EPISODE #10

Associates' responsibility to address and report ethics issues

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Terri: When can a lawyer who is working under the supervision of another lawyer defer to the other lawyer's judgment about ethics issues? In this episode, we'll address that question and other related issues of interest to associates. I'm Terri Garland and you're listening to The Portable Ethics Lawyer.

Today, we're joined by Rawn Reinhard, a senior loss prevention lawyer at ALAS.

Welcome, Rawn!

Rawn: Hey, Terri.

Terri: Lawyers work under the supervision of another lawyer in many situations. Today, we're focusing on issues that arise when associates work under the direction of a partner. In that situation, associates might think that they can rely on the partner to decide any ethics issues, but that's not the case, is it?

Rawn: Right, it's more complicated than that. If you think you can always just defer to a partner, you could fall seriously short of your responsibilities under the rules of professional conduct.

Terri: Would you walk us through the relevant rule?

Rawn: Sure. All 50 states and the District of Columbia have adopted some form of the ABA Model Rules of Professional Conduct. We're going to zero in on Model Rule 5.2, which addresses the duties of a subordinate lawyer. That's the term the ethics rules use for a lawyer who is being supervised by another lawyer.

Rule 5.2 begins by stating in paragraph (a) that "[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person."

The point here is that wrong is wrong, even if someone tries to tell you it's OK. Comment [2] to the rule makes this explicit. The comment says if the question can reasonably be answered only one way, the duty of both lawyers is clear and they're equally responsible for fulfilling it.

So, for example, let's say that you're talking to one of your friends at the firm. She's excited about how she just got a call to go into court next week for a hearing where she's going to represent a new client who is objecting to a subpoena. And as you talk, you realize she's actually going to be appearing in response to *your* subpoena. So at this hearing, there will be two firm lawyers—you and her—on opposite sides, in front of the same judge, in the same matter.

At least under the Model Rules, there's no ethical ambiguity in this situation. You can't do it. If the partner supervising you tells you not to worry—that things like this just sometimes happen and that both of you should just go ahead and appear—you should go directly to the firm's loss prevention partner or general counsel and explain the situation. And I mean actually go to their office, or make a telephone call and talk to them. No detailed email or voicemail describing the situation.

Your firm has loss prevention folks so that you don't have to deal with situations like this on your own. If there's an ethical issue, they'll help you with options and advice.

Terri: Got it. That's the rule when the ethical duty is clear. But isn't there something in the rule about being able to defer to a supervising lawyer?

Rawn: Sure. The second paragraph of Rule 5.2 provides that "[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." Note the two limitations: you only get to defer to a "supervisory lawyer's

reasonable resolution of an arguable question of professional duty." So it can't be a "wrong is wrong" situation.

Terri: OK, let's assume that there is an arguable question. Let's change your subpoena example a bit. Say that the associate's friend at the firm isn't actually representing the subpoenaed bank. She's not going to be objecting at the hearing. But she is representing an affiliate of that bank in a big deal.

What should the associate do then?

Rawn: How does any lawyer know whether the answer to a legal question is the right one? You'll probably have to spend a bit of time reviewing the rules. And you'd probably find out pretty quickly that the conflict rules don't have a "subpoena" exception. At the same time, though, there's certainly some ambiguity under the rules about how to handle affiliates in assessing conflicts.

The key thing here is that the associate needs to raise the issue. Firms sometimes miss things like this during their intake process. And sometimes issues don't really arise until after intake. So when you discover something like this, firms are really relying on you to bring it to the firm's attention.

Terri: Okay, let's say that the partner tells the associate that the firm's conflicts department has determined that there isn't a conflict because the bank and its affiliates waive all document subpoena conflicts in their Outside Counsel Guidelines.

Rawn: Well, you then have to think about whether the supervising attorney's explanation or solution makes sense.

Here, the fact that an affiliate is involved does make it less certain that there is a conflict. Also, the conflicts people at the firm have apparently looked at the issue and they're okay with the situation given the Outside Counsel Guidelines. So, you're okay. You've raised the issue, heard the proposed solution, and everything seems under control.

Terri: Alright, what about the situation where, after reading the rules and considering the situation, the associate reaches a different result than the supervising partner?

