



Ethical Rules: Personal and Nondelegable

As lawyers, we are frequently asked to deflect a client's potential liability on to third parties, or to establish comparative fault among our client and others involved in situations with disputed fault.

But when it comes to assessing ethical responsibilities among lawyers, concepts of comparative fault do not apply: Each of us is directly and independently responsible for complying with Arizona's Rules of Professional Conduct.¹ This is so even for the newest associate in a law firm working under the supervision of others, as well as the Arizona lawyer working under the direction of house counsel for an out-of-state client.

Take the case of New Mexico lawyer Michele Estrada.²

Ms. Estrada was a new associate in a law firm hired to defend a pharmacist accused of negligently filling a Ritalin prescription with another drug, methadone. She was found by the New Mexico Supreme Court to have been "consistently and forcefully instructed by out-of-state counsel" concerning how she answered discovery requests and presented evidence at trial.³ When the inventory records at the defendant pharmacy clearly showed that there was a surplus of 60 Ritalin tablets and a shortage of 60 tablets of methadone, Ms. Estrada was not permitted by defendant's out-of-state counsel to disclose or admit those facts, even though they had been reported by the defendant's manager to the New Mexico Board of Pharmacy. To make matters worse, Ms. Estrada offered exculpatory evidence of a prescription for the missing methadone tablets that was given to her by the client shortly before trial and that turned out to be a forgery.

The New Mexico Supreme Court upheld a sanction of suspension imposed by the disciplinary hearing committee, finding that Ms. Estrada had failed to use her independent judgment in following "orders" from out-of-state counsel as well as the client, and had accordingly failed to exercise her independent duty to the New Mexico court system.⁴

Ms. Estrada was found to have violated her duties of competence, her duty not to assist a client in misleading a court, her own duty not to mislead a court, her duty to be fair to opposing counsel and her duty not to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. The court quoted from another New Mexico case⁵ to the effect that culpability among counsel may vary in a given situation, but that ultimate responsibility does not.

Rather than attributing the ethical violations to the out-of-state counsel whose orders Ms. Estrada followed, the Court held that in the final analysis, each member of the bar is an officer of the court whose first duty is not to the client, a senior partner or some other lawyer, but to the administration of justice.

In Arizona, ER 5.2 (Responsibilities of a Subordinate Lawyer) states that a lawyer is bound by Arizona's ethical rules even though he or she is acting at the direction of another person. ER 5.2 is patterned on the Model Rules of Professional Conduct, is similar to the Restatement,⁶ and it essentially sup-

ports the holding of Michele Estrada's case; that is, the "Nuremberg defense" ("I was only following orders") won't work in disciplinary matters.

There is a second part to ER 5.2⁷ to the effect that the subordinate lawyer will not be charged with an ethical violation when his or her supervisor guessed wrong on an arguable question of professional duty. It is the author's experience that the State Bar's idea of what is an "arguable question" and that of many members of the bar are not always the same. This essentially means that a subordinate lawyer needs to know what the real risks are when a supervising lawyer directs him or her to do something that might get the attention of the disciplinary authorities.

The Comment to ER 5.2 presumes, however, that the supervisor's reasonable resolution of the question, even if it turns out to be wrong, "should protect the subordinate professionally if the resolution is subsequently challenged."⁸ Be this as it may, every lawyer, regardless of his or her place in the firm's pecking order, needs to understand that questionable ethics always need to be viewed skeptically and assessed honestly between lawyers — as diplomatically as the occasion warrants.⁹ **AZ AT**

endnotes

1. Rule 42, ARIZ.R.S.CT.
2. *In re Estrada*, 143 P.3d 731 (N.M. 2006).
3. *Id.* at 741.
4. *Id.* at 740.
5. *In re Howes*, 940 P.2d 159 (N.M. 1997).
6. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §12 (2000).
7. ER 5.2(b).
8. Cmt. 2, ER 5.2.
9. ER 5.2(b) is not without its critics. See Robert R. Keatinge, *The Floggings Will Continue Until Morale Improves: The Supervising Attorney and His or Her Firm*, 39 S. TEX. L. REV. 279 (1998) (arguing that effect of ER 5.2 is to reduce the vigor of associates' examination of questionable ethics), and Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887 (1997) (criticizing ER 5.2(b) for providing a Nuremberg defense for subordinate lawyers).

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