CREATING SPACE FOR CONSTRUCTIVE DISSENT IN LARGE LEGAL ORGANIZATIONS

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organizations such as law firms practice in a hierarchical structure where they often have little or no say about the clients and matters they represent and how those cases are handled for the first several years of their careers. Thus, junior lawyers in large firms lack the volitional capacity to make decisions regarding their conduct and act upon those decisions in a way that satisfies their legal and professional obligations.

Model Rule of Professional Conduct 5.2, the lone rule which purports to address this issue provides little actual guidance and no safe harbor for junior attorneys confronted with unethical orders. Moreover, firm culture and administration seldom provide support or protection for junior attorneys who wish to dissent or otherwise exercise independent judgment when faced with an ethical dilemma. Subordinate attorneys are therefore faced with the unenviable choice of engaging in unethical conduct at the direction of a supervisor or refusing at great detriment to their career.

This article examines the challenges a junior attorney faces in rendering the independent judgment to act ethically while practicing in a large law firm with top-down decision-making, with particular focus on the situation when an associate is told to act in a way which they believe is unethical. The article then examines possible solutions, both rule-based and organizational, which might be employed either individually or in concert with one another to address such situations and to create a culture within firms which values and supports ethical decision-making.

INTRODUCTION

The law is a self-regulated profession[1] and lawyers are called upon to exercise their independent professional judgment with respect to their taking on new matters, handling of cases, interactions with clients, third parties and tribunals, and overall adherence to the Rules of Professional Conduct. However, attorneys who work within large organizations such as law firms practice in a hierarchical structure where they often have little or no say about the clients and matters they represent and how those cases are handled for the first several years of their careers. Thus, junior lawyers[2] in large firms lack the volitional

1. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHIC. L. SCH. ROUNDTABLE 381, 399 (2001).

2. This article uses the terms "junior" and "subordinate" attorneys interchangeably to refer to those associates in the early years of their careers who

capacity to make decisions regarding their conduct and act upon those decisions in a way that satisfies their legal and professional obligations.

The Rules of Professional Conduct are the primary authority governing attorney ethical conduct.[3] However, these rules as presently conceived offer little recourse to junior lawyers in large organizations who are faced with orders or instructions they perceive as unethical. The lone rule purporting to address this dilemma, Model Rules of Professional Conduct (M.R.P.C.) 5.2, provides little actual guidance and no safe harbor for junior attorneys confronted with unethical orders.

Moreover, firm culture and administration seldom provide support or protection for junior attorneys who wish to dissent or otherwise exercise independent judgment when faced with an ethical dilemma.[4] Subordinate attorneys are therefore faced with the unenviable choice of engaging in unethical conduct at the direction of a supervisor or refusing at great detriment to their career.

The issue of subordinate dissent is not one that can be addressed by rule change alone. Rather, the profession must look holistically at the ways in which firm structure, including management, organization, and profit models, significantly hobble the ability to create a culture in which ethics are valued and those who seek to uphold their highest ideals are recognized and rewarded.

This article examines the challenges a junior attorney faces in rendering the independent judgment to act ethically while practicing in a large law firm with top-down decision-making, with particular focus on the situation when an associate is told to act in a way which they believe is unethical. The article then examines possible solutions, both rule-based and organizational, which might be employed either individually or in concert with one another, to address such situations and to create a culture within firms which values and supports ethical decision-making.

are subject to the authority of more senior attorneys, including partners, of-counsel, and senior associates.

3. Although individual states modify the Model Rules of Professional Conduct [hereinafter M.R.P.C.] when adopting them, the Model Rules as promulgated by the American Bar Association will form the basis for discussion in this article.

4. Of course, the term "constructive dissent" includes much more than ethical violations but may extend to disagreements over case strategy and other decisions. This article primarily focuses on the junior associate's ability to dissent regarding ethical questions but recognizes that any solution may apply to dissent more broadly.

Part I of this article begins by examining the current construct of attorney regulation and dissent, including both: 1) the lawyer's duty to self-regulate under the M.R.P.C.; and 2) the legal services organization as hierarchical structure (using the law firm as prototype). Part II considers some of the dilemmas lawyers may face, such as: 1) on-boarding new clients and matters; 2) strategic dilemmas, most notably in litigation; 3) dilemmas involving conflicts of interest; 4) dilemmas involving third parties, including the tribunal and adversaries; and 5) case management dilemmas. Part III looks at the ways in which the current rules fail to provide any meaningful recourse for organizational lawyers facing ethical dilemmas that stem from decision-making of superiors.

Finally, Part IV offers some solutions, suggesting that as a starting point, the Rules of Professional Conduct must be revised to provide better support and protection for junior attorneys. The solution recognizes that changing the rules in a vacuum will be ineffective. Rather, widespread structural and cultural change is the ideal way to instill ethical values throughout large legal organizations. Such changes must include better mentoring and systems for receiving ethical complaints in short term. In the longer run, the profession should holistically examine firm structure, management, and compensation to assure that ethics are prioritized and neither in tension with nor subjugated to profit-making.

I. THE CURRENT CONSTRUCT

A. The Law As A Self-Regulated Profession

The origins of the current system of attorney self-regulation date back to the late 19th century. Lawyers in the United States were historically characterized as an American governing class, "uniquely capable of identifying and pursuing the public good."[5] However, the late 19th century saw a crisis of professionalism in the legal profession as lawyers became more business-oriented at the expense of some of their professional ideals.[6] The reasons for this shift included the growth in the number and size of large law firms and the ways they began to operate more like business enterprises[7] as well as the growth

5. Pearce, *supra* note 1, at 390.

6. *See* Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 57–58 (Gerard W. Gawalt ed., 1984).

7. Elite law firms moved to adopt the "Cravath System" of specialization and practice, developed by Cravath, Swaine & Moore, in creating the framework for the

of the plaintiffs' bar and attorneys representing plaintiffs for contingency fees.[8] This shift in emphasis to business over professionalism began to erode the public's trust and confidence in the legal profession.[9]

The legal profession responded to this crisis of professionalism by creating structures and organizations to ensure that lawyers worked in the service of the public good.[10] These included self-policing bar associations to "control admission to the profession, promulgate ethics rules, and discipline offenders."[11] This development resulted in the current structure of self-governance, which is based upon the promulgation of rules of professional conduct, adopted by each state bar association.[12]

The profession's model of self-regulation, which began in the late 19th century, continues to this day. "The ABA Model Rules of Professional Conduct, as enacted by the various states, applies to all members of the legal profession, regardless of the nature of their professional activities."[13] The Model Rules of Professional Conduct apply equally to the practice of law in all settings, including private practice, in-house, and with some modifications, the public sector. The Model Rules of Professional Conduct ascribe a series of rules for attorneys to follow in their handling of matters and their dealings with clients, adversaries, third parties, and the tribunal.[14] The state bar associations are delegated authority by the courts to adopt and modify these rules and enforce them through disciplinary measures, as well as to regulate entry and qualification to practice.[15]

modern large law firm. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 23–34 (1977).

