In a May 2009 post on the Legal Ethics Forum Blog, law professor David McGowan invited nominations for the silliest legal ethics rule. Commenting on Prof. McGowan’s post, another law professor, Andrew Perlman, nominated Model Rule 5.2(b) based on his view that it “offer[s] a kind of Nuremberg defense for subordinate lawyers. Essentially, the rule encourages subordinates to follow orders in more cases than they should.” I challenged Prof. Perlman’s view in a series of comments, we carried on a brief on-line debate over the merits of Rule 5.2(b), and Art Garwin graciously invited us to continue our dialogue here.

Let’s begin by refreshing our recollection with respect to Model Rule 5.2 generally. The rule 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.

As for the present debate, Prof. Perlman’s position on these pages is curious because it does not mirror his views on the blog posts that spawned his article. In a post leading up to our exchange, Prof. Monroe Freedman championed Model Rule 5.2(b)’s silliness based on the sound reasoning that no lawyer should be subject to professional discipline for acting in accordance with a reasonable resolution of an arguable question of professional duty. Later, and as noted above, Prof. Perlman wrote: “I second Monroe’s nomination, but for a different reason. I view Rule 5.2(b) as offering a kind of Nuremberg defense for subordinate lawyers. Essentially, the rule encourages subordinates to follow orders in more cases than they should.”

Now, Prof. Perlman makes Prof. Freedman’s view his lead argument. This he should, and on this initial point we agree. No lawyer ought to be disciplined in connection with a reasonable resolution of an arguable question of professional duty, be that lawyer supervisory or subordinate, leader or follower. If only all disciplinary authorities and courts were gifted with such clarity. Unfortunately, they are not.

In any event, Prof. Perlman’s dislike of Model Rule 5.2(b) on other grounds is deeply entrenched. In a 2007 law review article, he drew on social science research to assert that “in some contexts, a subordinate lawyer will often comply with unethical instructions” given by a superior. With particular respect to Rule 5.2(b), he stated that “subordinate lawyers are likely to believe that responsibility for their actions ultimately lies with superiors.” He challenged Rule 5.2(b)’s facial sensibility on the ground that it rests on questionable assumptions about human behavior. Specifically:

By allowing a lawyer to avoid responsibility for “reasonable resolutions of an arguable question of professional duty,” the rule opens the door to interpreting a wide range of instructions as “arguably” ethical. For example, a subordinate . . . is likely to understand her ethical obligations through the distorted prism of what the partner wants, leading her to construe the . . . issue as “arguable” and the partner’s resolution of it as “reasonable.” This tendency, referred to . . . as ethical fading, suggests that the typical subordinate attorney will conclude that Rule 5.2 applies and that she can carry out the partner’s commands without fear of professional discipline.

One possible solution is to repeal Rule 5.2(b) to make it clear that subordinates have an independent duty to assess whether a particular course of action is ethical and legal. . . . Moreover, by putting subordinates on notice that they have an independent duty to question a superior’s orders, subordinates would be less likely to assume that a superior’s actions are permissible and more likely to offer resistance to unethical or illegal commands.

Consider, for example, the suggestion that states repeal Rule 5.2(b) to clarify subordinate lawyers’ duty to assess whether a course of action mapped by a superior is ethical and legal. To urge that approach, Prof. Perlman must hurdle Rule 5.2(a), which specifies that lawyers are bound by the rules of professional conduct regardless of whether they are acting at the direction of another person. But that leap does not land you at the conclusion that Rule 5.2(b) licenses subordinate lawyers to follow supervisors’ unethical directives in lockstep; to the contrary, Rule 5.2(b)’s qualifying language says they cannot.

Prof. Perlman returns to this theme in his article here, arguing that Rule 5.2(b) “is likely to encourage obedience in situations where we would want subordinates to voice dissent” based on the fact that “[l]awyers are trained to view just about anything as ‘reasonable’ or ‘arguable,’ so if a subordinate thinks she can avoid an unpleasant conflict with a supervising attorney by interpreting an order to fall within Rule 5.2(b), the subordinate will have a strong incentive to...
do so.” For starters, the fact that lawyers are trained in argument does not mean that they cannot spot losers and conduct themselves accordingly. They do so all the time in a wide range of circumstances and scenarios. But equally important, and again, what about Model Rule 5.2(a)? Is it ineffective? If so, why or how? Is there any evidence that subordinate lawyers tend to incorrectly view Model Rule 5.2(b) as a form of override? Heck, is there even any evidence that subordinate lawyers consult Rule 5.2 when pondering the ethical propriety of supervisors’ instructions?