Rawn: That's where things get a little more complicated. Let's assume, for example, that you don't hear anything about a waiver in the Outside Counsel Guidelines. But the subpoena still isn't actually on a firm client; it's on an affiliate. You'd prefer to get a signed waiver before serving the subpoena, but the partner says that's just not necessary for a routine document subpoena.

Terri: What should the associate do then?

Rawn: In that situation, you're probably still OK to defer to the partner, but you need to tell the partner why you view the situation differently.

In fact, California's version of Rule 5.2 now may require this. The official commentary to the California rule states that: "If the subordinate lawyer believes that the supervisor's proposed resolution of the question of professional duty would result in a violation of these rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer."

Terri: You know, the benefit of that approach is that you give your supervisor the opportunity to consider an alternative opinion. If you don't raise the point, then the supervisor won't even be aware that his analysis might have missed something.

Rawn: Right. After all, the associate might have learned that the bank and its affiliate have Outside Counsel Guidelines that say all affiliates have to be considered as if they were the firm's clients. That could change the conflict analysis. But if the partner still thinks his view is the right one and it's arguably consistent with the rules, then you've done all you're required to do.

Terri: How does that really work in practice?

Rawn: I'm sure a vast number of minor issues get resolved this way, and those minor situations are probably the best time to rely on this part of the Model Rule. But if really

significant representation issues are at stake, I'd probably be worried that a court or disciplinary board might second-guess my judgment.

In that kind of situation, it's probably time to go talk with a loss prevention partner or general counsel. Why put yourself in a position where all you're going to be able to say down the road is that you thought you could acquiesce to a supervising lawyer who wasn't even an ethics specialist? ALAS firms have experts at hand to resolve this kind of question. Use them!

Of course, if it's not an in-between situation, and you believe that the solution proposed by the supervising lawyer is unreasonable, then you should also go to your general counsel or loss prevention partner.

Terri: Rawn, we've covered quite a bit of ground. Would you recap your suggestions for complying with Rule 5.2?

Rawn: Sure. To sum up:

- Associates should be familiar with the rules of professional conduct and raise any issues that they observe.
- If they have concerns about a supervising lawyer's proposed solution to an ethical issue, they should look into whether it's consistent with the text of the rules, the comments, or maybe even some authorities on the issue.
- If a solution doesn't jibe with what the associates think the rules require, they need to raise that with the supervising lawyer. But as subordinate lawyers, associates aren't ethically bound to do more, so long as the supervising lawyer's solution seems within the bounds of reasonableness on an arguable point.
- But if the supervising lawyer's solution seems unreasonable and the supervising lawyer insists on pursuing it, an associate should talk to the general counsel or loss prevention partner.

Terri: So far, we've been talking about what associates should do when they're working under another lawyer's supervision and a question of professional duty arises. Let's switch gears a bit and talk about situations where there's no question of duty

pending in the associate's matter, but the associate hears or sees something that raises a concern about potential misconduct or professional liability. For example, imagine that the associate hears a partner talking about creating a fake Facebook account to "friend" a witness in one of the partner's cases. As you know, that would violate various ethics rules. How should the associate handle that situation?

Rawn: Again, you should raise the issue. That's always been ALAS's advice. And it's true for both junior and senior lawyers. We've seen too many claims where someone at the firm noticed an issue, but decided it wasn't really important or wasn't worth the fuss that might be caused by raising it. We've also seen—time after time—situations where what seemed to be a small issue or minor discrepancy proved to be the thread that, when pulled, uncovered a much larger issue. Firm management needs to learn about stuff like this.

Terri: Yeah. Problems usually don't solve themselves, and associates are really helping the firm when they give the firm an opportunity to solve a problem sooner rather than later. We've also seen that associates sometimes catch issues that others don't, such as noticing conflicts of interest that weren't found during the intake process.

Rawn: And although we've been talking here mainly about ethical issues, firms are really counting on associates to raise other things that might indicate problems.

Terri: Like client misconduct or fraud?

Rawn: Definitely. Or incidents that suggest a lawyer or staff member is suffering from an impairment, like addiction, substance abuse, mental health issues, or memory or cognitive loss. Associates sometimes even notice inconsistencies that end up exposing firm lawyers or staff engaged in illegal conduct.

