speaking of ethics

By Saul Jay Singer

Obedience

Mick Wiggins

If Your Supervising Attorney Orders You to Electrocute Stanley Milgram, Would You Obey?

After many demanding years in law school, incurring enormous debt pursuing a law degree, and enduring a difficult job search, Larry Lawyer finally lands a position as a litigation associate with Shady Firm. During his first few months, he performs the stimulating and exciting tasks traditionally assigned to first-year associates—drafting correspondence, conducting legal research, and managing massive document productions.

Soon after commencing work on his first case for Pam Partner, Larry discovers a "smoking gun" document which, if produced to the plaintiff, would guarantee the entry of summary judgment against Pam's client. He shows the document to Pam, who directs him not to produce it on the grounds of attorney–client privilege and because, she says, it is not reasonably calculated to lead to the discovery of admissible evidence. Larry responds that the document, which unambiguously contains Client's straight-out admission to plaintiff's key allegation, surely is relevant, and he asks Pam how a letter to Client's travel agent and copied to Client's employer (neither of whom are lawyers) could possibly be privileged. An enraged Pam tells Larry she doesn't have time to waste teaching first-year associates what they should have learned in an introductory evidence class and, sarcastically wondering how Larry ever passed the bar, she snaps "if you don't immediately carry out my instructions, I know where to find other associates who will."

In another case, Sam Supervisor instructs Larry to draft a letter to Client's landlord and to send a copy to Client—but not to the landlord. When a puzzled Larry suggests that doing so would be misleading Client and, therefore, unethical, Sam explains that he already had advised Client in the strongest possible terms that sending the letter would seriously damage her; that Client nonetheless insisted that the letter be sent; and that Shady Firm has an unambiguous ethical duty to protect its client—which, a clearly annoyed Sam says, is *exactly* what he intends to do.[1]

"Follow directions."

Inculcated at the very earliest stages of our development by parents, teachers, clergymen—and, yes, law professors and firm partners—obedience to authority is far more than merely one social value among many. In fact, many ethicists believe obedience is an impulse which overrides training in ethics and morality. Sociologists generally agree, noting that a system of authority is a baseline requirement inherent in any scheme for communal living. Many naturalists further subscribe to the theory that dissidence is genetically bred out of the species under a communal Darwinian "survival of the fittest" model because, without some system of authority and a power to enforce authority, the community would cease to exist.

> What if a reasonable lawyer in the subordinate's position would find that there exists a clear ethical duty not to follow the superior's orders, but this particular subordinate lacks actual knowledge to properly evaluate his or her superior's argument?

But what are the ramifications for a legal system which denies criminal defendants the Nuremberg Defense[2] when, as Stanley Milgram[3] and others[4] have demonstrated, the "ordinary, reasonable man," that oft-cited legal hypothetical construct, is so well programmed to simply obey? That question is no less relevant, powerful, and provocative in the realm of legal ethics.

The District of Columbia Rules of Professional Conduct include clear and specific exceptions to a lawyer's duty to follow *his client's* directions. For example, a lawyer cannot counsel or assist a client in conduct "that the lawyer knows is criminal or fraudulent" (Rule 1.2(e))[5]; bring or defend a proceeding with no basis in law and fact for doing so (Rule 3.1); fail to expedite litigation (Rule 3.2); or offer false statements of fact or law to a tribunal (Rule 3.3). Nor can a lawyer treat a client with dishonesty and deceit (Rule 8.4(c)) or fail to communicate openly and honestly with him or her (Rule 1.4).[6] But what duty does a subordinate lawyer have to disobey a superior's directions?

Pursuant to Rule 5.2(a), a lawyer is bound by the rules even when he or she acts at the directions of another, and the clear intent of this rule is to "foreclose any Nuremberg Defense." *Wallace v. Skadden, Arps, Slate, Meagher & Flom, et al.*, 715 A.2d 873 (D.C. App 1998).[7] But there is a serious question about whether that intent is accomplished, given the seemingly "contradictory"[8] provisions of Rule 5.2(b), pursuant to which a subordinate does not violate the Rules of Professional Conduct if he or she acts "in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

To raise a Rule 5.2(b) defense to a Bar complaint, a subordinate lawyer must satisfy a two-pronged test: (a) there must exist an *arguable* question of professional duty, and (b) the supervising lawyer's resolution of such question must be *reasonable*. However, while the drafters of the rule imposed a reasonableness standard on the second prong of the test—i.e., the superior's resolution of the question of professional duty must be "reasonable"—they did not do so with respect to the first prong; that is, the rule, on its face, provides merely that the ethical question at issue be "arguable," not that it be "*reasonably* arguable."[9] This begs the question: how "reasonable" does the argument have to be—and reasonable *to whom*? What if a reasonable lawyer in the subordinate's position would find that there exists a

clear ethical duty not to follow the superior's orders, but this particular subordinate lacks actual knowledge to properly evaluate his or her superior's argument?