8. *See* Russell G. Pearce & Pam Jenoff, *Nothing New Under the Sun: How the Legal Profession's Twenty-First Century Challenges Resemble Those Of The Turn Of The Twentieth Century*, 40 FORDHAM URB. L. J. 481, 484 (2012).

9. *See id.* at 483.

10. *See id.* at 484.

11. *Id.* at 484–485.

12. All 50 states have adopted some form of the Model Rules. *See* Robert A. Creamer, *Form Over Federalism: The Case for Consistency in State Ethics Rules Formats*, PRO. LAW. 23, 23 (2002); Douglas R. Richmond, *Associates as Snitches and Rats*, 43 WAYNE L. REV. 1819, 1824 (1997).

13. Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 268 (1985).

14. *See* Creamer, *supra* note 12, at 23.

15. *See id.*

The Model Rules of Professional Conduct address, with limited exceptions,[16] the responsibilities of individual lawyers rather than organizations. They consistently emphasize the independent judgment of the attorney in making decisions and acting ethically. As one commentator has noted, central to this model is the notion of autonomy. Professionals can apply complex skills to social problems only if they have discretion to select the manner in which their services are rendered.[17]

B. The Law Organization as Hierarchical Structure

Large law firms as organized today are notoriously hierarchical in structure and operations.[18] They are generally run by a group of equity partners who share in the profits of the firm.[19] Below them work attorneys of various levels: non-equity partners, of-counsel, senior, mid-level and junior associates, paralegals, law clerks, etc.[20] A typical case might be headed by a partner with an of-counsel or senior associate to oversee the work and then perhaps a mid-level and one or two junior associates.[21] Decision-making on the case will reside almost exclusively with the partner and most senior members of the case team while junior members may handle only isolated or discrete

16. *See e.g.* MODEL RULES OF PRO. CONDUCT r. 1.10 (AM. BAR ASS'N 2020) (Imputation of Conflicts of Interest).

17. *Id.*

18. *See* Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905, 919 (1994); John P. Heinz & Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1111, 1120 (1978) (analyzing social structure of legal profession in Chicago).

19. *See* Gross, *supra* note 13, at 260 ("'[L]aw firm associate' [refers] to an attorney who is a regular employee of a law firm. The law firm typically pays the associate's salary. The overhead expenses connected with the associate's work are also borne by the law firm employing the associate."); John Basten, *Control and the Lawyer-Client Relationship*, 6 J. LEGAL PRO. 7, 8 (1981) (structure of profession changing as increasing number of lawyers work as employees).

20. *See* Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67
FORDHAM L. REV. 837, 857 (1998); Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, MINN. L. REV. 700, 747 n.202 (1988) (discussing organizational structure of large law firms and their impact on legal system); Jeffrey S. Slovak, *Giving and Getting Respect: Prestige and Stratification in a Legal Elite*, 5 AM. BAR FOUND. RSCH. J. 31, 32 (1980) (examining social impact of stratification of firm partners and house counsel).

21. *See* Gross, *supra* note 13, at 261. ("[The partner] . . . can give the associate particular assignments. He can direct the associate regarding the type of work that should be done, how it should be done, and when it should be done.")

parts of the project. More junior members may have little or no communication with the client.[22]

The law firm structure is also one of individual over group profit. Partners bring in business separately and they are recognized and compensated based on this individual gain. Similarly, junior attorneys are given bonuses based on hours billed (and the attendant revenue brought in by those hours). The system generally prioritizes profitability over independent, ethical decision-making, and in some cases, rewards conduct that is very much in tension with those ideals.

C. The Incompatibility Between Firm Practice and The Rules of Professional Conduct

The very nature of self-regulation as conceived in the Rules of Professional Conduct is premised upon autonomy and personal responsibility in decision-making.[23] However, the structure of the firm, with its top-down decision-making approach, eliminates a great deal of latitude for independent thought or judgment, particularly for junior attorneys.[24] Indeed, firm structure does not recognize, reward or in many cases even permit individual decision-making.[25]

The tension between the ethical mandates of professional conduct and the demands of practicing law in a profit-driven setting are nothing new. Indeed, this dilemma is in some sense a microcosm of the tension between business and profession which has plagued the legal community since the professionalism crisis which led to the promulgation of the first comprehensive code of professional conduct in the late 19th century.[26] Nevertheless, this intractable dilemma remains real and unresolved for all attorneys, and most pressingly subordinate attorneys in large legal organizations today.

Thus, practicing at a firm is in some sense incompatible with the spirit, purpose, and, in many cases, execution of the rules of professional conduct and it can sometimes be impossible or impracticable for an attorney in a large organization to comply. This

22. *Id.*

23. Indeed, it is "conventional wisdom that lawyers practice in groups but not in teams, because of the unique nature of the lawyer-client relationship and the high degree of professional judgment and autonomy required." Twitchell, *supra* note 20, at 700.

24. *See* Richard P. Nielson, Book Review, 8 ACAD. MGMT. REV. 701, 702 (1983) (reviewing DAVID W. EWING, DO IT MY WAY OR YOU'RE FIRED (1983)).

25. *See id.*

26. *See* Pearce & Jenoff, *supra* note 8, at 483.

tension manifests itself in unique and particularly challenging dilemmas for junior attorneys.[27]

II. DILEMMAS LAWYERS FACE

The tension for subordinate lawyers between autonomy in the practice of law and the top-down decision-making structure of law firms manifests itself in numerous ways. A few of the most common include: 1) on-boarding new clients and matters; 2) strategic dilemmas, most notably in litigation; 3) dilemmas involving conflicts of interest; 4) dilemmas involving third parties, including the tribunal and adversaries; and 5) case management dilemmas. In each of these scenarios, an attorney's ethical duties under the rules may be compromised or impossible to fulfill given the priorities and instructions of a superior.

A. The On-Boarding Dilemma

One of the most important decisions an attorney makes is whether to represent a client in a particular matter.[28] Interestingly, the issue of whether to take on a client is not covered by the Rules of Professional Conduct. The rules do not even address whether a party has become a client or not, instead leaving this to the common law.[29] Yet, the "on-boarding" question is highly germane to the issue of dissent in law firms for several reasons.

