independent, albeit reasonable, interpretation of an arguable question.

45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b) cmt. 2 (1995).

II. THE FAILINGS OF THE RULE 5.2(B) SUPERIOR ORDERS DEFENSE

The real import of the Rule 5.2(b) defense is not its use in disciplinary proceedings but its intended effect on behavior.[46] A superior orders defense is a statement of policy which is meant to influence the way senior and junior personnel work with each other. It is most commonly used in the military to ease operations by encouraging soldiers to obey orders.[47] Rule 5.2(b) has a similar aim and effect. The rule facilitates law firm management by encouraging law firm associates to follow the directions of the senior lawyer without fear of the consequences.

But the practice of law is not war. Efficiency should not take precedence over individual reflection and thoughtful consideration of legal ethics. Rule 5.2(b) hurts the associate, the senior lawyer, and their law firm by stifling ethical debate. By failing to consider or ask about ethical issues, the associate misses out on important ethical development and training. The senior lawyer decides the issue alone, thereby increasing the risk of mistake. The firm, in turn, loses a valuable training opportunity for its lawyers and exposes itself to ethical lapses and malpractice. In sum, the danger of Rule 5.2(b) is precisely its intended effect: the senior lawyer will make all of the ethical decisions.

A. The Rule 5.2(b) Defense Departs from Traditional Standards of Individual Accountability

In the military, efficient functioning mandates that every soldier and officer obey orders by honoring the chain of command.[48]

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46. Indeed, the Model Rules are intended to act in the first instance primarily as a guide to and influence on lawyer behavior and only by default in disciplinary proceedings: "Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings." *Id.* Scope ¶ 2.

47. A British military expert summarized the rationale of the defense:

> Military effectiveness depends on the prompt and unquestioning obedience of orders to such an extent that soldiers are prepared to put their lives at risk in executing those orders. During military operations decisions, actions and instructions often have to be instantaneous and do not allow time for discussion or attention by committees. It is vital to the cohesion and control of a military force in dangerous and intolerable circumstances that commanders should be able to give orders and expect their subordinates to carry them out. In return for this unswerving obedience, the soldier needs the protection of the law so that he does not afterwards risk his neck for having obeyed an order which later turns out to be unlawful.

A.P.V. ROGERS, LAW ON THE BATTLEFIELD 143 (1995).

48. Professor Dinstein explains the interrelationship of obedience to orders and the life-threatening situations that soldiers must face:

> Any army by its very nature is founded on the basis of discipline. Discipline means that every subordinate must needs [sic] obey the orders of his superiors. And, when we deal with an army, ordinary dis-

The need for obedience is such a high priority that soldiers face criminal charges for insubordination if they refuse to follow orders.[49] As protection, the subordinate soldier may assert the superior orders defense to escape culpability if the ordered act is later challenged as illegal. The defense is not absolute, however, even under military conditions.[50] A soldier generally may not excuse an act

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cipline is not enough. Military discipline is designed, ultimately, to conduct men to battle, to lead them under fire to victory, and, if and when necessary, to impel them to sacrifice their lives for their country. In this aspect, . . . he must overcome his natural instinct to save his skin. The success of the military objective, to wit, victory in battle, as well as the lives of many soldiers, and above all, the security of the nation seem, therefore, to compel 'total and unqualified obedience without hesitation or doubt' to orders in time of war and emergency, and complementary training and instruction in time of peace.

YORAM DINSTEIN, THE DEFENCE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW 5 (1965).

49. This threat of court martial for insubordination creates a difficult dilemma for the soldier.

> The practical dilemma, upon whose horns the recipient of superior orders is driven, is one of exceptional severity: if the soldier submits to an illegal order, and commits a crime, he is violating the prescriptions of criminal law and will consequently be liable to the penalties it lays down; if he defies the order, and abstains from commission of the crime, he may be infringing the dictates of military law and as a consequence be liable to the penalties which that law provides. Dicey describes this choice of evils in famous words:
>
> > The position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.

Id. at 6-7 (quoting DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 303 (10th ed. 1959)).

50. "On the whole, modern theorists have rejected superior orders as a complete defence but are divided into two camps: those . . . who consider that superior orders are no defence at all and those . . . who say that superior orders ought to be a defence if the orders are not manifestly illegal." ROGERS, *supra* note 47, at 144-45; *see also* Luther N. Norene, Obedience to Orders as a Defense to a Criminal Act (1971) (unpublished thesis, Army JAG School) (on file with author) (surveying the different theories and applications of the defense). The defense usually was regarded as a complete defense until modern times when public outcry surrounding notorious cases caused a reexamination of the defense. For example, in the aftermath of the Civil War, the federal government tried Henry Wirz, former commandant of the confederate prisoner-of-war camp in Andersonville, Georgia, where many union soldiers died. Wirz argued that he was just following the orders of his superior officer, but the federal Military Commission rejected the defense, as urged by the federal prosecutor: "[a] superior officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result then both the superior and subordinate must answer for it." H.R. Exec. Doc. No. 23, at vol. 8 (1867-68), *reprinted in* L.C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW 303-04 (1976). Likewise, the allied victors in World War II were hesitant to allow the defense at the Nuremberg war crime trials for fear that the Nazi defendants would pass the blame upward to dead superiors, including Hitler himself, and thereby escape punishment. Accordingly, the Nur-

committed under direct orders from a superior officer if the act itself was "manifestly illegal."[51] Thus, a soldier must evaluate the order and refuse to follow it if it is clearly illegal.

Outside of the military, the defense is rarely recognized.[52] A common citizen cannot avoid criminal conviction merely by asserting that his boss told him to do the act.[53] Even if the supervisor ac-

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emberg Charter provided that superior orders were not a total excuse, but only a mitigating factor: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but they may be considered in mitigation of punishment if the tribunal determines that justice so requires." Charter of the International Military Tribunal, Art. 8 (Washington, D.C., 1947) *reprinted in id.* at 277-78. *See generally* ROGERS, *supra* note 47, at 143-44 (discussing military discipline and superior orders); RICHARD WASSERSTROM, *The Relevance of Nuremberg, in* WAR AND MORAL RESPONSIBILITY 134 (1974) (discussing the implications of superior orders at Nuremberg).

51. [T]he general rule is that a soldier committing an offence in obedience to superior orders is relieved of responsibility for his wrongdoing. If, however, the illegality of the order is clear on the face of it, that is, manifestly and palpably, the soldier must refuse to obey it or else pay the penalty.

DINSTEIN, *supra* note 48, at 8-9; *see also* GREEN, *supra* note 50, at 247 ("courts increasingly expect an ordinary soldier to exercise some measure of judgment and of conscience leading him to refuse to obey what is often described as a manifestly unlawful order"). The American Model Penal Code applies a slightly different standard to military personnel who are charged and tried before civilian juries. In such cases, the soldier has an affirmative defense if he "does no more than execute an order of his superior in the armed services which he does not know to be unlawful." MODEL PENAL CODE § 2.10 (1995); *see also id.* § 2.10 cmt. 2 (noting that the Model Penal Code defense "goes somewhat further than the military formulation" because "it is unrealistic to expect a civilian jury to examine the legality of military orders and the likelihood that a soldier of ordinary sense and understanding would know a given order to be illegal").

52. Unlike soldiers in the military, most civilians do not have a superior officer whom they must obey out of fear of prosecution for insubordination. Under exceptional circumstances where the individual is under compulsion to obey the directive, then the order might excuse the conduct. *See* United States v. Barker, 546 F.2d 940, 948-50 (D.C. Cir. 1976) (distinguishing the case where a police officer orders, as opposed to merely requests, a private citizen to assist him in arresting another person and noting that in the former case the citizen "is in no position to second-guess the officer's determination that an arrest is proper"). Generally though, even for people who work in environments closely resembling the military command structure, such as police officers, the superior orders defense does not excuse criminal or other wrongful behavior. *See, e.g.,* United States v. Konovsky, 202 F.2d 721, 730 (7th Cir. 1953) (holding that orders from superior officer were not a defense to police officers charged with willful deprivation of civil rights).

53. "A servant or other agent is not relieved from criminal liability for conduct otherwise a crime because of a command by his principal." RESTATEMENT (SECOND) OF AGENCY § 359A (1958); *see also id.* § 359A cmt. a ("The ordinary principles of the criminal law as to defenses, such as lack of knowledge and physical coercion to perform an act, are available, but there are no defenses peculiar to agents."). Lack of knowledge in some cases might negate the offense, and to the extent that the supervisor's order contributed to that lack of knowledge, it might have the indirect effect of excusing the act. *See* MODEL PENAL CODE § 2.04(1) ("Ignorance or mistake as to a matter of fact or law is a defense

companies his order with a threat to fire the employee, the employee cannot assert the superior orders defense for the underlying criminal act.[54] Likewise, an employee cannot avoid civil liability for his negligent or wrongful conduct by claiming that he was following his employer's bidding[55] or even that he feared losing his job.[56] The employee is responsible for his own negligent actions.[57]

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if . . . the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense."). In some cases, the actor may rely on an official statement or interpretation of the law, but the order of a superior, by itself, rarely will constitute such official authority. The law distinguishes between persons acting under apparent official authority (*e.g.*, a police officer believing that he has reasonable grounds to arrest a suspect based on the circumstances) and those merely carrying out the orders of their supervisors (*e.g.*, an officer arresting a suspect just because his sergeant told him to). *Id.* § 2.04(3) (providing a defense when the actor believes that the "conduct does not legally constitute an offense" only when the statute is not known or available or when he "acts in reasonable reliance upon an official statement of the law" contained in a statute, judicial opinion, administrative order or other official interpretation); *see also* United States v. Ehrlichman, 376 F. Supp. 29, 35 (D.D.C. 1974) (holding that the Watergate defendants' belief that they were authorized to break into Daniel Ellsberg's psychiatrist's office was no defense to "the knowing performance of acts . . . like the unauthorized entry and search").

54. The criminal law allows a defense of coercion, but such defense typically applies only when the actor was under a reasonable and continuing fear of physical, not merely economic, harm to himself or another person. *See, e.g.*, MODEL PENAL CODE § 2.09(1) ("It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist."). Threatened harm to property, and likewise loss of employment, is not enough to establish the defense of duress. *Id.* § 2.09 cmt. 3 (stating that "threats to property or even reputation cannot exercise sufficient power over persons of 'reasonable firmness' to warrant" application of the duress defense).

55. *See* RESTATEMENT (SECOND) OF AGENCY § 343 (1958) ("An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal . . . ."); *see also* 3 AM. JUR. 2D *Agency* § 309 (1986) ("From the standpoint of a person injured by the wrongful act of another, the relationship of principal and agent is immaterial, and the status of the wrongdoer in that connection of no consequence. . . . Nor is an agent who is guilty of tortious conduct relieved from liability merely because he acted at the request, or even at the command or direction, of the principal."). These same principles apply even if the agent is an employee, "servant," or a subagent of the principal. *Id.* § 361 ("The rules as to the liability of agents to third persons are applicable to the liability of servants, subservants and other subagents.").

56. RESTATEMENT (SECOND) OF AGENCY § 343 cmt. e ("The fact that the agent acts under physical or economic duress used by his principal does not relieve him from liability for causing harm to another."). The employer's command, however, may be a factor influencing the employee's state of mind such that he does not have the requisite intent for certain intentional torts. *See also id.* § 343 cmt. b ("[I]f a principal directs an agent to institute criminal proceedings against another, although the command does not of itself justify the agent in so doing, if from the command the agent has reasonable grounds for believ-

The superior orders defense is generally unavailable in professions other than law.[58] Most codes of professional ethics repeatedly underscore the individual professional's duties to use independent judgment and adhere to ethical standards.[59] Even medicine, which shares the life-threatening immediacy of the military, encourages subordinate medical staff to question a supervising doctor's orders.[60]

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ing the other guilty of the crime, the agent is not guilty of malicious prosecution.").