In response to the final question just posed, Prof. Perlman might well argue that its mere asking proves the essential uselessness of Rule 5.2(b). That is not the case, however, because Rule 5.2(b)’s validity as a defense does not depend on a lawyer’s awareness of it at the time of action. If a subordinate lawyer analyzes or challenges a supervisor’s approach to an issue at the relevant time and still follows the supervisor’s directive on the understandable basis that it seems reasonable, it does not matter whether the subordinate then consulted Rule 5.2(b) or whether she relied on intuition. What matters is that the subordinate has a recognized defense to related allegations of misconduct if things turn out badly and she is called to account.

Moreover, on what basis does Prof. Perlman imply that subordinate lawyers are wrongly assuming their supervisors’ instructions to be ethical or are failing to resist improper commands? What causes him to worry about subordinate lawyers remaining silent when they should voice dissent? There are few such cases reported. While it is unfortunately true that context may overcome character in influencing individual behavior, it does not always do so, and there is presently no empirical basis to conclude that subordinate lawyers are so susceptible to “ethical fading” that Rule 5.2(b) is correspondingly detrimental. In my many years as an associate and partner at a law firm, and now as a consultant to many large law firms, I have seen no evidence that senior lawyers instruct subordinates to behave unethically with meaningful frequency. In my experience, many associates are willing to question partners’ professional responsibility calls.11 I doubt that junior lawyers in corporate law departments, prosecutors’ offices or elsewhere are different in this regard. Subordinate lawyers don’t always question supervisors’ conduct or decisions, of course, and sometimes their failures are enormously consequential, but periodic misjudgments can be found everywhere, and they seldom suggest the need for regime change. While I prefer not to ground arguments on anecdotal evidence, Prof. Perlman offers nothing better in opposition.

Prof. Perlman might be expected to further argue that Rule 5.2(b) is unnecessary based on my perception that supervisory lawyers rarely instruct subordinates to act unprofessionally, and that subordinate lawyers are often willing to question supervisors’ ethically-charged decisions. To the contrary, frequency is irrelevant in this context. Rules can be valuable even if they are not routinely invoked. Model Rule 5.2(b) is such a rule.

At base, Prof. Perlman misinterprets Rule 5.2(b), and its interplay with Rule 5.2(a) eludes him. These lapses are reflected in his assertion that “in the absence of Rule 5.2(b), subordinates would be on notice that they always have an independent duty to question a superior’s orders and would thus be more likely to offer resistance to unethical or illegal commands.” Once again, Rule 5.2(a) clearly informs subordinate lawyers that they are always duty-bound to question the professional responsibility aspects of supervisory lawyers’ orders. Reading on, Rule 5.2(b) does not even remotely purport to diminish or eliminate subordinate lawyers’ Rule 5.2(a) duty to resist unethical commands. Rule 5.2(a) stands unchanged. All Rule 5.2(b) says is 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.”12 In short, subordinate lawyers always have a duty to question supervisory lawyers’ ethical judgments and oppose illegal commands even in the presence of Rule 5.2(b). Rule 5.2(b) simply permits subordinate lawyers to defer to their supervisors in appropriate cases once debate is exhausted and decisions must be made. Read the rule.

Squint at his article long enough, and you realize that Prof. Perlman does not believe that a question of professional duty is ever arguable; everything in the professional responsibility realm is black and white. Nothing could be further from the truth. Lawyers wrestle with arguable questions of professional duty all the time—and not because they are trained to see settled issues as arguable. Many conflict of interest issues that law firm general counsel, loss prevention partners, and ethics committees grapple with every day pivot on arguable questions of professional duty. The judgmental immunity doctrine in legal malpractice litigation reflects the long-standing judicial recognition that lawyers regularly face arguable questions of professional duty.13 The preamble to the Model Rules of Professional Conduct acknowledges that even within the framework of the Model Rules, “many difficult issues of professional discretion can arise.”14 Were
it not for Model Rule 5.2(b), subordinate lawyers who disagreed with or were opposed to supervisors’ reasonable resolutions of arguable questions of professional duty would be needlessly and unfairly forced into untenable positions with courts, colleagues, employers, and clients.