First, accepting a client is a question of volition and one in which the junior attorney in a large firm typically has little or no say. Second, the on-boarding dilemma has implications for numerous other ethical issues. The attorney contemplating a new client or matter must make sure there is no conflict of interest in handling the matter.[30] The

27. *See* Gross, *supra* note 13, at 259 ("The ethical problems of the law firm associate differ from the ethical problems of the law firm partner or the sole practitioner.").

28. *See* W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 999 n.50 (2006).

29. *See* Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d. 686, 693 n.4 (Minn. 1980) (citing Minn. L. Rev. Ed. Bd., *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 MINN. L. REV. 751, 759 (1979) (finding that "[a]n attorney-client relationship is created when a person 'seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice.'")).

30. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2020) (Conflict of Interest: Current Clients); MODEL RULES OF PRO. CONDUCT r. 1.9

attorney must decide whether they have the time and expertise to handle the matter competently and diligently.[31] The attorney also must make sure that the matter is one that they want to work on and is a case that they can or should handle.[32] Additionally, the attorney must undertake the careful analysis of whether accepting a new representation will present a conflict of interest with other current clients,[33] former clients,[34] prospective clients,[35] or the attorney's own interests.[36] A junior attorney who does not have a voice in whether or not to accept a new client or matter will face many of these issues, despite the fact that the on-boarding decision was not theirs.

This decision is important, among other reasons, because once an individual or organization becomes a client, a host of additional duties attach under the Rules of Professional Conduct.[37] And it is remarkably difficult under the Rules of Professional Conduct for an attorney to

(AM. BAR ASS'N 2020) (Duties to Former Clients); MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2020) (Organization as Client); MODEL RULES OF PRO. CONDUCT r. 1.11 (AM. BAR ASS'N 2020) (Special Conflicts of Interest for Former and Current Government Officers and Employees); MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR ASS'N 2020) (Conflict of Interest: Current Clients: Specific Rules).

31. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020) (Competence); MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2020) (Diligence).

32. *See* Steve Berenson, *Politics and Plurality in a Lawyer's Choice of Clients: The Case of* Stropnicky v. Nathanson, 35 SAN DIEGO L. REV. 1, 1 (1998).

33. M.R.P.C. 1.7 provides that an attorney may not take on a client whose interests conflict with a current client, unless certain criteria (including client consent) are met. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2020).

34. M.P.R.C. 1.9 prohibits an attorney from taking on a matter that would present a conflict with interests of a former client, unless the former client consents. *See* MODEL RULES OF PRO. CONDUCT r. 1.9 (AM. BAR ASS'N 2020).

35. There are some instances where speaking with a prospective client and obtaining their confidential information can create a conflict that precludes an attorney from representing another client, even if that prospective client consultation does not result in a representation. *See* MODEL RULES OF PRO. CONDUCT r. 1.18 (AM. BAR ASS'N 2020).

36. There are a wide range of personal interests that can create a conflict of interest and prevent an attorney from taking on a client, including personal or familial interests, outside loyalties, or the attorney's own business interests. *See* MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2020); MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR ASS'N 2020).

37. For example, while an attorney may have duties to both prospective (M.R.P.C. 1.18) and former (M.R.P.C. 1.9) clients, many duties, including competences, diligence, communication, and decision-making specifically apply only during the active life of a current attorney-client relationship. *See* MODEL RULES OF PRO. CONDUCT r. 1.1–1.4, 1.18, 1.9 (AM. BAR ASS'N 2020).

terminate a representation once it has begun,[38] so the decision whether to begin that representation in the first place is incredibly important.

In a solo practice of law, an attorney will typically meet or speak with a prospective client before deciding whether to take on the representation. An attorney might decline the representation because they are too busy with other cases, because of a lack of expertise in the subject matter of the case, or because the case is not particularly valuable. Other times, an attorney may choose not to represent a client because doing so would create a conflict of interest or violate another legal or ethical duty. Occasionally, an attorney may decide not to represent a client because the matter is ethically or morally repugnant to him or her.[39]

However, attorneys at firms are often denied that discretion, especially during the early years of their careers. At large firms, partners, often with longstanding client relationships, make the decisions regarding on-boarding clients, subject to conflicts considerations and other rules. These rainmakers will be loath to say no to any matter the firm can handle. Clients are typically brought in by partners without consulting more junior attorneys.

Only once the matter has been taken on by the firm will subordinates be notified and assigned to the case. Work on various matters is divided up among more junior lawyers, often through a centralized work assignment system, such as an assigning partner. Thus, junior associates have no role in on-boarding and cannot voice such hesitations, instead inheriting whatever clients and matters a partner has chosen, as well as all of the attendant ethical issues. Once

38. M.R.P.C. 1.16 governs terminating the attorney client relationship. *See* MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS'N 2020). M.R.P.C. 1.16(a) provides a list of circumstances where the attorney must terminate the relationship (mandatory), while M.R.P.C. 1.16(b) contains a list of circumstances where an attorney may terminate the relationship (permissive). *See id.*

39. *See* David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1039–40 (1995) (noting that both refusing and agreeing to represent clients carry moral significance). *But see* Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 15 (1951) ("[T]here is nothing unethical in taking a bad case or defending the guilty or advocating what you don't believe in. It is ethically neutral."). For example, King and Spalding decided no longer to represent the House of Representatives in the Defense of Marriage Act matter. *See* John Gibeaut, *Withdrawing from Controversial Case Was Awkward for King & Spalding, But That's About All*, AM. BAR ASS'N J. (Jul. 1, 2011), https://www.abajournal.com/magazine/article/at_unease_withdrawing_from_controversial_case_was_awkward_for_king_spalding.

a firm has taken on a case, an associate's refusal to work on it may well have consequences for that individual's career.[40]

B. The Strategic Dilemma

The senior attorney's decision to take on a client is only the beginning of complex ethical questions for attorneys. Once a case is underway, an attorney faces myriad decisions about case strategy, decision-making, communications, conflicts, and other issues which may arise.[41]

Litigation, while not the only practice setting, provides useful ground for examining the strategic dilemmas attorneys face.[42] In particular, litigation "involves many 'gray areas' calling for complex discretionary judgment."[43] For example, in litigation, attorneys must decide which claims to bring, or which defenses to raise, how extensive discovery requests should be and how to respond to them, which witnesses to depose and/or call at trial, whether to settle, etc.[44]

The classic example arises early in a case when an attorney must decide what claims to include in a complaint or what defenses to include in an answer. M.R.P.C. 3.3 requires that attorneys only include meritorious claims and defenses.[45] Similarly, Federal Rule of Civil Procedure 11 prohibits attorneys from bringing frivolous claims or defenses.[46] Yet many junior attorneys have faced direction from an

40. There is anecdotal evidence of firms allowing associates not to work on cases to which they have moral objections, such as representing big tobacco, the Catholic church in sex abuse cases, or working with overseas corporations that might have racist or sexist views inconsistent with American law and cultural. However, there is a dearth of authority for such incidents.