57. That his employer might be held vicariously liable under the doctrine of respondeat superior does not make the employee any less responsible to the third person plaintiff. 3 AM. JUR. 2D *Agency* § 309 ("It is no excuse to an agent that his principal is also liable for a tort, inasmuch as the rights of a principal and agent inter se do not measure the rights of third persons against either of them for their torts, and the fact that an agent might have a right of exoneration or indemnity against his principal for a tort would not affect the rights of a third person against the agent.").

58. The various professions may consider superior orders as a mitigating factor in actual disciplinary proceedings, but their professional codes of ethics do not expressly provide a superior orders defense. *See generally* BUREAU OF NATIONAL AFFAIRS, CODES OF PROFESSIONAL CONDUCT viii (Rena A. Gorlin ed., 2d ed. 1990) (containing "the official codes of ethics of the major professional organizations in business, health, and law.").

59. *See* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, CODE OF PROFESSIONAL CONDUCT, *reprinted in* CODES OF PROFESSIONAL CONDUCT, *supra* note 58, at 7 (stating that competence "is a member's individual responsibility"); *id.* at 8 (members should "[d]etermine, in their individual judgments, whether the scope and nature of other services provided to an audit client would create a conflict of interest"); *id.* Rule 102 ("In the performance of any professional service, a member . . . shall not subordinate his or her judgment to others"); NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, CODE OF ETHICS FOR ENGINEERS, *reprinted in id.* Rule 1(a), at 69. ("If [engineers'] professional judgment is overruled under circumstances where the safety, health, property or welfare of the public are endangered, they shall notify their employer or client and such other authority as may be appropriate."); *id.* Rule 9(b), at 73 ("Engineers shall not use association with a non-engineer, a corporation, or partnership as a 'cloak' for unethical acts, but must accept responsibility for all professional acts.").

60. The ethics code of the American Medical Association instructs subordinate resident physicians to stop and think about the ethics of the supervising doctor's orders:

> Medical students, resident physicians, and other staff should refuse to participate in patient care ordered by their supervisors in those rare cases in which they believe the orders reflect serious errors in clinical or ethical judgment, or physician impairment, that could result in a threat of imminent harm to the patient or to others. In these rare cases, the complainant may withdraw from the care ordered by the supervisor, provided withdrawal does not itself threaten the patient's immediate welfare. The complainant should communicate his or her concerns to the physician issuing the orders and, if necessary, to the appropriate persons for mediating such disputes. Mechanisms for resolving these disputes, which require immediate resolution, should be in place.

CODE OF MEDICAL ETHICS § 9.055 (AMA Council on Ethical & Judicial Affairs 1994). Even nurses, who have different education, training, and licensing as their supervising doctors, are individually accountable and must question the

Indeed, professional rules for lawyers, other than the ABA's current Model Rules, do not allow a young lawyer to excuse misbehavior because of a supervisor's order.[61] Federal Rule of Civil Procedure 11, for example, holds each lawyer accountable for any pleading he files.[62] The Supreme Court has underscored this personal responsibility:

> The signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment. . . . The message thereby conveyed to the attorney, that this is not a "team effort" but in the last analysis yours alone, is precisely the point of Rule 11.[63]

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doctor's orders. *See* AMERICAN NURSES ASSOCIATION, CODE FOR NURSES WITH INTERPRETATIVE STATEMENTS, *reprinted in* CODES OF PROFESSIONAL RESPONSIBILITY, *supra* note 58, § 4.3 ("Nurses are accountable for judgments made and actions taken in the course of nursing practice. *Neither physicians' orders nor the employing agency's policies relieve the nurse of accountability for actions taken and judgments made.*") (emphasis added).

61. The code of professional conduct for Canadian lawyers, for example, does not contain a superior orders defense. *See* CANADIAN BAR ASSOCIATION, CODE OF PROFESSIONAL CONDUCT (1974). The Canadian code emphasizes individual judgment and ethical responsibility over obedience to an employer's instructions. *Id.* "An employer-employee relationship . . . may give rise to special problems . . . but in all matters involving integrity and generally in all professional matters, if the requirements or demands of the employer conflict with standards declared by the Code the latter must govern." *Id.* "[T]he lawyer must assume complete professional responsibility for all business entrusted to him.". *Id.* commentary ¶ 3.

62. FED. R. CIV. P. 11(b). Under Rule 11, an attorney who presents a paper or position to the court, whether by "signing, filing, submitting, or later advocating," personally certifies that he has conducted "an inquiry reasonable under the circumstances," and that the paper or pleading (1) "is not being presented for any improper purpose," (2) is "warranted by existing law or by a nonfrivolous argument for the extension . . . of existing law," (3) the "factual contentions have evidentiary support" or "are likely to have evidentiary support after a reasonable opportunity for further investigation," and (4) "the denials of factual contentions are warranted on the evidence" or are "reasonably based on a lack of information." *Id.* Other procedural rules and statutes impose similar duties. Rule 26(g) of the Federal Rules of Civil Procedure declares that a lawyer who signs a discovery paper, certifies that it is "consistent with these rules," not made for "any improper purpose," and "not unreasonable or unduly burdensome or expensive." FED. R. CIV. P. 26(g)(2). Similarly, section 1927 of the Judicial Code allows the court to award attorneys' fees and costs against any individual attorney who "multiplies the proceedings in any case unreasonably and vexatiously . . . ." 28 U.S.C. § 1927 (1994).

63. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 125-27 (1989). In *Pavelic*, the question was whether the law firm could be held responsible in addition to the individual lawyer who signed the pleading. The Court held that the language of Rule 11 did not support such an expansive reading and that only the signing lawyer could be held responsible. *Id.* ("Where

Under Rule 11, every lawyer regardless of his status in a law firm, who signs a pleading or advocates a position must personally certify that he has conducted a "reasonable inquiry" and that he has evidentiary and legal support for his position.[64] That the signing lawyer was a mere associate[65] or local counsel[66] and acted at the direc-

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the text establishes a duty that cannot be delegated, one may reasonably expect it to authorize punishment only of the party upon whom the duty is placed."). The Court stated that the pre-1993 version of Rule 11 "strikingly depart[ed] from normal common-law assumptions such as that of delegability," but it was referring, not to the concept of responsibility for one's own acts, but instead to the vicarious liability of the firm for the acts of its members or employees. *Id.* at 124 (citing RESTATEMENT (SECOND) OF AGENCY § 140 (1958) which refers to the responsibility of all members of a partnership for the authorized acts of its partners). An actor is not absolved from liability simply because many areas of law choose to assign *additional* liability upward or laterally. *See supra* note 57. *Cf.* Roberts v. Lyons, 131 F.R.D. 75, 84 (E.D. Pa. 1990) ("The doctrine of respondeat superior fails to absolve an associate or a partner from professional responsibility [under Rule 11 and local procedural rules]."). In 1993, federal rulemakers revised Rule 11 to change the result in *Pavelic* and they expanded the potential responsibility under Rule 11 to include the law firm. *See* FED. R. CIV. P. 11(c)(1)(A) ("Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.") However, this potential expansion of responsibility to the law firm did not diminish the responsibility of the actual signing lawyer for his own pleadings. *See id.* advisory committee's note ("The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court.").

64. FED. R. CIV. P. 11(b). That an attorney relied upon another lawyer may be a factor in determining the reasonableness of the inquiry, but such reliance by itself does not necessarily constitute a reasonable inquiry. *See id.* advisory committee's note (stating that "what constitutes a reasonable inquiry may depend on such factors" as "whether [the signing lawyer] depended on forwarding counsel or another member of the bar"); Garr v. United States Healthcare Inc., 22 F.3d 1274, 1279 (3d Cir. 1994) (noting "that sometimes it is difficult to reconcile the tension between the requirement that a signer personally discharge the Rule 11 obligations and the acknowledgment that a signer may rely on another party's inquiry in some cases").

65. As reflected in *Project 74 Allentown, Inc. v. Frost*, 143 F.R.D. 77, 91-92 (E.D. Pa. 1992), *aff'd*, 998 F.2d 1004 (3d Cir. 1993), courts hold associates to the standards of Rule 11 but consider the associate's special circumstances in determining the appropriate sanction. In *Frost*, the court assessed a minimal $100 sanction against the associate who had filed a false interrogatory response, but imposed thousands of dollars in sanctions against the senior lawyers for more pervasive wrongs:

> The court is not unmindful of the difficulties a young associate faces when she is given an unpalatable assignment by a senior attorney. Refusing to work on a case a young associate believes to be unmeritorious will not serve to raise that associate's standing within the firm. Such concerns do not, however, relieve a lawyer of her obligations under Rule 26(g) or Rule 11. The court will, however, consider them as mitigating circumstances.

Id. *See also* Dr. Pepper Bottling Co. v. Del Monte Corp., No. CIV.A. 3:88-CV-3012-D, 1992 WL 438013, at *7 (N.D. Tex. Sept. 18, 1992) (reprimanding rather than imposing costs against "a young associate [who was] brought into a case to assist more senior lawyers, given instructions concerning how a particular as-

tion of another lawyer does not excuse the conduct of filing the offending paper.

Similarly, the ABA insisted on individual accountability until it adopted Model Rule 5.2(b). Before the ABA promulgated the Model Rules in 1983, the ABA stated its standards for professional conduct in the 1908 Canons of Professional Ethics and the 1970 Model Code of Professional Responsibility. Neither the Canons nor the Model Code expressly granted any form of superior orders defense, and both emphasized individual judgment. The 1908 Canons stressed the lawyer's singular duty to uphold the standards of the profession[67] and to take responsibility for his own actions, even in the face

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pect of the case was to be litigated, and told generally how to proceed"); Roberts v. Lyons, 131 F.R.D. 75, 83 (E.D. Pa. 1990) ("No lawyer may disclaim responsibility for his/her own actions or for a paper bearing his/her name. . . . [C]ounsel simply cannot delegate to others their own duty to act reasonably and to meet the professional mandates set forth in Rule 11, Rule 16 [and local rules]."). *But see* Trout v. O'Keefe, 144 F.R.D. 587, 595 (D.D.C. 1992) (finding that U.S. Navy changed its position for an improper purpose, but refusing to sanction a young attorney who signed the paper in light of the attorney's "necessary reliance on others . . . and his junior status. . . . [I]t would be inequitable to sanction [him] while those who formulated the . . . policy and insisted on it for years went scot free.").

66. As they do for junior associates, *see supra* note 65, courts hold local counsel to the dictates of Rule 11, but may impose lesser sanctions against them than against the lead attorneys. In *Val-land Farms, Inc. v. Third Nat'l Bank in Knoxville,* 937 F.2d 1110 (6th Cir. 1991), the Sixth Circuit affirmed sanctions against the Tennessee counsel who filed a complaint which included at least one frivolous count and which was prepared and forwarded by lead Chicago counsel:

> The text of [Rule 11] does not provide a safe harbor for lawyers who rely on the representation of outside counsel . . . . The lawyers who sign materials submitted to federal courts have the responsibility to determine that those materials comply with Rule 11. If . . . local counsel[] signed Val-Land Farms's complaint relying entirely on the representations of [lead Chicago counsel], so much the worse for them.