Indeed, Model Rule 5.2(b) is important from a practical perspective precisely because it recognizes that lawyers in law firms and other organizations must often act in unison, and thus permits a subordinate lawyer to defer to a supervisory lawyer’s reasonable determination of an arguable issue when a decision must be made. It is generally acceptable for subordinate lawyers to let their supervisors decide close ethical questions because lawyers occupying supervisory or leadership roles commonly have more experience and greater professional knowledge on which to draw. In this way the rule reflects the reality of law practice, and mirrors the reasonable expectations of clients and courts.

Still, Prof. Perlman clings to the argument that Model Rule 5.2(b) frames a “Nuremberg defense.” He is glued to this view despite the well-recognized fact that Rule 5.2’s “main thrust is to foreclose any ‘Nuremberg defense.’” Rule 5.2(b) supposedly affords a Nuremberg defense because no lawyer should ever escape liability for her misconduct no matter the difficulty of the issue, regardless of whether she was following a superior’s orders. As Prof. Perlman sees things, if we do not excuse non-lawyers’ misconduct committed at a superior’s direction, we should not extend such shelter to lawyers. “We typically do not give non-lawyers a free pass when they break the law at the direction of an authority figure, and lawyers should be treated no differently,” he says.

The problem with this analogy is that it does not fit the facts. We treat lawyers exactly the same as non-lawyers when, in Prof. Perlman’s words, they break the law. No lawyer can escape civil or criminal liability by arguing that she relied on a superior’s judgment in acting a particular way. In contrast, most non-lawyers do not have to obey rules of professional conduct or anything like them. Our profession is simply different in this way.

It is not a valid criticism of Rule 5.2(b) to argue that subordinate lawyers mistakenly believe ex ante that the rule will somehow protect them. The relevant time to consider Rule 5.2(b)’s effect on subordinate lawyer behavior is, after all, the time at which a subordinate lawyer is alleged to have imprudently obeyed a superior. As I previously explained, all that the assertion of a Rule 5.2(b) defense establishes is that the lawyer is attempting to avoid discipline by asserting an affirmative defense. The fact that lawyers invoke Rule 5.2(b) when disciplinary authorities come calling does not imply that they consulted the rule before obeying their bosses, or that the rule otherwise gave them false comfort. By way of analogy, defendants’ assertion of privileges or immunities in response to defamation allegations does not imply that they read the Restatement (Second) of Torts before deciding to speak or write the offending words, or that they were somehow lulled into complacency by the relevant Restatement sections. The fact that lawyers who invoke Rule 5.2(b) as a defense to discipline typically lose is meaningless—except to the extent their failures prove that the rule does not afford subordinate lawyers a Nuremberg defense. All sorts of affirmative defenses regularly fail in litigation because the facts do not support their assertion, yet no one advocates their abandonment on silliness grounds.

Does Rule 5.2(b) apply only in rare cases? Sure. The same can be said of other rules, however, so that is no reason to jettison it. Is it difficult to formulate an example of Rule 5.2(b)’s application? Hardly. Consider the hazy ethical world of surreptitious discovery and undercover investigations. Suppose that a junior partner wonders whether she can have a private investigator visit a business while posing as a customer to discover whether its sales force is engaging in unlawful activity. This conduct potentially implicates Rules 4.1(a), 4.2, 4.4(a), 8.4(c) and 8.4(d), yet there is little case law on-point, and the cases that have permitted such conduct are district court decisions and therefore lack precedential value. If the senior partner who leads the law firm’s litigation practice group informs the junior partner that her planned course of action is ethical and the other side nonetheless files an ethics complaint against her when it discovers the ruse, should not the junior partner benefit from a Rule 5.2(b) defense? Of course she should.