Indeed, the focus of Comment [1] to Rule 5.2 is upon whether a subordinate following his or her supervisor's directions "had the knowledge required to render [the] conduct a violation of the Rules." Citing the case where a subordinate follows his superior's directions and files a frivolous pleading, the comment states that there is no ethical violation unless the subordinate "*knew* (i.e., had *actual knowledge*[10]) of the document's frivolous character."[11] Therefore, where a reasonable lawyer would know that there is no arguable question about the ethical impropriety of a particular act or omission, but this particular subordinate nonetheless believes that there exists an "arguable question" and acts in accordance with his or her supervisor's direction, he or she can raise a proper Rule 5.2 defense.

Moreover, when a senior lawyer takes responsibility for any ethical breach, "the junior lawyer has little incentive to even consider tough ethical issues, let alone to raise them."[12] In addition, if the question was indeed "arguable" and the resolution was indeed reasonable, then Rule 5.2(b) is meaningless because *neither* the supervisor nor the subordinate should be disciplined.[13] For all these reasons, some commentators urge the repeal of Rule 5.2(b) and advocate the imposition of an unambiguous, independent duty on subordinate lawyers to determine whether they may ethically follow their supervisors' directions.

However, other analysts argue that such a repeal would impose an untenable and onerous burden on lawyers. This argument is particularly cogent in light of studies demonstrating that members of a group will override their own reasoned judgment and the evidence before their eyes to conform with unanimous, but obviously mistaken, opinions of the remainder of the group.[14] As such, how reasonable is it to expect a newly minted attorney such as Larry Lawyer to override his own reasoned judgment when a partner or other supervisor insists—often with a veiled, if not direct, threat about the severe adverse repercussions of noncompliance—that there is no "arguable question of professional duty?"

Those who favor retaining Rule 5.2(b) also point to Comment [2] to the rule, which supports the interests of law firms in taking a consistent course of action: if "the question is reasonably arguable," then "someone has to decide upon the course of action;" such authority "ordinarily reposes in the supervisor" and "the supervisor's reasonable resolution of the question should protect the subordinate."

Compelling arguments on both sides. What do you think?

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Notes

1 This hypothetical is not-so-loosely based upon D.C. Bar Legal Ethics Op. 270, where the D.C. Bar Legal Ethics Committee ruled that a subordinate lawyer who learns that an employing lawyer has sent a client what purports to be copies of correspondence which were, in fact, never sent, has the duty to (a) assure that the client is informed of the deception, and (b) report the employing lawyer to the Office of Bar Counsel. (In contrast to the instant hypothetical, however, the subordinate in Opinion 270 played no role in drafting the letter or in perpetuating the fraud against the client.)

2 The "Nuremberg Defense," named for the post-World War II Nuremberg Trials where it was infamously raised by Nazis accused of war crimes, is a defendant's argument that he cannot be held guilty of a crime when he was "only following orders" of a superior.

3 Stanley Milgram, who set up his renowned experiments at Yale University in the early 1960s, demonstrated that more than half of randomly selected volunteers would essentially execute through electrocution innocent, unknown third parties simply because they were repeatedly and firmly ordered to do so in a scientific setting.

4 For example, shortly after the William Calley Jr. case in the My Lai Massacre, a study by Herbert C. Kelman and Lee H. Lawrence found that more than half of the American population stated that it would follow orders if commanded to shoot all the inhabitants of a Vietnamese village.

5 *See*, in particular, Comments [6] and [7].

6 *See, e.g.*, D.C. Bar Legal Ethics Op. 270, supra note 1.

7 In *Wallace*, a subordinate lawyer alleged, inter alia, that she was wrongfully discharged for carrying out her duty pursuant to Rule 8.3 to report to her superiors various acts of misfeasance and unethical conduct by firm lawyers. The court rejected that argument, noting that Rule 8.3, under certain circumstances, requires a lawyer to report professional misconduct *to the Bar*, not to supervising lawyers.

8 *See, e.g.,* Geoffrey C. Hazard Jr. & W. William Hodes, The Law of Lawyering § 43.2 (3d ed., Supp. 2004) ("the subsections of Rule 5.2 appear to contradict each other.")

9 "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." *See* Rule 1.0(j).

10 "Knowingly," "known," or "knows" denotes *actual knowledge* of the fact in question (which may be inferred from the circumstances). *See* Rule 1.0(f).

11 It is interesting to note that, in the face of the language of Rule 5.2(b) to the contrary, the American Bar Association reads in a nonexistent "knew *or reasonably should have known*" standard. *See* ABA Annot. Model Rules of Prof'l Conduct at 425–26 (3d ed. 1996).

12 Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 W. Forest L. Rev. 887 (1997).

13 *See, e.g.,* Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 Ohio St. L.J. 243, 265–66 (1985).

14 *See, e.g.*, Solomon E. Asch, *Opinions and Social Pressure,* Scientific American (Nov. 1955).

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