Id. at 1117. *See also* Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 558 (9th Cir. 1987) (noting that "[a]n attorney who signs the pleading cannot simply delegate to forwarding co-counsel his duty of reasonable inquiry" but that reliance on forwarding counsel "may in certain circumstances satisfy an attorney's duty" if it gives him sufficient knowledge of the facts to certify the pleadings); Long v. Quantex Resources, Inc., 108 F.R.D. 416, 417 (S.D.N.Y. 1985) (holding that "at the very least, a local counsel that signs the papers of foreign counsel must read the papers, and from that have a basis for a good faith belief that the papers on their face appear to be warranted by the facts asserted and the legal arguments made, and are not interposed for any improper purpose"); Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F.Supp. 656, 660 (M.D.N.C. 1985) (noting that although local counsel may be "far less culpable than out of state counsel," local counsel may not "disclaim all responsibility for a paper bearing his name").

67. "[A]bove all, a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen." CANONS OF PROFESSIONAL ETHICS Canon 32 (1908) superceded 1970). Likewise, the Canons instructed the lawyer to "strive at all

of client demands to the contrary.[68] Likewise, the Model Code required the lawyer to use his own professional judgment.[69]

In re Knight,[70] a 1971 disciplinary case,[71] is a good example of the effect of superior orders in legal ethics prior to the adoption of

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times to uphold the honor and to maintain the dignity of the profession . . . ." *Id.* Canon 29.

68. For example, Canon 30, "Responsibility for Litigation," explained:

> No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

Id. Canon 30. Similarly, Canon 15, "How Far a Lawyer May Go in Supporting a Client's Cause," instructed that a lawyer "must obey his own conscience and not that of his client." *Id.* Canon 15.

69. For example, the Preamble to the Model Code explained that a lawyer was to use his own independent judgment:

> The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. *Each lawyer must find within his own conscience* the touchstone against which to test the extent to which his actions should rise above minimum standards.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl. para. 4 (1981) (emphasis added). Similarly, the Model Code repeatedly emphasized that the lawyer was to take every precaution against outside influences on his judgment, even in the face of adverse employment consequences:

> The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence.

Id. EC 5-21.

70. 281 A.2d 46 (Vt. 1971).

71. Few cases even considered the issue of superior orders under the Model Code or the 1908 Canons. *See infra* notes 76, 82. However, the ABA in a 1972 informal ethics opinion confirmed that a junior lawyer must independently follow the rules, despite his supervisor's order to the contrary. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1203 (1972). A junior lawyer asked whether he could defer to his supervising lawyer's judgment that they were not required to report client information to prevent a fraud upon the court:

> In a law office a junior attorney forms a firm conviction that it is necessary in connection with a client nature pending before a tribunal to call some information to the attention of the tribunal—that it would be a fraud on the tribunal to maintain some part of the client's claim without revealing the information. In accordance with the customary practice of the office the junior operates under the general supervision of a senior attorney. The senior directs the junior not to reveal the information. The senior states that the withholding is not fraud or mis-

the Model Rules. Knight had been a lawyer for only eight months when his employer, an experienced lawyer, involved him in an improper entrapment scheme to benefit their client in a divorce action. They hired a woman to lure their client's husband into a "compromising situation" and tape-recorded the encounter.[72] Although the senior lawyer made the actual plans, directed the actions of young Knight, and "berated [Knight] to such an extent that [he] was fearful of losing his employment,"[73] the court did not exculpate Knight:

> Inexperienced as [Knight] may have been in the actual practice of law at the time of this occurrence, he was a member of the Bar, sworn to uphold high ethical standards, nor could he assign to another his duty to his oath and his conscience to avoid participation in the highly unethical acts in which he played a part, even though that part was of a subordinate nature.[74]

The court did not ignore Knight's predicament; it imposed only a three-month suspension rather than disbarment.[75] Such treatment was typical prior to the Model Rules. If a junior lawyer actually engaged in professional misconduct, the fact that he did so at the direction of another lawyer was not an excuse, but it might serve as a mitigating factor against disbarment or other harsh punishment.[76] These mitigating factors, however, came into play

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> representation under then prevailing state of law and that the information is privileged. The junior, after thoughtful consideration and weighing the greater experience and learning of his elder colleague, disagrees. What is required of the junior under the Code of Professional Responsibility?

Id. The ABA Ethics Committee responded that the junior lawyer should give "great weight" to the supervising lawyer's reasoning, but in the end must use his own best judgment on the issue. *Id.* The Committee warned that the young lawyer must independently act to conform to his own interpretation of the rules: "[i]f the views of the two are irreconcilable, then the junior attorney should withdraw." *Id.* The Committee cautioned that the junior lawyer's duty did not end there. If the junior lawyer gained unprivileged knowledge that a violation did in fact occur, he must report the senior lawyer to the disciplinary board. *Id.* For a discussion of an associate's duty to report his senior lawyer under the current rules, see *infra* note 143.

72. *In re* Knight, 281 A.2d at 47.

73. *Id.*

74. *Id.* at 48.

75. "The State does not ask that the respondent be disbarred, and we agree that considering the mitigating circumstances in the situation of the respondent, such severity would not be justified. However, since the conduct of the respondent cannot be entirely excused or palliated, the [suspension] is imposed." *Id.*

76. For example, the court in *In re Rivers*, 331 S.E.2d 332 (S.C. 1984), a case under the Model Code, sanctioned a junior attorney who had relied on the ethical advice of his supervising lawyer to assist an investigator in conducting improper interviews of jury members. *Id.* The investigator had questioned the

only after the court determined that the junior lawyer violated the rules—not in its initial assessment that the conduct itself was improper under the rules. This treatment, while recognizing that extenuating circumstances may make the junior lawyer less culpable than his supervisor, warned young lawyers that they should think for themselves. Model Rule 5.2(b) sends a very different message.

B. The Policy Justifications of Rule 5.2(b) Are Flawed

Why did the ABA break with precedent and adopt a defense traditionally used only in the military? An analysis of the history of the rule and its official comment reveals that the drafters intended Model Rule 5.2(b) to serve much the same purpose as the military defense. Rule 5.2(b) emerged in 1983 as part of the new Model Rules of Professional Conduct, which resulted from the ABA's six-year effort to reexamine and overhaul the Model Code.[77] The ABA assigned this monumental task to a special commission chaired by Omaha lawyer Robert Kutak.[78]

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propriety of the interviews, but the senior lawyer assured him that the conduct was ethical. *Id.* at 332. The junior lawyer relied upon this assurance without actual knowledge of the impropriety of the interviews when he prepared the questions for the investigator. *Id.* The court refused to totally absolve the associate of wrongdoing, but only imposed a reprimand. *Id.* at 333. The senior lawyer was disbarred. *Id.* ("Inexperienced attorneys are held to the same standards as their more experienced colleagues .... [I]gnorance [of the law] is no excuse. It is the duty of attorneys to discover and comply with rules of practice."). *See also In re* Warlick, 339 S.E.2d 110 (S.C. 1985) (disbarring senior lawyer in *Rivers* for informed or intentional improper juror contact); *In re* Moore, 312 S.E.2d 1 (S.C. 1984) (suspending senior lawyer for mishandling client funds but only reprimanding subordinate because although "the two are equally culpable ... it is apparent that [the subordinate] is comparatively inexperienced and he was, in large measure, following the dictates of his senior partner"); *In re* Callahan, 442 N.E.2d 1092, 1094-95 (Ind. 1982) (finding that lawyer who participated in extortion scheme "merely acquiesced in the activities of his senior partner at a time when he was struggling to make a beginning and was susceptible to the guidance of what appeared to be a successful practitioner" but suspending the lawyer for two years because "[t]hese findings ... do not totally mitigate the impropriety of the acts of Respondent"); Attorney Grievance Comm'n of Md. v. Kahn, 431 A.2d 1336 (Md. 1981) (disbarring both junior and senior attorneys for improper solicitation and mail fraud scheme where junior lawyer "was not the prime mover or architect of the illegal scheme" but "willingly associated" with it); *In re* Connelly, 240 N.Y.S.2d 126, 140 (App. Div. 1963) (finding that associates' subordinate status, combined with their relatively minor role in the publication of prohibited firm advertisement and the arguable nature of the violation itself, mitigated against sanctions against the associates, but warning of censure in the future).

77. *See* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Chair's Introduction (1996) (noting that the Kutak commission "launched an unprecedented debate on the ethics of the legal profession").

78. The formal title was "The Commission on Evaluation of Professional Standards," but it became commonly known as the "Kutak Commission" after its chair. *Id.*

One aim of the Kutak Commission was to recognize the modern reality that lawyers often practice in law firms rather than as sole practitioners. By the mid-1970s, large law firms were increasing in size and dominance, causing some to question the proper roles of lawyers in these firms.[79] The Model Code primarily treated lawyers as sole practitioners and did not address many of the peculiarities of practice in groups, such as a corporate law department or a law firm.[80] The Kutak Commission filled this void by dedicating an entire section of the new Model Rules (Part 5) to "law firms and associations."[81] Hence, the creation of Rule 5.2.

Although Rule 5.2(b) represented a significant departure from the traditional treatment of superior orders in legal ethics,[82] neither

79. In the mid-1970s, two notorious cases brought the issue of an associate's duties to the forefront of legal debate. In *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), a senior litigation partner in the prestigious firm of Donovan Leisure Newton & Irvine lied in an affidavit about the existence of documents. His associate may have known that he was lying (depending on which version of the story is believed), but did nothing despite his independent obligation to correct misstatements to the court. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(2) (1981) (requiring a lawyer who learns that another person, other than a client, has committed a fraud upon a court to "promptly reveal the fraud to the tribunal"). When the truth came out, the partner resigned and was sentenced to a short prison term. Many observers, however, sympathized with the associate's dilemma. *See* Steven Brill, *When a Lawyer Lies*, ESQUIRE, Dec. 19, 1975, at 23-24 (noting that the associate respected and was "intimidated" by the partner, who was the associate's "ticket to partnership"); *see also* JAMES B. STEWART, THE PARTNERS 327-65 (1983) (telling the story of the Kodak incident and the impact on the lawyers involved). In *Meyerhofer v. Empire Fire & Marine Insurance Co.*, 497 F.2d 1190 (2d Cir. 1974), a law firm prepared an SEC filing for an insurance company client, but one of the firm's associates objected that the statement did not meet disclosure requirements. The partners in the firm disagreed, and the associate resigned. *Id.* The associate then disclosed the information to the SEC. *Id.* In a subsequent suit by investors, the court held that the associate did not violate his professional obligations. *Id.* at 1195-96.

80. The Model Code acknowledged group law practice in a few contexts, such as conflicts, but it did not address a supervising lawyer's responsibilities with regard to his subordinate lawyers. *See generally* ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 153 (1987) [hereinafter LEGISLATIVE HISTORY] ("The predecessor Model Code did not address . . . the responsibilities of a partner or supervisory lawyer for the ethical conduct of other lawyers in the firm or organization.").

81. The Model Rules consist of eight parts. Part Five is entitled "Law Firms and Associations" and has seven rules addressing professional issues of group law practice. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.1-5.7 (1995).