41. This article addresses strategic ethical dilemmas in the context of litigation but recognizes that analogous issues may arise in transactional and other practice settings.

42. *See, e.g.*, Suchman, *supra* note 20, at 838–45.

43. Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 712 (1998).

44. *See id.* at 712–13.

45. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

46. FED. R. CIV. P. 11(b) (in bringing a claim, the attorney must certify that: "(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable

overzealous superior to bring a claim or defense that the junior attorney knows has no basis in law or fact. If the junior attorney refuses, they may face career consequences. Yet if they comply and sign the pleading, sanctions or attorney discipline may result.[47]

Where attorneys differ as to litigation strategy, junior attorneys must also subjugate their independent judgment to the will of the senior attorney. For example, the senior attorney may direct their subordinate to engage in discovery requests that are burdensome and therefore beyond the permissible scope of the Federal Rules of Civil Procedure.[48] Where the senior and subordinate attorneys disagree about the scope of discovery, the judgment of the senior attorney will prevail. For example, the senior attorney could demand more depositions than are necessary, resulting in excessive and unnecessary billing and cost to the client.[49]

C. The Conflicts Dilemma

There can also be disagreements between partners and subordinates about the existence of conflicts of interest and the steps necessary to resolve them. Conflicts may arise either at the start of a case or further down the line when there is a discovery of new facts or parties that create a potential conflict. For example, a factual discrepancy might arise between two clients in a joint representation that makes it impossible to continue representing both parties. Or, a

opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.").

47. FED. R. CIV. P. 11(c) ("If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.").

48. The scope of discovery is covered by Federal Rules of Civil Procedure rule 26, which provides for broad discovery subject to limitations including relevance " and whether the burden or expense of the proposed discovery outweighs its likely benefit." FED. R. CIV. P. 26. Federal Rules of Civil Procedure rule 26(b)(2)(C) provides that discovery must be limited where, "…(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." FED. R. CIV. P. 26(b)(2)(C).

49. *See* MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2020) (creating an ethical duty for attorneys not to charge unreasonable fees. Determination of whether fees are reasonable is a case-specific inquiry and includes factors such as the degree and complexity of the matter, as well as customary fees for comparable matters).

new party might be identified in the course of a matter whose involvement creates a conflict with either another current or former client.

The existence of conflicts of interest and the determination of whether they are consentable are very much a matter of judgment and subjective assessment of risk. In determining whether there is a conflict of interest, an attorney must decide if direct adversity exists or whether there is "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities" to others."[50] To determine whether it is permissible to continue the representation despite the conflict, the attorney must consider whether, among other factors, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client."[51] Both of these considerations are highly subjective analyses which, in the firm context, will generally be undertaken by the senior attorney. The subordinate will have little or no say in whether a conflict exists and whether it is consentable. Rather, they will be subject to another's decision, and in some cases forced to continue the representation, notwithstanding a personal conviction that doing so is a conflict of interest and a violation of their professional duties.[52]

D. Third Party Dilemma

The conflict between hierarchical decision-making in law firms and an attorney's individual duties under the Rules of Professional Conduct may manifest itself not just in the attorney's dealings with clients, but with courts and third parties as well. For example, attorneys are expected to deal candidly with the tribunal and to disclose controlling relevant authority.[53] Yet a partner might instruct an associate to strike a case which is relevant, but harmful to the

50. MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2020).

51. MODEL RULES OF PRO. CONDUCT r. 1.7(b)(1 (AM. BAR ASS'N 2020).

52. *But see* McCurdy v. Kansas Dep't of Transp., 898 P.2d 650, 653 (Kan. Ct. App. 1995) (holding that attorney who refused work due to conflict was improperly suspended. "MRPC 5.2 permits subordinate attorneys to rely on the judgment of their superior, this rule, however, does not require a subordinate attorney to defer all questions of ethical conduct to his or her superior.") (citing Wieder v. Skala, 609 N.E.2d 105, 108–09 (N.Y. 1992)).

53. *See* MODEL RULES OF PRO. CONDUCT r. 3.3(a)(2) (AM. BAR ASS'N 2020) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

client's case from a draft brief or characterize it in a way that is less damaging, thereby misrepresenting the law to the court.

Similarly, attorneys are not permitted to mislead the tribunal; when a client makes a false statement under oath, the attorney faces the difficult task of having the client correct that statement or withdrawing from the case.[54] However, a partner might instruct the associate to let the statement stand and proceed with the representation.

Attorneys also have a duty to deal fairly with adversaries.[55] Notwithstanding this duty, a partner might tell an associate to draft unduly vexing and burdensome discovery requests, or to withhold documents or information which are arguably responsive to a discovery request but injurious to the client's case. The subordinate would again face the dilemma of whether to comply with orders and violate ethical rules, or to refuse to do so and risk the consequences to their career.

E. The Case Management Dilemma

The constraints of large firm life may also hinder an attorney's ability to fulfill his ethical duties with respect to managing cases.[56] The tension between the ways in which junior attorneys are directed to run cases and their ethical duties under the Model Rules of Professional Conduct can also encompass areas such as time spent on a case, communication with clients, and consultation with clients with respect to decision-making and billing.[57]

Ethical dilemmas may result regarding the time and effort to be expended on a case. For example, an attorney may be told to only spend a certain number of hours on a case, which may be insufficient

54. *See* MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2020). ("A lawyer shall not knowingly . . .offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.").

55. *See* MODEL RULES OF PRO. CONDUCT r. 3.4 (AM. BAR ASS'N 2020). (providing in relevant part that, "[a] lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; . . .(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.").

56. *See* Douglas R. Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W. VA. L. REV. 449, 449–50 (2003) [hereinafter, Richmond, *Subordinate Lawyers and Insubordinate Duties*].

57. *See id.* at 452, 461.

to gain an understanding of the law and fulfill their duty of competence.[58] Similarly, a junior attorney who is overloaded with cases may not be able to spend adequate time on a case to handle it diligently, as required by the rules.[59] By contrast, an attorney who is a sole practitioner and not subject to the discretion of a more senior attorney would be able to make more independent decisions about time and effort expended in order to fulfill these duties.

