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When your boss tells you to bend ethical line, know where to turn

Welcome back! The Court of Common Sense is back in session. We are continuing with our young lawyers theme as a new crop of lawyers enters the workplace this fall. Today we will be discussing law firm ethics and courtroom decorum.

Q: *What should an associate do when a partner orders the associate to do something the associate considers improper?*

A: Great question and a tough area to politically navigate within the law firm setting. Illinois Rules of Professional Conduct 5.1 and 5.2 govern this situation.

Rule 5.1 outlines the responsibilities of partners, managers and supervisory lawyers. Subparagraph (c) of that rule provides that a supervisory lawyer “shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved.”

In sum, if a supervising lawyer orders a subordinate lawyer to violate the Rules of Professional Conduct in any way, that supervising lawyer becomes responsible for the violation itself.

But the analysis does not end there. The junior lawyer is also bound by the Rules of Professional Conduct, notwithstanding the fact that the associate acted at the direction of the partner or supervising lawyer.

Thus, under Rule 5.2, the subordinate lawyer has an independent duty to follow the Professional Rules of Responsibility. The junior lawyer must also report any unethical or improper conduct to the firm’s general counsel, managing partner or other partner in the firm.

Law firm partners or other lawyers in the firm with compa-

nable managerial authority in turn are required to take “responsible efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Rule 5.1(a).

Supervising lawyers, remember: Law firms are teaching institutions. We are responsible, and ethically required to provide guidance to junior lawyers.

If the ethical boundaries are unclear, a subordinate lawyer does not violate the Rules of Professional Conduct if the subordinate lawyer is acting in accordance with a supervising lawyer’s reasonable resolution of an arguable question of professional duty. Rule 5.2(b).

As the comments to Rule 5.2 explain, where there is a question regarding judgment as to an ethical duty, the supervising lawyer may assume responsibility for making that judgment. A cautionary note for subordinate lawyers: Where the question can reasonably be answered only one way, it is the duty of both lawyers to act in an ethical manner.

This scenario also involves Rule 8.4. Rule 8.4 defines professional misconduct as when a lawyer “violates or attempts to violate the Rules of Professional Conduct, knowingly assists or induces another to do so or does so through the acts of another.”

(Young lawyers take note, Rule 8.4 makes it professional misconduct to avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. So, pay those student loans as they become due.)

This scenario may also implicate Rule 8.3, Reporting Professional Misconduct, also known as the *Himmel* obligation, so called



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because the rule came from the case, *In re Himmel*, 125 Ill.2d 531 (1988). *Himmel* requires any lawyer who has knowledge that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) to inform the appropriate professional authority. In Illinois, that authority is the Attorney Registration & Disciplinary Commission.

[T]he subordinate lawyer has an independent duty to follow the Professional Rules of Responsibility.

So, what kind of conduct needs to be reported pursuant to *Himmel*? The rule requires reporting when a lawyer knows that another lawyer has committed a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects or when that lawyer has engaged in

conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(b), (c). As indicated by the rule, not every violation of the ethical duty gives rise to a *Himmel* reporting obligation.

If you find yourself in a *Himmel* reporting situation, contact the firm’s general counsel, managing partner or other trusted supervisor who is not implicated in the violation. If no such person exists at the firm, or you are uncomfortable making a disclosure at the firm, you may contact the ARDC’s Ethics Inquiry Program.

The program was created by the ARDC to assist attorneys and the general public on questions about a lawyer’s professional responsibilities. The program is free of charge and is staffed by ARDC attorneys and a team of paralegals who are experienced in addressing ethics questions and ARDC procedures.

If you are uncertain of your ethical obligations, you may make a confidential inquiry by telephoning (312) 565-2600 or (800) 826-8625. Additional information about the Ethics Inquiry Program can be found at iarde.org. Note, however, that an attorney’s *Himmel* obligations are not satisfied by calling the ethics hotline. If a lawyer has a duty to report misconduct, you must follow the procedures for filing a request for an investigation located on the ARDC’s website.

New lawyers beware that *Himmel* and Rule 8.3 do not require a lawyer to report any violation that could be a professional offense. The reporting obligation is limited to offenses that “a self-regulating profession must vigorously endeavor to prevent.” Rule 8.4, Comment 3. Thus, it is important to use

judgment in deciding whether reporting is required in accordance with Rule 8.3.

Q: *I am going to be appearing in state court for the first time, any tips on courtroom etiquette?*

A: Another great question! Rule No. 1: Always dress appropriately. (See the inaugural column of Court of Common Sense, published Aug. 4). Dress is the one thing that TV lawyers get right. A suit or some variation thereof is (in my humble opinion) the only appropriate dress code for court appear-

ances.

Other guidelines are just “common sense” (pun intended). Stand when the judge enters, exits and stands; turn off your cellphone; don’t chew gum; don’t talk while court is in session; no excessive moving about the courtroom when court is in session; and don’t otherwise disrupt the tribunal.

These guidelines aren’t just good advocacy for your client; proper court behavior is also required by the Illinois Professional Rule of Conduct 3.5(d).

Rule 3.5(d), titled “Impartiality and Decorum of the Tribunal,” covers a host of no-no’s related to court appearances. Section (d) specifically provides that a lawyer shall not “engage in conduct intended to disrupt a tribunal.”

New lawyers beware: Illinois courts still require the litigants to draft their own orders after the hearing (or at the time a motion is filed in the appellate court). Learn how to do this before you go to court.

Illinois Supreme Court Rule

271 requires the prevailing party to prepare the order after the hearing and present the order to the court for entry. Before you do so, always show the order to opposing counsel so that the notice requirements are met.

Stick to these guidelines, and your practice can soar.

Until next time, the Court of Common Sense is adjourned.

— *Have thorny ethics or business etiquette questions? Send your questions to kristencourtofcommonsense@gmail.com to get them answered.*