82. The current comment to Rule 5.2 recognizes that "[t]here was no counterpart to this Rule in the Model Code." *Id.* Rule 5.2 Model Code Comparison. The Kutak Commission also provided legal "references" or a "background" description for each rule, in which it expressly acknowledged that the defense in Rule 5.2(b) had no precedent.

the Kutak Commission nor commentators devoted much attention to Rule 5.2 during development of the Model Rules. Other aspects of the law firm section, such as the new supervisory responsibilities of partners, sparked some controversy,[83] but Rule 5.2 did not. In the

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> A subordinate lawyer is liable for misconduct occurring at the direction of a supervisor or resulting from fear of loss of employment, although the court may consider these facts in mitigation of the penalty imposed. [*See In re* Kiley, 256 N.Y.S.2d 848 (App. Div. 1965); *In re* Mogel, 238 N.Y.S.2d 683 (App. Div. 1963); *In re* Goldberg, 184 A. 74 (Pa. 1936); *In re* Lemisch, 184 A. 72 (Pa. 1936); *In re* Knight, 281 A.2d 46 (Vt. 1971).] These authorities involve a subordinate lawyer's participation in clearly wrongful conduct; the proposition stated in (b) has not been squarely presented to a court.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 (Proposed Final Draft, May 31, 1991). For a discussion of the *Knight* case, see *supra* notes 70-76 and accompanying text. The other four cited authorities either fully punished the junior lawyer for misconduct or gave him a lesser punishment than the senior lawyer. *In re* Kiley, 256 N.Y.S.2d 848, 849 (App. Div. 1965) (suspending for two years a junior lawyer who submitted false medical bills to insurers, but who relied on a senior partner in the firm); *In re* Mogel, 238 N.Y.S.2d 683, 685 (App. Div. 1963) (disbarring a senior partner for facilitating a client's gambling ring, but only suspending the junior partner who assisted him because the junior partner did not initiate the arrangement); *In re* Goldberg, 184 A. 74, 75 (Pa. 1936) (disbarring a junior attorney for sacrificing his client's interests in order to benefit the senior lawyer's other client and finding that the subordinate was a willing participant in the employer's scheme); *In re* Lemisch, 184 A. 72, 73 (Pa. 1936) (disbarring a junior partner for improper assistance in client's criminal activity and rejecting the defense that he was merely acting at the direction of his recently deceased senior partner because the evidence showed that the junior lawyer was a willing participant).

83. Two new rules, current Rules 5.1 and 5.3, imposed on supervisory lawyers limited responsibility for certain misconduct by the attorneys and assistants whom they supervise. *See* LEGISLATIVE HISTORY, *supra* note 80, at 153-54 (Rule 5.1 "was intended to establish the principle of supervisory responsibility without introducing a vicarious liability concept." Rule 5.1(c) "established a principle of accessorial responsibility . . . ."). Rule 5.1 set out these duties with regard to other lawyers:

> (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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1. *See also id.* Rule 5.3 (imposing similar duties with regard to non-lawyer staff). Supervisory and accessorial responsibility remains a subject of debate. New York, for example,

entire record of the Kutak Commission's work, few documents, other than the drafts of the rules themselves, even mention Rule 5.2 or its predecessor drafts.[84] Rule 5.2 generated virtually no debate (or interest) when the Kutak Commission sent the draft set of proposed rules out for public comment,[85] when the ABA finally adopted the

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has recently expanded the concept and adopted a controversial disciplinary rule aimed at the law firm itself, not just its individual members. Its version of the supervisory lawyer rule does not speak just to individual partners, but instead to the "law firm." *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.5 (1996) (providing that a "law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules"). *See generally* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991) (advocating a system of law firm discipline to supplement individual discipline of firm lawyers).

84. The author reviewed the Kutak Commission files at the ABA Center of Professional Responsibility and found very little independent commentary or discussion (other than the rule drafts) addressing Rule 5.2(b) and its various predecessor versions. For a discussion of the highlights of the commentary, see *supra* notes 16, 19, 24, and *infra* notes 85, 94, and accompanying text.

85. In January 1980, the Kutak Commission sent out a discussion draft of the Model Rules, including a predecessor version of Rule 5.2(b), then labeled as Rule 7.3 (b):

> (b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's resolution of a reasonably arguable question of professional duty.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (Discussion Draft Jan. 30, 1980). The discussion draft as a whole spurred significant debate, but only a handful of submissions commented on Rule 7.3 (current Rule 5.2). These few comments both endorsed and criticized the rule. The San Francisco Bar Association, for example, argued that the proposed rule did not give enough protection to a young subordinate lawyer. *See* Bar Association of San Francisco, Legal Ethics Committee, Report Concerning the ABA Proposed Model Rules of Professional Conduct (Sept. 25, 1980) (Kutak Box 44, Doc. 0314) (unpublished papers on file with the ABA Center for Professional Responsibility) ("An inexperienced lawyer may not perceive a question of impropriety in what the inexperienced lawyer is requested to do by a senior attorney. A concept similar to that expressed in 7.3(b) is needed for the protection of young lawyers, but we do not believe that the proposal gives adequate protection."). Other state bar committees criticized the rule for giving any defense at all. *See* New York State Bar Association, Report of the Special Committee to Review ABA Draft Model Rules of Professional Conduct, at 35-36 (Aug. 29, 1980) (Kutak Box 45, Doc. 0357) (unpublished papers on file with the ABA Center for Professional Responsibility) ("The Rule would allow a subordinate lawyer to act in accordance with a supervisory lawyer's resolution of a 'reasonably arguable question of professional duty' . . . . While acting in such a manner may help the subordinate lawyer to keep his job, we believe that every lawyer must have as a primary obligation and concern the best interests of the client, not his career.").

After this public comment period, the Kutak Commission clarified paragraph (b) to require that the senior lawyer's resolution be reasonable. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 (Proposed Final Draft 1981). This modified version in turn drew minimal public comment when the Kutak Commission again released the proposed rules for public comment. A few members of the bar criticized the addition of the "reasonable" requirement as weakening the defense. *See* Philadelphia Bar Association, Evaluation and Report Concerning the Proposed Final Draft of the Model Rules of Professional Conduct

new Model Rules,[86] or when the individual states later adopted the Model Rules.[87]

This lack of attention may have been mere oversight. After all, the new rule purported to speak from the point of view of the law firm associate. It may not have caught the eye of bar committee members who typically are established lawyers. More likely, however, the lack of controversy reflected the organized bar's endorsement of the rule's primary aim—ease in law firm management.

Rule 5.2(b) allows efficiency in law firms by preventing conflicts between partners and associates regarding the proper ethical

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(1980) (Kutak Box 56, Doc. 0694) (unpublished papers on file with the ABA Center for Professional Responsibility) ("the addition of the word reasonable destroys the protective privilege which should be afforded to a subordinate after a decision has been made by a supervisor on a matter where there is a question concerning the proper course of action"); New York State Bar Association, Banking, Corporation and Business Law Section, Comments Regarding the Proposed Final Draft Model Rules of Professional Conduct (Oct. 31, 1981) (Kutak Box 54, Doc. 0635) (unpublished papers on file with the ABA Center for Professional Responsibility) ("We urge that 'reasonable' be deleted . . . to avoid unnecessary doubt. That the question of professional duty is 'arguable' should be sufficient."). The remaining comments on the subordinate lawyer rule mirrored those to the January 1980 version of the rule. *See, e.g.*, Florida State Bar, Special Study Committee on the Model Rules of Professional Conduct, at 34-35 (June 3, 1982) (Kutak Box 57, Doc. 0729) (unpublished papers on file with the ABA Center for Professional Responsibility) ("[T]his rule provides guidance not contained in the existing Code regarding the responsibility of a junior lawyer . . . [t]he committee favors its adoption.").

86. The ABA House of Delegates formally approved the Model Rules in its August 1983 Annual Meeting, but the House of Delegates had considered the proposed rules at earlier meetings. *See* LEGISLATIVE HISTORY, *supra* note 80, at 1-2. The House of Delegates focused their debate on rules more controversial than Rule 5.2. *Id.* (noting that Rules 1.5, 1.6, 1.8, 3.3, 3.4 and 7.3 were the "most controversial black letter rules").

87. The author wrote the professional responsibility authority of each state asking for, among other things, the "legislative history" of the state's consideration of Rule 5.2. Thirty-four states responded. Through this process and independent research, the author was able to find evidence of independent discussion of the promulgation of Rule 5.2 in only eight states and the District of Columbia. For a discussion of the promulgation and adoption of Rule 5.2, see *supra* note 4, and *infra* notes 90-92 and accompanying text. Most of the responding states reported that they had no legislative history at all. Some states affirmatively reported that their committees did not debate Rule 5.2. *See, e.g.*, Letter from John Arrington, Jr., Chair, Oklahoma Bar Association Rules of Professional Conduct Committee, to Carol M. Rice, Assistant Professor of Law, University of Alabama School of Law (June 25, 1996) (on file with author); Letter from Michelle Courtemanche, Legal Assistant, Florida Bar Lawyer Regulation, to Carol M. Rice, Assistant Professor of Law, University of Alabama School of Law (May 15, 1996) (on file with author). In most states, the official comment to the state version of Rule 5.2 is the sole "legislative history" of the rule's adoption on the state level, but the comment is identical to the official comment to the Model Rule. *See infra* note 90. Texas is a notable exception; it has greatly expanded comments. *See, e.g., supra* notes 12, 24, and *infra* notes 90, 111 (discussing and quoting the comments to the Texas Rules of Professional Conduct).

course. The official comment explains that, in matters of professional judgment, the supervising lawyer must make the decision, "[o]therwise a consistent course of action or position could not be taken" within a law firm.[88] To avoid such a stalemate, the rule delegates decision-making authority to the senior lawyer. Rule 5.2 shifts responsibility to the supervisor by "protect[ing] the subordinate professionally if the resolution is subsequently challenged."[89] Since the associate will not bear professional responsibility for the decision, he will not have any grounds to delay representation of their mutual client by arguing his ethical viewpoint. Law firms thus run more efficiently than they would if associates challenged the ethical decisions of their supervisors.

Rule 5.2(b) has another purpose: protection of the associate. This purpose may have motivated the ABA and the Kutak Commission, but they did not say so directly. A few states,[90] however, ex-

88. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b) cmt. 2.

89. *Id.* One author argues that the drafters had the additional rationale of not chilling zealous advocacy:

> The drafters of the Model Rules made a principled decision that, since good faith doubts about the Model Rules' requirements are inevitable, it would be in the public's best interest to provide a safe harbor for subordinate lawyers in situations where reasonable minds differ as to the meaning of a rule, considering the facts that the supervisory lawyer usually has more experience in making ethical judgments and that uncertainty concerning the relative responsibilities of the two lawyers could have a chilling effect on zealous representation. The drafters thus made a rational presumption in favor of the supervisory lawyer's resolution of ethical disputes.

Kenneth J. Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility,* 92 DICK. L. REV. 777, 805-06 (1988). However, the Model Rules, and the Model Code before them, recognize that a lawyer's duty to his client is limited by his parallel duties to comply with the law and the rules of professional conduct. *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a) (requiring a lawyer to withdraw if the presentation will result in a violation of law or the rules of conduct). Indeed, zealous advocacy is not the paramount goal of a lawyer. *Id.* Rule 1.3 cmt. 1 ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.").

90. Most states simply adopted the official comments to the Model Rules thereby endorsing the law firm efficiency justification, and some states affirmatively restated the law firm efficiency rationale in their own official comments and legislative history. *See, e.g.,* Memorandum from the Washington State Bar Code of Professional Responsibility Committee to the Board of Governors (June 4, 1982) (on file with author) (noting that proposed Rule 5.2(b) provides "a mechanism for resolving disputes between the superior and the subordinate by exempting the subordinate from responsibility for a violation if the subordinate follows the supervisory lawyer's reasonable resolution . . . " and that such an exemption "may be necessary to avoid stalemates . . . .").

pressly advocated this rationale when they adopted Rule 5.2(b).[91] They recognized that a law firm associate often finds himself "between the rock of ethical constraints and the hard place of a supervisory attorney's instructions."[92] Rule 5.2(b) alleviates this pressure by allowing the associate to follow the supervisory attorney's instructions without fear of compromising his job or professional discipline.