In a similar vein, the subordinate attorney in a hierarchical organization may struggle to fulfill their duties regarding communication and decision-making. M.R.P.C. 1.4 requires regular communication with the client.[60] However, junior attorneys are often restricted in their client contact and may be precluded from fulfilling this obligation. M.R.P.C. 1.2 requires consultation with the client in decision-making, but junior attorneys who are instructed to act without discussing matters with the client have little choice but to violate this rule.[61]

Another area in which subordinates may be ordered to violate ethical rules is in billing and fees. One might not ordinarily consider

58. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

59. *See* MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2020) ("A lawyer shall act with reasonable diligence and promptness in representing a client."). *But see* Davis v. Ala. State Bar, 676 So. 2d 306, 307–08 (Ala. 1996) (pointing out that associates were assigned burdensome caseloads of up to 600 files per lawyer with minimal staff support and worked under limitations on the amount of time they could spend with clients and working on cases, as well as being subjected to a quota system that required them to open a specified number of files in a certain timeframe, and prohibition on return existing clients' calls so that they could spend more time developing new business).

60. MODEL RULES OF PRO. CONDUCT r. 1.4(a) (AM. BAR ASS'N 2020) (provides that, "[a] lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.").

61. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020) (provides that: "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").

fees to be an ethical issue. However, M.R.P.C. 1.5 provides, "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[62] The rule goes on to provide factors for consideration in determining whether a fee is reasonable, including the complexity of the matter, typical fees for the type of matter, etc.[63] Associates may face great pressure to bill enough hours and spend excessive time on a matter.[64] The associate then faces the dilemma of following the order and violating M.R.P.C. 1.5.

F. Aggregating the Dilemmas: How Prevalent Are They?

The aforementioned examples highlight just some of the myriad situations where a partner's direction may put a subordinate attorney in conflict with his independent ethical duties under the rules of professional conduct. Reading through this laundry list of potential dilemmas may cause the reader to ask: how often do junior associates actually find themselves in these situations?

Researching ethical dilemmas such as those highlighted above is problematic at best. Many of these situations are resolved without rising to the level of a published opinion by a court or ethics board.[65] Thus, the evidence to this point has tended to be anecdotal rather than statistical. A follow-up project would include a survey of junior associates at law firm regarding the frequency and nature of such incidents, which could be contrasted with survey results from attorneys in other practice scenarios, such as small firms and in-house.

Notwithstanding the lack of current data, the gap between these real-life dilemmas and the guidance provided by the Rules of Professional Conduct (as set forth more fully in Part III below) is real and worthy of examination.

Additionally, although beyond the scope of this article, an important corollary for subsequent study is the intersection between

62. MODEL RULES OF PRO. CONDUCT r. 1.5(a) (AM. BAR ASS'N 2020).

63. MODEL RULES OF PRO. CONDUCT r. 1.5(a)(1), (3) (AM. BAR ASS'N 2020).

64. However, in other circumstances, an associate may feel pressure to cut hours in order to increase partner realization on fees. This would not be a violation of M.R.P.C. 1.5, but pressure to actually spend time on a matter might affect a junior attorney's ability to work competently and diligently on a matter under M.R.P.C. 1.1 and 1.3, as discussed above. *See* MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2020).

65. *See* Susan Humiston, *Who Gets Disciplined?*, 74 BENCH & BAR OF MINN. 8, 8 (2017) (explaining that in Minnesota approximately 150 to 180 attorneys get disciplined each year, which is extremely small percentage of the 29,000 attorneys in the state at the time).

the issue of constructive dissent and underrepresentation of women and people of color in law firms. Despite efforts to diversify, law firm partnerships remain overwhelmingly white and male.[66] To the extent that women and people of color are in subordinate positions at law firms, they are disproportionately affected by this inability to raise ethical concerns. Further examination is needed to examine the effect of this issue on underrepresented groups in law firm advancement, attrition, and discipline.

III. THE FAILED PROMISE OF THE RULES OF PROFESSIONAL CONDUCT

Given the dilemmas posed above and the numerous ethical rules to which attorneys are expected to adhere, one might expect a similarly complex set of rules to aid the junior attorney facing such issues. However, there is only one rule that attempts to offer any direct guidance for a subordinate attorney in dealing with instructions from superiors that affect their ability to comport with ethical rules. Model Rule of Professional Conduct 5.2 provides:

> (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
>
> (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.[67]

Thus, when lawyers in a supervisor-subordinate relationship face an ethical dilemma, each lawyer has an independent ethical duty to fulfill. This includes the junior attorney, who must simultaneously meet their ethical obligations while following the orders of a superior which might require breaking the rules of professional conduct. As one commentator aptly notes:

> An attorney who violates the disciplinary rules is subject to disciplinary action… An associate is confronted with an

66. *See* Meg McEvoy, *Analysis: Black Workers Are Under-Represented in the Legal Industry*, BL L. (June 11, 2020, 4:45 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-black-workers-are-under-represented-in-legal-industry (white lawyers make up 89.87% of equity partners); Debra Cassens Weiss, *Female Lawyers Still Underrepresented, Especially in Partnership Ranks; Which Law Firms Do Best?*, AM. BAR. ASS'N J. (Sept. 16, 2021) https://www.abajournal.com/news/article/female-lawyers-still-underrepresented-especially-in-partnership-ranks-which-law-firms-do-best (women make up just 23.3% of equity partners).

67. MODEL RULES OF PRO. CONDUCT r. 5.2 (AM. BAR ASS'N 2020).

> unpleasant problem when a partner gives him instructions that the associate believes are unethical. Under the ABA Model Code of Professional Responsibility, the associate receives little guidance except for the warning that he may be disciplined for violations of the Model Code of Professional Responsibility. Even if he fears the loss of his job, an associate must comply with the Model Code of Professional Responsibility. Disobeying the instructions of a partner raises different problems.[68]

Mainly, by disobeying instruction, the attorney risks discharge and no recourse if an at will employee.

Rule 5.2(b) does provide a limited exception for the subordinate attorney where they act "in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[69] However, this rule is inadequate and fails to take into account many circumstances in which the junior attorney may be ordered to act in ways that are in tension with their professional duties.