The point is that firms need associates to raise issues like these even if they don't seem to directly implicate an ethical rule. Some companies encourage employees to speak up when they see someone doing anything "different, dumb, or dangerous." That sounds like a good idea for law firms, too.

Terri: ALAS recommends reporting this kind of issue to general counsel or loss prevention partners—why is that?

Rawn: Those folks are there precisely to field this kind of issue. They want to encourage reporting of issues, so they're going to try to handle any concerns in a discreet manner. Also, many states recognize attorney-client privilege for reports made to a firm's in-house counsel.

Terri: Anyone else associates can report to?

Rawn: Sure. Some firms have ombuds policies. That can also be a right answer, but if a question of professional responsibility or liability is involved, the associate should expect that the ombudsperson will probably turn the matter over to a loss prevention partner. Also, the in-firm privilege might not apply to that initial report.

Another option is to raise the issue with the practice group leader or the lawyer who is supervising the specific matter in question.

Terri: Yeah. I think that's what a lot of associates would do first.

Rawn: I agree, and as I mentioned, under some circumstances there can be an obligation to talk to the supervising lawyer when an issue involves a disagreement about resolving an ethical question.

But if the issue never gets fixed, that probably won't prevent the client from naming you in a malpractice claim.

Terri: That's an important point. At ALAS, we've seen several claims where an associate noticed a conflict or some other issue. They raised it with a more senior lawyer, but then they never followed up. Sometimes, the associate's issue never got addressed and that proved to be a problem for the firm.

Rawn: Once you notice an issue, you really should take ownership for making sure that it gets acceptably resolved, though I think associates can have some assurance that that will happen if they bring the matter to the attention of someone in loss prevention.

Terri: Are there any related issues affecting associates?

Rawn: Well, in the scenarios we've been discussing, we've been assuming that the associate is supervised by a partner or other senior lawyer. Some associates take it as a point of pride that they're not being supervised: that they're handling matters "on their own." They think it's a sign that the firm thinks really well of them.

At an ALAS firm though, it's more likely an indication that there's been a slip-up. In general, ALAS firms expect that all associates will be working under the supervision of a partner.

Terri: The risks also increase if an associate takes on a matter outside their usual practice area without supervision. Even experienced lawyers can mess up when they're "dabbling" in a new field.

Rawn: Absolutely. When associates are assigned to a matter in an unfamiliar area, they need to make sure that someone with knowledge of that area of law is available to watch over what they're doing.

Terri: That reminds me of a similar situation, often referred to at ALAS as a "body snatch." Say, for example, a litigation partner pulls a tax associate into a case to advise on tax consequences of a settlement agreement. The tax associate may think she's being supervised because she's helping a litigation partner, but she's not actually being supervised by a partner who has the relevant expertise to check her work.

Rawn: Right. The tax associate really needs to bring the situation to the attention of her practice group leader. The firm will probably want to make sure that the associate's advice gets run by a tax partner, regardless of whether the client gets charged.

Terri: That's important to protect both the associate and the firm, isn't it?

Rawn: Yep. If you don't have a supervisor, then you can't claim any benefit from Model Rule 5.2, and the firm may also be violating Model Rule 5.1, which requires firm management to engage in reasonable supervision. More importantly, you're not getting

the practical guidance and training that will make you a better lawyer. And there's no one to catch mistakes that you make before they do harm to you, the firm, or the client.

Terri: That's right. Feedback on your work from an experienced lawyer is really key to developing as an associate.

Rawn: That, plus being in a firm where all lawyers—associates, counsel, and partners—don't hesitate to call on their loss prevention department when an arguable question comes up. In fact, I'll go out on a limb and make this assertion: if an associate at an ALAS firm brings an ethics issue to the attention of one of the firm's loss prevention experts and then relies on their advice, no bar association is likely to bring a disciplinary charge against that associate.

Terri: That's a good place to wrap up. Thanks, Rawn, for outlining the issues in this area.

Rawn: Glad to do it! Best of luck to all the associates out there. I'm sure you'll all do great!

Terri: Until next time. I'm Terri Garland, and this is the Portable Ethics Lawyer.

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