Although the associate protection and law firm efficiency policy grounds have some initial appeal, neither rationale fully justifies the rule's dramatic departure from individual responsibility. Some associates may feel a real need for protection since the supervising partner likely controls, or at least influences, the associate's future compensation and employment. The mere act of questioning the partner's ethics could forever taint the relationship. Furthermore, if the partner fires the associate for taking an ethical stand, the associate may not have any recourse or ability to sue for wrongful discharge.[93]

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91. Texas' comment to its version of Rule 5.2 explains this second purpose:

> By providing such a defense to the supervised lawyer, Rule 5.02 recognizes that the inexperienced lawyer working under the direction or supervision of an employer or senior attorney is not in a favorable position to disagree with reasonable decisions made by the experienced lawyer. Often, the only choices available to the supervised lawyer would be to accept the decision made by the senior lawyer or to resign or otherwise lose the employment. This provision of Rule 5.02 also recognizes that it is not necessarily improper for the inexperienced lawyer to rely, reasonably and in good faith, upon the decisions made in unclear matters by senior lawyers in the organization.

TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 5.02 cmt. 4 (1997). *See also* Minutes of the Special Committee of the District of Columbia Bar on the Model Rules of Professional Conduct (Oct. 9, 1984) (on file with author) (noting necessity for Rule 5.2(b) because "if the supervisory lawyer turns out to be incorrect, it is a difficult position for the subordinate who has relied on the senior lawyer's determination to be in without the protection which Rule 5.2(b) affords . . . the rule deals with a situation which exists"); JUDITH L. MAUTE, A PRACTITIONER'S GUIDE TO THE OKLAHOMA RULES OF PROFESSIONAL CONDUCT 111 (1989) (Rule 5.2(b) "does not commit partners and associates to a life of career-threatening ethical disputes.").

92. Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct, N.J.L.J. (July 28, 1983) (on file with author).

93. The traditional view of lawyers is that they are "at will" employees, whom employers may terminate for any or no reason at all. Courts have begun to make exceptions to the "at will" doctrine and allow discharged employees to sue, either for breach of contract, based on an implied duty of fair dealing and good faith, or in tort for retaliatory discharge. These advancements, however, have been slow for lawyers, particularly in-house counsel, due to concern that the suit would interfere with the client's ability to discharge its lawyer. The Model Rules protect the client's right to discharge his lawyer. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a) (providing that a lawyer must "withdraw from the representation of a client if . . . (3) the lawyer is discharged"); *id.* Rule 1.16 cmt. 4 ("A client has a right to discharge a lawyer at any time, with or without cause."). *Compare* Weider v. Skala, 593 N.Y.S.2d

These concerns, however, are not present in every case. Rule 5.2(b) falters in that it assumes that the associate faces the choice of job or ethics in every situation. It does not consider that an associate may not feel any pressure to conform. His supervising lawyer may actively encourage or even reward independent ethical thinking. The law firm or department may have policies which protect lawyers who raise ethical concerns. Rule 5.2(b) ignores these possibilities, and instead takes the cynical approach by immunizing every subordinate lawyer.

Moreover, even if a law firm associate does feel pressure to conform, he is not unique and does not deserve special protection.[94] Other young lawyers face similar dilemmas. A sole practitioner, particularly a recent law school graduate, may feel equal or even greater financial urgency. His client, perhaps his only client, may

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752, 753 (N.Y. 1992) (allowing an associate, who was fired after insisting that the partners report another associate for misconduct, to sue the law firm for breach of the implied duties of good faith and fair dealing, but not for tort of retaliatory discharge), *with* Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 348 (Ill. App. Ct. 1986) (refusing to extend the tort of retaliatory discharge to in-house counsel who was fired for his refusal to remove documents in discovery). *See generally* H. Lowell Brown, *The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFF. L. REV. 777 (1996) (analyzing the duties of in-house lawyers to report client misconduct); Sandra J. Mullings, Weider v. Skala*: A Chunk in the Armor of the At-Will Doctrine or a Lance for Law Firm Associates?*, 45 SYRACUSE L. REV. 963 (1995) (analyzing wrongful discharge claim by a former associate against a law firm after insisting on reporting another associate's wrongdoing to the disciplinary body); Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO. J. LEGAL ETHICS 553 (1988) (concluding that lawyers are within the ambit of protection from wrongful discharges); Wilbur, *supra* note 89, at 805-06.

94. The preferential treatment of law firm associates prompted some states to reject Rule 5.2(b). *See, e.g.*, THE ETHICAL OREGON LAWYER § 16.10(D) (Oregon State Bar CLE 1991) ("The purpose of the amendment [eliminating Rule 5.2(b)] was to make clear that all Oregon lawyers are held to the same standard of conduct and that there is no 'subordinate lawyer' defense or exception. DR 1-102(C) is thus stricter than ABA Model Rule 5.2(b) . . . ."). For a discussion of state responses to Rule 5.2(b), see *supra* note 4. Similarly, some bar committees objected to proposed Model Rule 5.2(b) on this ground during the comment period for the Model Rules. *See, e.g.*, New York State Bar Association, Report of the Special Committee to Review ABA Draft Model Rules of Professional Conduct, at 36 (Aug. 29, 1980) (Kutak Box 45, Doc. 0357) (unpublished papers on file with the ABA Center for Professional Responsibility) ("Lawyers are engaged in a profession where public service, and not the profit motive, must be the guiding light, and every lawyer, whether in a large firm or small, whether young or old, should have the same professional obligations."); Colorado Bar Association Ethics Committee, Report of Special Subcommittee Commenting on the January 30, 1980 Discussion Draft of the Model Rules of Professional Conduct, at 27 (1980) (Kutak Box 42, Doc. 0222) (unpublished papers on file with the ABA Center for Professional Responsibility) ("Each lawyer, either supervisory or subordinate, should maintain the highest standards of professional responsibility and we believe it is inappropriate to classify lawyers as supervisory or subordinate and suggest different standards for each.").

pressure him to take ethically-questionable steps. Likewise, the lone in-house corporate lawyer who must report to nonlawyer officers may face intimidating client demands.[95] Yet, the rules do not provide relief for these lawyers.[96] Not only must they use their own professional judgment and refuse the client demand, but they also must affirmatively explain why they cannot follow the client's wishes.[97]

By contrast, Rule 5.2(b) allows a law firm associate to silently follow a questionable order by a partner. Admittedly, the partner's order is more apt to comply with the rules of conduct than the client demand.[98] The supervising lawyer, unlike the client,[99] is bound by

95. In-house counsel "face special difficulties when confronted by requests to perform unethical acts. In-house counsel derive all of their professional income from one client-employer. Consequently, this may deprive them of the economic independence usually enjoyed by private practitioners . . . ." Wilbur, *supra* note 89, at 781.

96. A lawyer may not violate the rules of professional conduct, even at the request of his client, and in fact must withdraw from the representation if the representation will require him to violate the rules. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.16(a) ("a lawyer shall not represent a client or . . . shall withdraw . . . if: (1) the representation will result in violation of the rules of professional conduct or other law"); *Id.* Rule 1.16 cmt. 2 ("A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law."); *see also* Blair v. Shenandoah Women's Ctr., Inc., 757 F.2d 1435, 1438 (4th Cir. 1985) ("We emphatically reject any suggestion that a lawyer may shield his transgressions behind the simplistic plea that he only did what his client desired."). In fact, a client's demand that the lawyer engage in improper behavior is not even a mitigating factor in sanctioning the lawyer for the misconduct. For a discussion of the impact of a client demand on lawyer discipline, see *infra* note 139 and accompanying text.

97. "When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(e). If the client is a corporation and the client instruction also violates law or substantially injures the corporation, the lawyer may have to appeal to the top of the corporate chain of command, regardless of how unpleasant it may be for the lawyer. *Id.* Rule 1.13(b) (setting out the steps that a lawyer, whether in-house or outside counsel, must take when confronted with an improper demand from a lower level organizational employee).

98. *See* Wilbur, *supra* note 89, at 781 (noting that unlike in-house counsel, the law firm "associate receives at least some protection from the fact that his employers, the firm's partners, are also bound by the requirements of legal ethics").

99. Of course, the client himself may be a lawyer, but whether the Rule 5.2(b) defense applies to an instruction by a client-lawyer is unclear. The client-lawyer could qualify under a broad interpretation of "supervisory lawyer." For a discussion of "supervisory lawyer," see *supra* note 12. A senior in-house lawyer-officer of a corporation, for example, would qualify as both a client and a supervising lawyer of a junior level in-house counsel. This question highlights the inconsistency of Rule 5.2(b). If the lawyer-client were considered a mere client, the lawyer could not defer to the client's instruction. For a discussion of

the rules of conduct and is under an affirmative duty to not order the associate to engage in improper acts.[100] The supervisor also has training and experience in questions of legal ethics.

However, the supervisor's legal expertise also argues against giving the subordinate extra protection. The supervising lawyer's input enhances the subordinate's ability to make sound ethical judgments. He can use the supervisor as a sounding board and draw upon his experience and knowledge. The lone lawyer, on the other hand, must make ethical judgments by himself. He does not have an elder lawyer, let alone other members of the firm or special ethics committees, with whom to discuss and debate the matter.[101] Thus, the associate's predicament is sympathetic when viewed in isolation, but it is not worthy of special protection when compared to that of other lawyers.

Similarly, the law firm efficiency rationale of Rule 5.2(b) has a superficial appeal that fails, or at least weakens, under scrutiny. An associate's objection to a partner's direction may slow their mutual representation of the client, and the associate's outright refusal to follow the direction may cause more serious implementation problems. But the representation will not be completely thwarted if the associate is held accountable for his own conduct. In most cases, the lawyers merely would pause to discuss the ethics issue. One lawyer likely will convince the other of his view, or they will mutually agree on another interpretation of the issue. If they cannot agree, agency law dictates that the partner, by virtue of his position, would decide what action to take.[102] The lawyers may encounter

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deferring to a client's instructions, see *supra* notes 95-97 and accompanying text. On the other hand, if the client-lawyer was also considered a supervisory lawyer, Rule 5.2(b) may allow the lawyer to defer to him.

100. At least two separate rules prohibit a lawyer from ordering another lawyer to violate the rules. Rule 8.4(a) states that it is "professional misconduct for a lawyer to: . . . knowingly assist or induce another to do so . . . ." MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 8.4(a). Rule 5.1(c) makes a supervising lawyer responsible for an associate's violation of the rules of professional conduct if the supervisor ordered the act or learned of the act in time to mitigate its effect. *Id.* Rule 5.1(c). For a discussion of Rule 5.1, see *supra* note 83 and accompanying text.

101. The Model Rules may require firms to provide affirmative ethical assistance. Rule 5.1 requires law firms to put in place "measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a). *See also supra* note 83. The comment to Rule 5.1 explains how lawyers can fulfill this duty and note that "[s]ome firms . . . have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee." *Id.* Rule 5.1 cmt. 2. The ABA Special Committee on Professionalism also has urged law firms to take more steps in training their associates and fostering their ethical development. *See supra* note 3.

102. As an employee of the partner or "master," the associate is an agent or "servant" and subject to the master's control. *See* RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958) ("A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is

some other implementation problems, but rarely will these problems amount to more than mere inconvenience.[103]

Rule 5.2(b) will not accept even the marginal inefficiencies which result from an associate making his own professional judgments. Even in the military, a soldier must pause to determine if the order is manifestly illegal.[104] Under Rule 5.2, that is essentially all that an associate lawyer must do.[105] The practice of law, however, does not need the same standards of conduct as the military. The need for efficiency is not as great in the practice of law.[106] Lawyers are not in life and death situations.[107] Law firms do not have intricate chains of command. The military bureaucracy dwarfs even the largest of law firms, not to mention the much smaller lawyer teams working on individual client matters.