First, the rule only covers when the senior and junior attorney disagree over an "arguable question of professional duty."[70] However, in many of the scenarios presented in Part II, the course of action which the junior attorney is obliged to follow based on orders from the superior is a *clear* violation of an ethical duty, not an arguable question of one.[71] As one commentator has noted, "Where the potential ethics violation is clear, or where the supervisory lawyer's resolution is

68. Gross, *supra* note 13, at 268, 297.

69. MODEL RULES OF PRO. CONDUCT r. 5.2(b) (AM. BAR ASS'N 2020) ("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.").

70. *Id. See also* MODEL RULES OF PRO. CONDUCT r. 5.2, Comment 2 (AM. BAR ASS'N 2020). ("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.").

71. *See* Andrew M. Perlman, *The Silliest Rule of Professional Conduct: Model Rule 5.2(b)*, 19 PRO. LAW. 14, 16 (2009) (one downside is that Rule 5.2 applies to such a narrow set of circumstances that it is practically inapplicable); Rachel Reiland, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want to Take a Closer Look at Model Rules 5.1, 5.2 and 5.3*, 14 GEO. J. LEGAL ETHICS 1151, 1158–59 (2001).

unreasonable, Rule 5.2(b) provides a subordinate lawyer no shelter from discipline."[72]

Clearly, the rule drafters did not contemplate following the orders of a senior attorney which the subordinate is confident violate the rules of professional conduct. To the contrary, by addressing only questionable orders, the drafters evince a strong intent not to extend this latitude to clear violations of the rule. However, clear violations are the very problem which most pressingly needs attention, and the rule remains silent on this problem, and instructions for the junior attorney faced with such a dilemma are nonexistent.

Thus, M.R.P.C. 5.2 is vague and confusing. In one instance, it seems to tell the junior lawyer that they are responsible for their own conduct, regardless of orders. However, in the next sentence, it instructs them to defer to judgment of the senior lawyer—but only in certain ambiguous circumstances.[73]

Additionally, even for circumstances that are covered by Rule 5.2 in its current form, the effect of the rule for the junior attorney is unclear. Rule 5.2(a) does not act to establish a defense or an excuse for engaging in unethical conduct at the direction of a superior. Rule 5.2(a) does not relieve junior attorneys from accountability. They cannot avoid responsibility by deferring decisions involving issues of professional responsibility to senior attorneys. For example, as one state appellate court held:

> We recognize that an associate attorney is not in the same position as an attorney associating into a case. There is a clear imbalance of power between an often younger associate and an older partner or supervisor, and situations may arise where an associate is put into a difficult position by questioning a more experienced attorney's choices. Nonetheless, every attorney admitted to practice in this state has independent duties that are not reduced or eliminated because a superior has directed a certain course of action.[74]

72. Richmond, *Subordinate Lawyers and Insubordinate Duties*, *supra* note 56, at 464.

73. *See* Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 888–91 (1997).

74. Jay v. Mahaffey, 161 Cal. Rptr. 3d 700, 718 (Cal. Ct. App. 2013) (holding that following superior's orders was not a defense in claim of malicious prosecution).

Thus, M.R.P.C. 5.2 does not shield the junior attorney.[75] Rather it acts to provide a semblance of mitigation in very limited circumstances. Or, as one commentator has noted, "[w]here both a supervisory lawyer and a subordinate lawyer are involved in misconduct, their degrees of culpability may vary but ultimate responsibility does not."[76]

Nor can M.R.P.C. shield the junior attorney from consequences of following unethical orders which violate other rules and laws or the professional discipline which may follow from such a breach. These may include sanctions under the Federal Rules of Civil Procedure, such as F.R.C.P. 11, which prohibits including frivolous claims or defenses in a pleading,[77] or liability in a civil suit for legal malpractice.[78]

One of the reasons that M.R.P.C. 5.2 and the other rules fail to address the junior attorney's dilemma is that they are by nature geared toward instructing an independent attorney on how to navigate the ethical issues which arise. They are written with the expectation that the attorney has not only the volition but the capability to make and execute that independent judgment. They do not account for the interpersonal dynamics of a hierarchical organization such as a firm which may not permit an attorney to act in an ethical manner, even when the attorney recognizes the violation and wants to act properly.[79]

75. *See* Gross, *supra* note 13, at 299 n.173 (citing *in re Mogel*, 238 N.Y.S.2d 683, 685 (N.Y. App. Div. 1963)).

76. Richmond, *Subordinate Lawyers and Insubordinate Duties*, *supra* note 56, at 466 (internal quotes omitted). *See also* Levin v. Seigel & Capitel, Ltd., 733 N.E.2d 896, 898–99 (Ill. App. Ct. 2000) (holding that attorney who signed pleadings and not his firm was liable for court sanctions under the states equivalent to rule 11 imposes a personal responsibility on the individual signer to validate the truth and legal reasonableness of the pleadings and other documents filed with the court. "This personal responsibility is nondelegable and not subject to principles of agency or joint and several liability.").

77. *See* FED. R. CIV. P. 11. *But see* MODEL RULES OF PRO. CONDUCT r. 5.2 Comment 1 (AM. BAR ASS'N 2020) ("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.").

78. *See* Richmond, *Subordinate Lawyers and Insubordinate Duties*, *supra* note 56, at 467.

79. Indeed, the rules are geared toward the attorney as monolith and often do not take into account the myriad roles, with differing ethical pressures, that attorneys may inhabit. For example, the rules do not cover the unique dilemmas of in-house counsel. *See* Pam Jenoff, *Going Native: Incentive, Identity & The Inherent Ethical*

Notwithstanding the defects of M.R.P.C. 5.2, it is important to note that there are other ethical rules which may provide limited support for the subordinate attorney when faced with such dilemmas. While M.R.P.C. 5.2 is the one that purports to deal with the decision-making dynamic between subordinate and senior attorneys, other rules proscribe attorneys from undertaking conduct which would violate ethical and moral norms. For example, M.R.P.C. 2.1 provides, "[i]n representing a client, a lawyer shall exercise *independent* professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as *moral*, economic, social and political factors, that may be relevant to the client's situation."[80] Similarly, M.R.P.C. 8.4 provides, "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[81]

Thus, these rules provide additional support for refusing to engage in unethical conduct when ordered. Indeed, M.R.P.C. 8.4(a) prohibits senior attorneys from ordering junior attorneys to act unethically in the first place.[82] One could argue that the unethical senior attorney who is pre-disposed to insisting that their subordinate follow an unethical course will be undeterred by these additional admonishments.

These additional rules, which attempt to provide normative guidance for the attorney seeking to act ethically, still do not provide concrete solutions for how to do so for the junior attorney in a hierarchical organization.