Nor does a lawyer need the soldier's simple test for obedience. A lawyer is trained to think for himself. He has education in legal

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controlled or is subject to the right to control by the master."). The associate also is a subagent of the client, who also is a principal of the associate. *Id.* § 5(1) ("A subagent is a person appointed by an agent . . . to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible."); *id.* § 5(1) cmt. c (noting that the "inference is that the regular employees of an agent are subagents"). For further discussion of agency law, see *infra* note 141.

103. For an analysis of the steps that an associate and supervisor should take when the associate believes that the supervisor's direction violates the rules, *see infra* notes 141-49 and accompanying text.

104. For a discussion regarding military superior orders, see *supra* notes 47-51 and accompanying text.

105. Although the terms of the superior orders defense are different under Rule 5.2(b) (an arguable question and a reasonable resolution) than in the military (manifest illegality), the working standards for the test in practice will be essentially the same. The associate will follow his supervisor's order unless it appears clearly wrong. For a discussion of the practical effect that Rule 5.2(b) has on an associate, see *infra* notes 107-11 and accompanying text.

106. Speed and efficiency are valued, but they are not the sole aims of a lawyer's work. The rules encourage lawyers to diligently represent their clients and recognize that procrastination is a common problem that lawyers must strive to avoid. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *see also id.* Rule 1.3 cmt. 2 ("Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time .... [U]nreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."). However, speed does not override the need for competent representation, and the rules elsewhere encourage lawyers to thoroughly prepare and reflect on issues. Rule 1.1, for example, mandates that a lawyer provide the "thoroughness and preparation reasonably necessary for the representation." *Id.* Rule 1.1.

107. Lawyers occasionally have extreme time pressures and, at least in capital cases, may hold their client's life in their hands. The rules do not grant special exemptions for lawyers in capital cases, but the rules do account for the impact of time pressures on a lawyer's state of mind, even without Rule 5.2(b). For a discussion regarding circumstances that influence an attorney's state of mind, see *supra* notes 26-30, and *infra* notes 133-36 and accompanying text.

ethics. A lawyer, even the newest of associates, is far better equipped than a soldier, indeed than most any other employee in any other job, to interpret arguable questions of duty. That is the unique talent of the lawyer. It is his job.

In sum, the two bases for the Rule 5.2(b) superior orders defense are weak. Although law firm associates are sometimes in difficult situations, their pressures are no different from other lawyers. Furthermore, the problems that might arise when a partner and associate disagree on an ethical question can be resolved in other ways. The rule achieves only marginal efficiency and, as will be seen below, these minimal benefits come at too high a price.

C. Rule 5.2(b) Chills Ethical Debate and Compliance

Rule 5.2(b) undermines professionalism, primarily by chilling ethical debate, but also by decreasing the likelihood that lawyers will act in accordance with the rules of professional conduct. To achieve its stated aim of efficiency, Rule 5.2(b) mandates that one lawyer, the senior lawyer, decide all close ethical questions. The senior lawyer, however, is not always the lawyer best able to make ethical decisions. A junior lawyer is sometimes in a better position to make a particular ethical judgment than his supervisor.[108]

Associates in law firms often handle the day-to-day management of client matters, such as discovery or a due diligence review, and are much more familiar with the facts that give rise to the ethical questions. Moreover, the young lawyer has had more recent training in legal ethics than the partner, assuming that the partner had such training at all. Finally, a junior lawyer is more insulated from client pressures and may be better able to assess ethical issues.[109] Thus, in at least some circumstances, a junior associate is

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108. *See* Menkel-Meadow, *supra* note 13, at 761 n.9 (Model Rule 5.2(b) is "particularly troubling" because "most junior lawyers, who have been educated after Watergate and subject to new ABA standards requiring instruction in professional responsibility, [are] the most equipped to make sound ethical judgments;" the "junior lawyers not only know the rules much better than their seniors, but they may be better able to detect ethical conflicts because their attachments to important clients [may] be weaker."); Gross, *supra* note 13, at 300-01 ("Model Rule 5.2(b) fails to account for those particular situations in which an associate is as well equipped as a partner to make ethical decisions. In such cases, deference by the associate to the questionable ethical decisions of a partner is unwarranted. For example, a partner might tell an associate who is skilled in discovery practice to withhold documents on the ground that the documents are not indicated in the formal request for document production. In that situation, an associate who is skilled in discovery can interpret the document request as easily as can the partner.").

109. Associates are employees and usually receive salaries that are impacted only indirectly by client satisfaction. Associates may get bonuses that are more directly tied to performance, but partners are more likely to have their financial remuneration, partnership shares, and draws, based on client satisfaction and billing. *See* Gross, *supra* note 13, at 306 ("The partner's inter-

more qualified to make sound ethical judgments than his supervisor.

Rule 5.2(b) certainly does not bar the associate from sharing this knowledge or giving input for ethical decision-making. Indeed, some commentators have suggested that the rule actually encourages the subordinate's participation in ethical debate.[110] To ensure that the defense will protect him, the associate must determine both that the question is arguable and that the supervisor's resolution is reasonable.[111] In reality, however, an associate will rarely go through this two-step analysis. He will simply follow the partner's instructions unless the act is clearly improper.

Texas' version of Rule 5.2 explicitly states that the associate is "expected" to follow all partner's instructions that are not "clearly wrong."[112] This is a significant directive. After all, how often does

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est in maximizing the profit of the law firm, which might be greater than the interest of the associate who receives a fixed salary and who is only indirectly affected by modest changes in the profits of the firm, might diminish the partner's objectivity.").

110. *See* Miller, *supra* note 13, at 294 (Rule 5.2(b) "operates to 'fix' liability, but underneath that effect lies the purpose of encouraging subordinates to challenge questionable orders received from superiors in an attempt to prevent misconduct which might otherwise occur by blindly following orders."); Wilbur, *supra* note 89, at 806 (arguing that Rule 5.2(b) "forces the lawyers involved into a full discussion of the ethical consequences of the proposed action"). *See also* Letter from Robert St. John, Chair of the New Mexico Advisory Opinions Committee to Carol M. Rice, Assistant Professor of Law, University of Alabama School of Law (May 13, 1996) (on file with author) ("[I]t is an overstatement to refer to [Rule 5.2(b)] as an 'I was just following orders' defense. The Rule refers to a 'reasonable resolution of an arguable question of professional duty' which would seem to me to impose a fair degree of judgment and responsibility on the subordinate lawyer."). *Cf.* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 16.2 (practitioner's ed. 1986) ("The Model Rules also seem to assume, although they do not require, that a discussion will occur between senior and junior lawyers that, one hopes, will lead to better ethical decisions."); John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 974 (1995) ("[I]f an associate identifies a problem of professional responsibility, brings it to the attention of the supervisory lawyer, and acts under the direction of the lawyer's reasonable resolution of an arguable question of professional responsibility, that associate will not be responsible for the action under the Model Rules."); Gross, *supra* note 13, at 300-01 n.179 (arguing that the associate is better able to make ethical decisions as to discovery, but noting that "[b]ecause the associate decides under Model Rule 5.2(b) what is an 'arguable question' and what is a 'reasonable question,' Model Rule 5.2(b) could provide an associate who is skilled in discovery with sufficient flexibility to determine whether to defer to the partner's decision").

111. For a discussion of the official definitions of "arguable question" and "reasonable resolution," see *supra* notes 23-25 and accompanying text.

112. The official comment to the Texas version of Rule 5.2 explains:

> In many law firms and organizations, the relatively inexperienced lawyer works as an assistant to a more experienced lawyer or is directed, supervised or given guidance by an experienced lawyer in the

any lawyer know that another is "clearly wrong" in his interpretation of the ethical rules? The analysis is even more challenging for a young lawyer who has just graduated from law school, where his professors repeatedly stressed that few, if any, questions of law are ever "clear." Thus, under this Texas directive, an associate simply will follow his supervisor on most ethics questions without challenging the direction.

Model Rule 5.2(b) has the same aim and effect.[113] Indeed, the stated policy of the rule is to affirmatively encourage an associate to follow his supervisor's direction in order to avoid stalemates and to increase firm efficiency. Second, the rule's two specifications—a reasonable resolution of an arguable question—do not require extensive analysis and are broad enough to encompass most ethical questions. The vast majority of ethics issues are arguable.[114] They can be answered "more than one way."[115] If the partner chooses one of the alternative interpretations that made the question arguable in the first place (i.e., one that is not clearly wrong), then his resolution is reasonable and Rule 5.2(b) will protect the associate. Thus, the mandate that the associate should follow the partner's instruc-

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> firm. In the normal course of practice the senior lawyer has the responsibility for making the decisions involving professional judgment as to procedures to be taken, the status of the law, and the propriety of actions to be taken by the lawyers. Otherwise, a consistent course of action could not be taken on behalf of clients. *The junior lawyer reasonably can be expected to acquiesce in the decisions made by the senior lawyer unless the decision is clearly wrong.*

TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 5.02 cmt. 2 (emphasis added).

113. *Cf.* Miller, *supra* note 13, at 294 ("[T]he role of the subordinate within the hierarchy of the firm is presumably to obey the supervising attorney and partner."); Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 612 (1994) ("[F]irm associates are in no position to question the judgment of a partner, albeit a non-lawyer, as long as that judgment falls short of promoting overt ethical violations.").

114. The Model Rules elsewhere acknowledge that questions of professional duty often are arguable:

> Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment ....

MODEL RULES OF PROFESSIONAL CONDUCT pmbl. ¶ 8 (1995). *See also* 1 HAZARD & HODES, *supra* note 27, § 501, at lxxxi (noting that in applying the rules of conduct, lawyers "exercise an enormous amount of discretion and make an unending series of 'judgment calls'"); 2 *id.* § 5.2:101, at 778 (stating that an "application of the rules often involves subtle matters of judgment and discretion"); 2 *id.* § 5.2:301, at 780 (determining that "[i]n many instances, the law of lawyering permits more than one resolution of an issue"); MAUTE, *supra* note 91, at 111 ("As a practical matter, most instances of professional duty depend upon subtle factors.").

115. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b) cmt. 2.

tions unless they are clearly wrong is not unique to Texas—it is the expectation under the Model Rule.[116]

Such deference to supervising lawyers is a clear abrogation of one of the associate lawyer's primary duties—the duty to exercise independent professional judgment.[117] Indeed, the comment to Rule 5.2(b) contemplates a firm relationship under which the associate does not think for himself: "[w]hen 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.*"[118] Such acquiescence compromises a lawyer's duty and tells the associate that he need not exercise professional judgment. If the question requires any professional judgment, as most questions of ethics do,[119] then the senior lawyer must resolve the issue. Therefore, the associate, merely because he works for another lawyer, is excused from the fundamental duty of every lawyer to use independent professional judgment.

Rule 5.2(b) also undermines other rules which require a lawyer to reflect, and even investigate, before acting. For example, the comment to Rule 5.2(b) explains that "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."[120] Ordinarily, a lawyer violates Model Rule 3.1 if he files a frivolous pleading—period—regardless of whether he believes that it is frivolous.[121] Rule 3.1

116. Following a superior's order, however, is not an affirmative duty under the current version of Rule 5.2(b). The associate is not subject to discipline solely because he fails to acquiesce to superior orders. An earlier draft of Rule 5.2(b), however, instructed that the subordinate *must* follow the supervisor's resolution:

> (b) When a course of action involves a matter of professional discretion or a reasonably arguable question of interpretation of professional duty, the subordinate lawyer *shall* act in accordance with the supervisory lawyer's decision as to the proper course of action.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b) (Tentative Draft No. 5, Nov. 17, 1989) (Kutak Box 12, Doc. 0036) (unpublished papers on file with the ABA Center for Professional Responsibility) (emphasis added). This version was short-lived. The January 1980 Discussion Draft of the Rules dropped the "shall" language and stated the subordinate's duty in permissive terms as current Rule 5.2(b) does. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (Discussion Draft Jan. 30, 1980). *See also supra* note 85.

117. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT pmbl. ¶ 11 ("Every lawyer is responsible for observance of the Rules of Professional Conduct."); *Id.* Rule 2.1 (noting that "a lawyer shall exercise independent professional judgment").

118. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 cmt. 2 (emphasis added).

119. *See supra* note 113.

120. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 cmt. 1.

121. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (providing that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous").

compels the lawyer to make a reasonable inquiry before filing the pleading.[122] Yet, the comment to Rule 5.2 appears to relieve a subordinate lawyer of this duty. In fact, under this interpretation of the rule, the associate has every incentive not to inquire about the validity of the pleading. Ignorance is bliss—there is no violation of the rules so long as the associate knows nothing about the pleading.[123]

Even if an associate wants to debate ethical questions, Rule 5.2(b) thwarts his ability to do so by creating a major obstacle—the negative reaction of his supervisor. This reaction may exist in any

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122. *Id.* Rule 3.1 uses the objective standard of "not frivolous" rather than the subjective standard used in the comparable Mode Code provision. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1981) (providing that a lawyer may not file a suit or assert a position "merely to harass or maliciously injure another"). The purpose of the change was "to track the standard generally used and defined in the law of procedure." ABA Center for Professional Responsibility, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* 119 (1987). Most procedural rules, such as Federal Rule of Civil Procedure 11, expressly require a "reasonable inquiry." For a discussion regarding Rule 11, see *supra* notes 62-66 and accompanying text. Some commentators question whether Model Rule 3.1 is as demanding as Federal Rule 11. *See* Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. REV. 959, 971 (suggesting that the standard in Model Rule 3.1 "might be somewhat less strict than [Federal Rule of Civil Procedure 11 because the comment to Rule 3.1 indicates that] an action taken for a client is not frivolous merely because the facts have not first been fully substantiated"); *cf.* Stevens, *supra* note 15, at 493-95 (noting that Wyoming added to its version of Model Rule 3.1 a proscription based on Federal Rule of Civil Procedure 11 and included an express requirement of reasonable inquiry "to strengthen the rule, to make it enforceable, and to clarify its application to pleadings"). Yet, most agree that the Rule 3.1 objective frivolous standard requires some form of inquiry reasonable to the circumstances, even if it may be a lesser standard than that in the procedural rules. *See* George A. Kuhlman, *Pennsylvania Considers the A.B.A. Model Rules of Professional Conduct*, 59 TEMP. L.Q. 419, 423-24 (1986) (noting that Rule 3.1 places "a burden on the lawyer to make sufficient inquiry to form a reasonable belief that the claim has no frivolous motive").

123. This comment appears to misapply Rule 5.2(b). As noted above, the associate's lack of knowledge is irrelevant to the application of the defense. For a discussion regarding Rule 5.2(b) defense and the junior lawyer's state of mind, see *infra* Part II.B. Rule 5.2(b) would relieve the associate only if the pleading was arguable and the senior lawyer reasonably concluded that it was not frivolous. However, if the senior lawyer reasonably concluded that the pleading is not frivolous, then the pleading likely would not violate Rule 3.1 because the frivolous standard of Rule 3.1 is an objective one. For a discussion of the effect of the Rule 5.2(b) defense on objective rules of conduct, see *infra* Part II.C. Yet, the comment assumes a frivolous pleading (i.e., an unreasonable one) and still excuses the associate who files it. Such a result is not possible under the rules, even under Rule 5.2(b). Nevertheless, the confusion of this comment highlights the danger of Rule 5.2(b). The associate will not question the validity of the pleading. He will file it unless it clearly appears frivolous, thereby exposing him to professional discipline. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b).

context, but Rule 5.2(b) compounds it. Even the most conscientious supervising lawyer may not appreciate having his ethics questioned and may pressure the associate to follow his directive. Rule 5.2(b) may encourage a supervisor to react negatively and insist on obedience to his instructions.[124] The rule squarely places the responsibility for all judgment calls solely on the supervisor. From the supervisor's perspective, the associate has no reason to object because he will not be held responsible if the supervisor is wrong.

Ironically, Rule 5.2(b) actually may undercut its aim of protecting the associate. An associate who does not want to take a cynical view of his duties, or blindly follow orders, faces more obstacles than he would without Rule 5.2(b). An associate who critically analyzes the ethics of his actions has no "standing" to raise ethical concerns since he cannot be held responsible.

This system also hurts the senior lawyer. The rule authorizes him to make ethical decisions, but his senior status would probably afford him such authority anyway.[125] By immunizing the associate and deterring him from raising ethical issues, Rule 5.2(b) eliminates one of the partners' resources in spotting and deciding ethical issues.

Although the senior lawyer may have ordered a particular course of action, he may not have considered all of its ethical implications. The senior lawyer should want the associate to at least raise, if not actively discuss, the ethical implications of his orders. After all, the senior lawyer will be held responsible if he errs in his

124. L. Harold Levinson, *To a Young Lawyer: Thoughts on Disobedience*, 50 MO. L. REV. 483, 494 (1985) (noting that "the Model Rules enable the supervisor to insist on obedience from the subordinate in the borderline situations described in Rule 5.2(b)"); *cf.* MAUTE, *supra* note 91, at 111 ("the newer lawyer can rely in good faith on the experience and judgment of the senior lawyer who *insists* on a resolution that is reasonable under the circumstances") (emphasis added). This insistence likely is purely a practical consideration and not a question of the legal right of the partner or the duty of the associate. The associate is not subject to professional discipline under Rule 5.2(b) if he refuses to follow the supervisor's order. *See supra* note 116. Likewise, under general agency law, an employee does not have a duty to follow unreasonable orders, such as one in violation of ethical rules. For a discussion regarding agency law and unreasonable orders, see *infra* note 141. However, one author has suggested that the deference afforded senior lawyers in Rule 5.2(b) changes the approach to wrongful discharge suits brought by associates who were fired for refusing to follow a supervisor's order. *See* Wilbur, *supra* note 89, at 779, 806 (arguing that unlike the Model Code, "the Model Rules give the supervisory lawyer the right to direct a subordinate to follow [the supervisor's view of] conflicting ethical positions," and that "a different standard is required" for wrongful discharge actions brought in Model Rules jurisdictions). *But see* McCurdy v. Kansas Dep't of Transp., 898 P.2d 650, 653 (Kan. Ct. App. 1995) (holding in wrongful suspension suit brought by subordinate lawyer that Rule 5.2(b) did not permit a senior lawyer to insist on obedience to his directions).

125. For a discussion regarding agency law, see *supra* note 102, and *infra* note 141.

judgment. By undermining ethical debate, Rule 5.2(b) acts to the detriment of every lawyer involved, subordinate and supervisor alike.[126]

III. A BETTER WAY TO GUIDE YOUNG LAWYERS

Ethics need not be sacrificed in order to resolve the concerns addressed by Rule 5.2(b). Lawyers in other forms of practice must consider and comply with ethical rules, and lawyers in law firms should meet the same standard. Even if an associate is less culpable than his supervising attorney, his underlying conduct is not made proper merely by his subordinate status. A lower culpability should only mitigate against a harsh punishment.

Rule 5.2(b) should be repealed. Other law, for the most part, is sufficient to address the peculiar concerns of law firm supervisors and subordinates. Under agency law, the partner has the power to determine the client's best course of action and to break any stalemates resulting from ethical debate.[127] If the partner decides on the wrong action and the associate follows that direction, the disciplinary scheme already considers whether the associate is less culpable. Lack of experience or knowledge mitigates against harsh sanctions. Professionalism would be promoted if the system affirmatively rewarded ethical discussion and debate. If the associate and the supervisor consider the ethical implications of the supervisor's order, that consideration, and not the mere fact of the superior order, should mitigate against a harsh sanction if they are wrong.

A. The Proposal

As an initial matter, paragraph (a) of Rule 5.2 should remain untouched and stand alone without paragraph (b). Every lawyer should know that he "is bound by the Rules of Professional Conduct notwithstanding that [he] acted at the direction of another person."[128] It is a statement worth making, especially in light of the confused history and uncertain meaning of current Rule 5.2(b). Total abolition of both parts of Rule 5.2 might inadvertently send the wrong message. Individual accountability, as currently stated in Rule 5.2(a), should be the unequivocal message of the rules of conduct.

To the extent that the associate deserves special consideration, the current disciplinary system is flexible enough to address some of his concerns. First, as discussed earlier, sometimes a supervisor's

126. WOLFRAM, *supra* note 110, § 16.2.2 ("In the long run, the protection of autonomous ethical decision making can only redound to the benefit of the firm and its lawyers.").

127. For a discussion regarding agency law, see *supra* note 102, and *infra* note 141.

128. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(a).

instructions may affect the associate's state of mind, thereby impacting whether he has violated the underlying rule of conduct.[129] The Model Rules already recognize that the determination of a lawyer's knowledge will depend on the "circumstances."[130] A subordinate's status and inexperience, or even the fact of the superior order, are all circumstances that may render him ignorant on a particular point. Without the requisite knowledge, the junior lawyer did not violate the rule.[131] Thus, to the extent that the junior lawyer's status and his superior's order have any legitimate bearing on whether he is in violation of a rule, other rules account for these factors even absent Rule 5.2(b).

Even under rules where the associate's knowledge is irrelevant (i.e., a rule that states an outright prohibition or uses a reasonableness standard),[132] the associate's state of mind might impact the assessment of sanctions. As noted in the "Scope" section of the Model Rules, the disciplinary assessment of a lawyer's behavior will be made based on all the circumstances at the time of the underlying behavior.[133] The ABA Standards for Imposing Lawyer Sanctions cite the lawyer's mental state as a "factor to be considered in imposing discipline"[134] and define three levels of culpability, depending on whether the lawyer had actual intent to violate the rules, mere knowledge of the nature of the act, or was simply negligent.[135] The

129. For a discussion of the impact of a superior order on the state of mind of the associate, see *infra* Part II.B.

130. MODEL RULES OF PROFESSIONAL CONDUCT terminology ¶ 5.

131. For a discussion regarding requisite knowledge, see *supra* notes 27-29 and accompanying text.

132. For a discussion regarding rules with an outright prohibition, see *supra* notes 30-33 and accompanying text. For a discussion of rules with a reasonableness standard, see *supra* note 37 and accompanying text.

133. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.
MODEL RULES OF PROFESSIONAL CONDUCT Scope ¶ 5.

134. The ABA Standards state that: "[i]n imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer's mental state; and (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 17, § 3.0.

135. Specifically, the ABA Standards define the following mental states and relative culpability of lawyers:

> The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant

ABA Standards also include a lawyer's inexperience as a mitigating factor and "substantial experience in the practice of law" as an aggravating factor.[136] Thus, if an associate is in fact less knowledgeable about an ethics question than his supervising lawyer, he will warrant less punishment.

The rules and sanctions standards do not directly recognize other concerns of subordinate lawyers, such as the pressure to conform to a partner's orders.[137] Certainly, a subordinate lawyer who disobeys his supervisor's orders could lose his job.[138] The standards, though, already address a similar dilemma—that faced by a lawyer whose *client* insists that he act in violation of the rules. The ABA Standards recognize that a client demand cuts both ways in determining a lawyer's culpability. On the one hand, the demand puts pressure on the lawyer, but on the other hand, the lawyer's temptation to conform may be for financial reward. Thus, under the ABA Standards, a client demand is neither a mitigating nor aggravating circumstance.[139]

A demand from a supervising lawyer should have the same neutral effect. The mere existence of a superior order should not be a mitigating factor because it may discourage independent decision-

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> circumstances of his or her conduct but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

Id. Part II.

136. *Id.* §§ 9.22 (aggravating factors), 9.32 (mitigating factors).

137. If anything, under the current ABA Standards, such pressures may warrant a harsher punishment. The ABA Standards list "selfish motive" as an aggravating consideration. *Id.* § 9.22 ("Aggravating factors include: . . . (b) dishonest or selfish motive . . . ."). An associate's acquiescence in misconduct in order to please his boss arguably is such a selfish motive. The Report of the New York State Bar Association, commenting on the January 1980 draft of the subordinate lawyer rule, argued that while following a superior lawyer's direction "may help the subordinate lawyer to keep his job, we believe that every lawyer must have as a primary obligation and concern the best interests of the client, not his career." The report stressed that "public service, and not the profit motive, must be the guiding light, and every lawyer, whether in a large firm or small, whether young or old, should have the same professional obligations." *Id.*

138. For a discussion regarding termination of a subordinate lawyer, see *supra* note 93.

139. STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 17, § 9.4 ("The following factors should not be considered as either aggravating or mitigating: . . . (b) agreeing to the client's demand for certain improper behavior or result"); *see also id.* § 9.4 Commentary ("[M]itigation should not include a lawyer's claim that 'the client made me do it.' Each lawyer is responsible for adhering to the ethical standards of the profession. Unethical conduct is much less likely to be deterred if lawyers can lessen or avoid the imposition of sanctions merely by blaming the client.").

making. However, it also should not be an aggravating factor due to the dilemma in which it may put the associate.

Instead, the disciplinary scheme should look beyond the order to account for the associate's actual response. If he overcame the understandable reluctance to remain quiet, he should be rewarded. In fact, ethical consideration and debate should be a mitigating factor for all lawyers. Many states already encourage similar ethical consideration by providing a complete defense to a lawyer who relies upon an advisory opinion from the state ethics committee.[140] A lawyer—subordinate, supervisor, or sole practitioner—who raised and debated the question internally before acting should also warrant less punishment. However, because such discussion necessarily will not be as disinterested as the state's ethics advisory committee, internal debate should only be a mitigating factor, and not a complete defense.

B. The Impact on Law Firms and Associates

The aim of this proposal is to raise the ethical atmosphere in law firms and departments by encouraging ethical debate and making each lawyer individually accountable for his own actions. This system will not incapacitate law firms. The associate will have more incentive to spot ethical issues and initiate discussion. In most cases, the two lawyers should be able to agree upon a reasonable solution to the problem without a stalemate. If their assessment is correct, both lawyers will benefit by their enhanced ethical awareness and compliance with the rules of professional conduct. If they err in their judgment, they both will be subject to potential disciplinary proceedings. However, the fact that they debated and acted reasonably should mitigate against harsh sanctions.

In the rare cases where the two lawyers cannot agree upon a reasonable resolution of the question, the associate must make his own decision. That does not mean that he will act for the client. Presumably the senior lawyer, whom the client authorized to make decisions on his behalf, will decide what will be done for the client.[141]

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140. For a discussion regarding the immunity of ethics advisory opinions, see *supra* note 44.

141. The partner is the primary agent for the client and the master of the employee, and as such, the partner will control the representation subject at the direction of the client (the principal). For further discussion regarding agency law, see *supra* note 102 and accompanying text. This control does not create a duty in the associate to obey where the directions are unreasonable and in violation of professional ethics. *See* RESTATEMENT (SECOND) OF AGENCY § 385(1) ("[A]n agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform."); *see also id.* § 385 cmt. a (noting that "professional ethics" are relevant to "determining whether or not the orders of the principal to the agent are reasonable"). In this circumstance the partner usually will retain the authority to decide the course of action for the client but not to require the associate to act

At the same time, the associate must refuse to act in a manner that he believes will violate the rules of conduct.[142] In some cases, he may simply refuse this one act and continue working with the supervisor on the client matter. In other cases, he may request to be reassigned to another matter, or in extreme cases, resign his position. Under some limited circumstances, he may have to report the senior lawyer.[143]

The impact of the proposal can be illustrated by a senior lawyer's direction to an associate to interview an opposing party. This question, as noted earlier, has generated significant ethical debate recently.[144] Assume that the senior lawyer for a plaintiff in a car accident case orders his associate to interview the other driver, knowing that, although the other driver has not yet been named in a formal complaint, he has hired his own attorney. The state law has not defined "party," so the propriety of the interview is questionable, but not clearly wrong. The associate, having recently studied this questionable issue in law school, realizes that the interview may violate Rule 4.2.

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contrary to the associate's view of his professional obligations. The associate will use his professional ethics to decide whether he will obey the order, but he will not (usually) act for the client.

142. In circumstances where the underlying rule of conduct requires an affirmative act or remedy by the lawyer, *see, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1995) (requiring a lawyer to affirmatively remedy false evidence), the associate may have to consult with the client, opposing counsel, or the court. *See* Philadelphia Bar Ass'n Professional Guidance Comm., Guidance Op. 94-25 (1994) (advising the associate that he must independently tell the client about a settlement offer despite his supervising attorney's instructions to the contrary). *Cf.* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1203 (1972) (stating that the associate should withdraw and possibly report the senior lawyer who refuses to correct a fraud upon the court).

143. The duty to report rarely would arise where Rule 5.2(b) would now apply and deletion of Rule 5.2(b) will have no effect on the duty to report misconduct by other lawyers. Rule 8.3 of the Model Rules requires a lawyer to report only those violations that raise "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a). Rarely will a senior lawyer's "reasonable resolution of an arguable question" raise a serious question about his fitness. If the question is not arguable and the order not reasonable, then the supervisor's instruction might raise a question about the supervisor's fitness. However, that is true even with current Rule 5.2. Moreover, Rule 8.3 does not require or permit a lawyer to report professional misconduct where such report would require disclosure of client information protected by Rule 1.6. *Id.* Rule 8.3(c). Rule 1.6 broadly protects all "information relating to [] representation," which includes information gained in interviews conducted by lawyers on behalf of a client. *Id.* Rule 1.6(a). In most cases where two lawyers in a single firm are at a stalemate, the matter will involve client information that a lawyer can not reveal even to report the other lawyer. Note that the duty to report other lawyer was broader under the Model Code, which did not have these two restrictions on the duty to report. *Cf.* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1203 (1972).

144. For a discussion of ethical dilemmas regarding interviews with opposing parties, see supra notes 39-41 and accompanying text.

Under current Rule 5.2(b), the associate might decide to follow the superior's instruction in silence, knowing that he would be immunized against any violation. Without Rule 5.2(b), however, the associate will have an incentive to raise the question because he will not be excused if the interview is improper. Simply raising the question is an advancement over the current system. Long out of law school, the supervisor may not be aware of the developing law and may not realize that a question exists as to the propriety of the interview. Thus, the elimination of Rule 5.2(b) has the positive result of educating the senior lawyer.

Furthermore, once the associate raises the question, the two lawyers may debate, if not research, the issue. Their decision regarding the interview will be better informed and will more likely conform to Rule 4.2. Even if they follow the same course of action originally ordered by the senior lawyer—to conduct the interview—both lawyers will benefit from enhanced ethical debate and awareness. The senior lawyer will be better informed for future ethical decision-making, and will know that his associate has high ethical standards. In turn, the associate will know that his input matters and his firm cares about ethics.

If the associate and partner cannot agree, then they must make their own independent decisions. The supervisor must decide what to do about the interview: whether he personally will conduct the interview, ask another lawyer to do it, or forego it altogether in light of the first associate's stand on the issue. Having decided that the interview is improper, the original associate must not conduct the interview.[145] However, depending on the senior lawyer's course of action, the associate may have a number of other decisions to make.

If the supervisor or another lawyer conducts the interview, the associate first must decide whether he has to report his colleagues to the state bar for what he believes to be a disciplinary violation. This assumed scenario, however, should not trigger the reporting requirement, in large part because the honest disagreement on this arguable ethics question does not raise a "substantial question as to [the interviewing] lawyer's honesty, trustworthiness or fitness as a lawyer."[146] Second, the associate must decide if he personally can continue working on this matter and still meet his ethical duties and obligations to the client. His representation of the client may

145. The opposite scenario—that the associate now believes the interview is proper, but the partner believes it to be improper—should not present an ethical dilemma for the associate or the partner. The senior lawyer will not order the associate to conduct the interview, and the associate may comfortably follow this more cautious ethical approach.

146. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3.

be unduly limited, for example, by his inability to use or rely upon the interview he believes to be improper.[147]

If the senior lawyer reluctantly decides against the interview, the associate's refusal to conduct the interview may create an unworkable tension between the associate and partner. They may decide that, in the best interests of the client, they cannot continue working together on this matter. Indeed, in the rare extreme case, the associate may lose his job. However, in most cases, the firm can and should respect the associate's ethical stand.[148] Indeed, the partners may be ethically required to do so under Rule 5.1, which obligates partners to create an environment that promotes compliance with the rules of conduct.[149] An atmosphere of ethical consideration also makes good business sense. Associates in an intolerant atmosphere will be afraid to raise issues, thereby potentially exposing the partners to more serious ethical lapses (and malpractice) in the future.

This illustration so far has assumed that the associate has a legitimate and well-founded objection to the propriety of the interview. Elimination of Rule 5.2(b) could arguably cause associates to overreact and constantly raise ethical concerns, even unfounded objections. However, if the concern is unfounded, the senior lawyer should easily quell the associate's concerns. This discourse will train the associate and eliminate his cynicism, as well as give the senior lawyer an opportunity to assess the associate's legal skill and judgment.

In sum, the enhancement of ethical debate would benefit law firms. Firm lawyers will more likely conform to ethics rules, thereby reducing malpractice exposure and ethical sanctions. Firm associates will be better trained. Nevertheless, these benefits may come at some cost. In some cases, ethical debate may slow the process of running the law firm and representing the client, but such "ethical inefficiencies" are not unique to firms. Other lawyers must take the time to explain to a client that they cannot violate the rules of professional conduct[150] and must withdraw from the representation if they otherwise would violate the rules.[151] The rules of profes-

147. Rule 8.4 bars a lawyer from violating the rules "through the acts of another." *Id.* Rule 8.4(a). For a discussion of an associate's duty to report a senior lawyer, see *supra* note 143.

148. The partners thus could achieve at least some of the aims that the ABA's Special Professionalism Committee urged for law firms during this professionalism crisis. *See supra* note 3.

149. For a discussion of Rule 5.1, see *supra* note 83.

150. Rule 1.2(e) requires a lawyer to give a "Miranda warning" to clients who expect him to violate the rules. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(e). For a discussion of a lawyer's duty to inform clients of relevant limitations, see *supra* note 97.

151. For a discussion of the mandatory withdrawal provisions of Rule 1.16(a), see *supra* note 96.

sional conduct appropriately value ethical conduct above efficiency in these instances, and they should do so for all lawyers.

CONCLUSION

Rule 5.2(b), although well intended, presents too many problems to justify its continued use. The ABA and the individual states should eliminate it from their rules of professional conduct. The laudable goal of Rule 5.2(b), acknowledging the reality of multi-lawyer practice, can be achieved through less harmful means. In fact, the disciplinary scheme already has sufficient flexibility to address the predicament of the junior lawyer if he is less culpable than the partner. Disciplinary rulemakers should go one step further and affirmatively reward attorneys for ethical debate by making such consideration a mitigating factor if the lawyers reach a wrong decision. Through these simple means, rulemakers can foster thoughtful consideration of ethical issues and enhance professionalism.