IV. POSSIBLE SOLUTIONS

Given the intractable tension between independent ethical judgment and following unethical orders, as well as the inadequacies of the current rules in addressing the issue, what options does the junior lawyer have when they are that certain that the conduct they have been ordered to undertake violates ethical rules? First of course, the courageous associate may attempt to speak with their supervisor

Problem of In-House Counsel, 114 W. VA. L. REV. 725, 726 (2012). However, the rules do provide guidance for specialized attorneys in some circumstances, such as prosecutors. *See* MODEL RULES OF PRO. CONDUCT r. 3.8. (AM. BAR ASS'N 2020).

80. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2020) (emphasis added).

81. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020).

82. *See id.*

and convince that attorney to rethink the course of action.[83] Assuming that does not work, a junior attorney may go to another senior attorney, mentor, or ethics committee (to the extent one exists) within the organization for help.[84]

However, if the conflict may not be resolved through internal means, the junior associate faces an unenviable choice: "[s]ubordinate lawyers who, after responsible debate and affording their superiors reasonable deference, remain convinced that a proposed course of action is unethical, may (1) be required to ask to withdraw from the particular matter and be reassigned to other matters in the firm; or (2) in extreme cases, be required to resign from the firm."[85]

Career suicide cannot be the answer to this dilemma. Rather, a comprehensive solution is required which provides practical advice to attorneys faced with unethical orders while reconceptualizing the system which created and perpetuates this ethical tension in the first place. Thus, the proposed reforms include: (1) modifying the rules to provide better guidance and protection for subordinate attorneys; and (2) broad reform of legal organizations to ensure that ethical decision-making is valued and rewarded.

A. Modifying Rule 5.2

The first part of the solution is to modify M.R.P.C. 5.2, the rule which, as discussed more fully above, purports but fails in any meaningful way to provide guidance to junior attorneys. A starting point would be to modify the language of the rule to increase the protections afforded to subordinates.

Of course, the public policy for not modifying the rule too expansively is clear. If taken too far, this could amount to a kind of "superior orders" defense that would shelter the junior attorney from

83. *See* Andrew J. Seger, *Marching Orders: When to Tell Your Boss "No"*, 87 FLA. BAR J. 34, 34 (2013).

84. *See id. See also* Gross, *supra* note 13, at 300–02 (issues of confidentiality would in many cases preclude seeking outside assistance.); MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020) (prohibits disclosing client information); MODEL RULES OF PRO. CONDUCT R. 1.6(b)(4) (AM. BAR ASS'N 2020) (does permit certain disclosures when seeking advice on potential conflicts of interest, but that exception is not broad enough for the attorney to utilize it in seeking outside advice in most cases).

85. Richmond, *Subordinate Lawyers and Insubordinate Duties*, *supra* note 56, at 467 n.124. *See also* 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).

any discipline. Indeed, some have argued that M.R.P.C. 5.2 already amounts to a superior orders defense—that junior associates are instructed to sit back and let superiors make all of the ethical decisions.[86] Under this rationale, if M.R.P.C. 5.2 were expanded, the junior attorney would then have a "blank check" for unethical conduct simply by involving a superior's instructions. Expanding this protection further might give junior associates too much latitude in avoiding the consequences of ethical breaches they are charged with carrying out.

However, any concern about an overly expansive rule change that might give junior attorneys too much latitude to hide behind superior orders could be tempered by requiring that the attorney attempt to raise ethical concerns before complying. For example, revised M.R.P.C. 5.2 language might read: *"if after good-faith attempt to raise ethical concerns both to the senior attorney and through available dissent chains, the subordinate attorney is still unable to convince their superior to abandon the course of action, they may be absolved of consequences of the ethical breach and any disciplinary action resulting therefrom."*

If properly modified, M.R.P.C. 5.2 could provide both guidance for seeking assistance in resolving dilemmas regarding unethical orders and a kind of safe harbor exculpation if such guidance is followed.

B. Modify the Rules Writ Large

Another possible solution is to re-envision the Rules of Professional Conduct overall in ways that are better suited to the realities of modern practice. One possibility with respect to law firms is to conceive the rules as a collective ethic. Instead of modifying M.R.P.C. 5.2 to excuse the junior attorney, why not reconceptualize the rules more broadly to hold the firm or organization accountable for ethics violations?

Of course, beyond the difficulties associated with the scope and magnitude of such ambitious reform, there would be a number of difficulties with this approach. First, the Rules of Professional Conduct are very much geared toward individuals. This reflects the way in which law practice has traditionally been conceptualized, as a loosely aligned configuration of individually practicing professionals, rather than a cohesive organization.

86. *See* Rice, *supra* note 73, at 888–89.

However, there is precedent for a kind of collective responsibility in the Rules of Professional Conduct. This is found principally in M.R.P.C. 1.10: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so."[87] This rule provides that where one attorney in a firm has a conflict that precludes them from taking on a matter, the conflict is imputed to all members of the organization to share that conflict.[88]

In a similar vein, under M.R.P.C. 5.1(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 or has comparable managerial authority 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.[89]

Finally, attorneys face not only dilemmas about their own conduct but about the conduct of other attorneys. M.R.P.C. 8.3(a) provides, "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[90] Thus, the attorney may in many circumstances not only have a duty not to follow the unethical orders of a superior, but where the superior undertakes the ethical behavior themselves, has a duty to report them.[91] (However, under the present system, doing so may arguably have even more serious career consequences for a subordinate attorney than refusing to follow unethical orders itself).[92]

Thus, the law does attempt to provide some collective accountability to the organization and superiors. However, this is not on its own enough to take the burden off of the junior associate who

87. *See* MODEL RULES OF PRO. CONDUCT R. 1.10 (AM. BAR ASS'N 2020).

88. *See id.*

89. MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2020).

90. MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2020).

91. *See* Ryan Williams, *Reputation and the Rules: An Argument for a Balancing Approach under Rule 8.3 of the Model Rules of Professional Conduct*, 68 LA. L. REV. 931, 931–32 (2008).

92. *See* Wieder v. Skala, 609 N.E.2d 105, 106 (N.Y. 1992) (attorney fired after insisting firm report another attorney's misconduct as required by state ethics rules).

is forced to act unethically. Rather, any rewriting would have to shift the burden to the attorney ordering the conduct.

Another obstacle to reforming the Rules of Professional Conduct to more collective organizational ethic would be the ill-fit such a change would provide for those who do not work in large legal organizations. The rules have traditionally been addressed toward attorneys as a monolith, without regard to specialization or practice type. This approach is increasingly problematic given the diverse and specialized nature of modern legal practice. Though beyond the scope of this article, it would be beneficial to consider whether the Rules of Professional Conduct should be reformed to focus on context specific ethical norms, such as particular dilemmas faced by in-house counsel or the sole practitioner.

C. Changing Firm Culture

Any change to the rules is likely to be ineffective without significant changes to firm culture and organizational structure. In the law firm as presently conceived, partners are charged with bringing in business (*i.e.*, "rainmaking"). The partner is assessed and compensated by how much business (new clients and new matters) they bring into the firm and how much profit those yield. Therefore, they have the incentive to be able to stretch rules to take on new business regardless of ethical constraints, such as competence, diligence, and conflicts of interest. They also have incentive to please these clients by winning so that they will be happy and give more business to the firm, which may result in a more aggressive litigation strategy, regardless of the ethical rules. They also may engage in conduct that will result in more fees.

Conversely, an associate who is paid a relatively fixed salary may not be subject to the same pressures. This is not to suggest that partners are inherently more dishonest or that they intentionally or regularly deviate from ethical rules. However, the way that law firm structure is set up with profit and rainmaking lends itself to aggressive decisions which may skirt ethical rules. There is an undeniable difference in the roles and motives of partners and associates and the difference in how much farther a partner may be willing to stretch the rules may be driven by the differing nature of his role and compensation. The present structure, where partners bring in business and are compensated for doing so, creates a kind of competitive atmosphere

among the partners, rather than a collective ethic and goal.[93] This model also drives partners to direct subordinates to act with business development and profitability in mind in ways which are anathema to the ethical rules.

Any meaningful change to the Rules of Professional Conduct to address the ethical pressures placed on subordinates must be accompanied by law practice reform which takes into account the organizational norms which create these dilemmas in the first place. Changes to firm culture should, at a minimum, include: (1) development of reporting systems for ethical concerns; and (2) more formal mentoring processes for attorneys to seek help resolving ethical issues. In the bigger picture, firms need to reconceptualize the partnership model to create an emphasis on collective, ethical lawyering, instead of individualized profit centers.

1. Reporting Systems

Corporations have realized in the past two decades the importance of having mechanisms in place for reporting ethical complaints.[94] However, many law firms still have not implemented such measures.[95] Firms should create committees or ethics offices specifically designated to receive ethics complaints. As one commentator has noted:

> [F]ormal material controls on ethicality in these firms are remarkably weak. Although these are some of the most structurally-elaborated firms in the country, they conduct very little routine ethical evaluation, and they possess few mechanisms for incorporating ethical information (were it available) into the allocation of material rewards. Most of the firms' sanctioning regimes are premised on "exceptional case response," and yet the structures for identifying and reporting response-worthy cases are either nonexistent or marginalized.[96]

Some firms do have an office of ethics counsel. However, at present, this office is generally focused on resolving conflicts of interest either from potential/existing clients or from a lateral attorney seeking to join the firm and bring clients with them.

93. HOWARD LESNICK, BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW (1992).

94. Joseph L. Badaracco, Jr. & Allen P. Webb, *Business Ethics: A View from the Trenches*, 37 CAL. MGT. REV. 8, 23 (1995).

95. *See* Suchman, *supra* note 20, at 859.

96. *Id.* at 858–59.

Legal organizations should be required to institute a formal ethics hotline or complaint procedure. Junior attorneys and other staff with ethical concerns should be able to raise these concerns, anonymously and without threat of reprisal. This would create an alternative chain of complaint where a concerned attorney does not have to go through superiors and fear risk of reprisal. It also makes sure that organizations are aware of the complaints and issues across the organization (for which the firm itself may be liable) in order to be alert for the possibility of wider, more systemic issues.[97] (A system which allows for anonymous complaints would be ideal. However, given the contextual nature of complaints that arise, it may be difficult or impossible to keep the identity of the complainant confidential).

2. Mentoring

Attorneys should be encouraged to develop mentoring relationships throughout their careers. Firms do in many cases have mentoring programs where junior attorneys are assigned a senior attorney to guide and advise them professionally. Other times associates are encouraged to seek out mentors of their choice or let mentoring relationships form organically.[98] Mentors can be an important resource to help junior attorneys address and resolve ethical dilemmas by creating a senior resource outside the reporting chain (*i.e.*, someone who is not "part of the problem" and who can advise in a more disinterested and objective manner). While not a complete solution, mentors can be an important tool in resolving dilemmas and creating an ethical culture in firms.

3. The Bigger Picture

Changes such as creating reporting systems and enhancing mentoring are, at best, bandages which are inadequate to fix the larger ills of ethics in firm culture. Law firms must be reformed to de-emphasize the sole profit motive at the expense of ethics and professional ideals. Meaningful reform will not involve superficial

97. A complaint channel could be designed more broadly than ethical dissent to receive complaints of discrimination and other matters.

98. This latter scenario can be problematic for attorneys from traditionally underrepresented groups in the legal profession, as studies have shown that partners may have a subconscious bias toward mentoring junior associates who "look" like themselves. Since the majority of senior attorneys are still white and male, this can have the effect of excluding diverse junior attorneys from inclusion in mentoring opportunities, a phenomenon known as "second generation discrimination." *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 473 (2001).

changes, but rather systemic reform that weaves ethics into the culture, purpose, and operations of the firm.

The long-entrenched partner model and its sole focus on profitability has fostered many ills other than unethical decision-making. Reconceptualizing firm culture and structure in a more ethical way will help with other goals firms seek to achieve, including diversity and work-life balance. Thus, such reform should be seen not as a "should" or nuisance but rather a best practice and a business imperative.

A comprehensive proposal for such reform is beyond the scope of this article and creating a collective ethics-driven firm model will be the topic of a subsequent article.

CONCLUSION

The problem of junior attorney autonomy and ethical decision-making in large, hierarchical legal organizations such as law firms is not just a defect in the Rules of Professional Conduct. Rather, it is symptomatic of a larger culture in which ethics are at best a secondary or even tertiary priority, relegated behind profit-making and business development.

Any attempt to address this issue through the rule reform alone will be ineffective. Yet larger structural changes will require a near overhaul of the structure of firms and the profession—an overly ambitious proposal for which there is arguably little appetite in the real world.

Until such change is possible, the profession should adopt clearer rules regarding subordinate attorney dissent, including the steps a junior attorney can and should take when faced with unethical orders. At the same time, the profession should undertake more robust systems of reporting and mentoring so that attorneys have genuine recourse when faced with such dilemmas.