Alternatively, assume that a law firm represents a bank trust department in its capacity as an executor of a decedent’s estate. Another client asks a senior litigation associate who has represented it ably in a number of matters to sue the bank for breach of contract. The associate approaches the senior partner who serves as the law firm’s general counsel to ask whether the anticipated litigation would amount to direct adversity to a current client and thus pose a conflict of interest under Model Rule 1.7(a). The general counsel consults the sparse case law, which suggests that this situation amounts to direct adversity, compares that to the American College of Trust and Estate Counsel’s (“ACTEC”) commentary to Model Rule 1.7, which takes the opposite view, and concludes that the ACTEC position is better-reasoned. Because there is no case law on-point in the relevant jurisdiction, the general counsel advises the associate that the firm can accept the matter. You can imagine what happens next—the firm
files the suit, the bank files a motion to disqualify, the court grants the motion, and opposing counsel then reports the associate to state disciplinary authorities. Should not our senior associate be allowed to invoke Rule 5.2(b) as a defense to the disciplinary complaint? Again, of course she should.

How many other illustrations would you like? Although Rule 5.2(b) does not come up routinely, there are certainly enough good examples to justify the rule, especially in the area of conflicts of interest. Prof. Perlman’s inability to recognize such situations, and his refuge in a single example in a treatise, highlight the weakness of his position.

Critics might discount the foregoing examples on the basis that in neither instance would the supervisory lawyer deserve discipline, and because the supervisory lawyer does not deserve discipline, the subordinate lawyer does not require the protection of Rule 5.2(b). But the point, of course, is that it is the subordinate lawyer who is in disciplinary counsel’s crosshairs. It is her action that is under scrutiny. To deprive her of a Rule 5.2(b) defense is to punish her prudence in seeking a senior lawyer’s advice and discourage such responsible behavior by other subordinate lawyers. It is no answer to say that it is sufficient for the subordinate lawyer to defend herself on the basis that she acted reasonably under the circumstances just as her supervisor would be forced to do, because that approach does not encourage the consultation and teamwork that Rule 5.2(b) promotes.

In addition, Prof. Perlman might fault these examples because they do not involve newly-minted lawyers. One of his principal objections to Rule 5.2(b) is that it applies to all subordinate lawyers rather than only neophytes, and that “[e]ven if junior attorneys might warrant additional protection from discipline, more experienced subordinates do not.” The problem here, as anyone familiar with corporate, government, or law firm life can attest, is that subordinates’ vulnerability does not always turn on experience level. Some of the most vulnerable people in organizations are those with substantial experience. This is especially true in the current economic climate.

What of the contention that while subordinate lawyers who obey unethical directives in cases falling under Rule 5.2(b) might deserve lesser penalties than would otherwise be imposed for the underlying misconduct, they should not escape liability? Does the solution to thorny ethics problems impaling subordinate lawyers lie in the exercise of prosecutorial discretion or modified rules of disciplinary enforcement? The practical difficulty with these superficially appealing approaches is first that they ignore the considerable toll that any professional discipline takes on conscientious lawyers, and the stigma attending even lenient sanctions. Second, while it is tempting to trust prosecutorial discretion, it is unwise to do so, as numerous criminal cases amply demonstrate. For that matter, Model Rule 5.2(b) fulfills an important purpose by protecting subordinate lawyers who understandably trust superiors’ judgment but are nonetheless investigated by disciplinary authorities guided by the bright light of hindsight. At the very least, Model Rule 5.2(b) deters disciplinary authorities from unfairly charging subordinate lawyers with professional misconduct in appropriate circumstances.

Oddly, what Prof. Perlman wholly overlooks is that which I have alluded to previously: Model Rules 5.2(a) and (b) together encourage subordinate lawyers to test supervisors’ ethically questionable decisions or directives. Rule 5.2 as a whole encourages junior lawyers to inquire of their supervisors, research the applicable law, or get a second opinion before acting in ethically uncomfortable ways. Indeed, only if they do these things can they hope to avoid professional discipline. Furthermore, supervisory lawyers sometimes miss issues or incorrectly analyze problems. When respectfully challenged by subordinate lawyers, they are likely to examine or re-examine their approaches in new or different ways and thus avoid serious missteps. Model Rule 5.2 is therefore laudable in at least two ways: it (1) encourages professionally responsible behavior by subordinate lawyers; and (2) increases the likelihood of professionally responsible behavior by supervisory lawyers.

In conclusion, Model Rule 5.2(b) is not perfect. Few rules are. No lawyer of any stripe should be punished for reasonably resolving an arguable question of professional duty. The rule applies in relatively few cases, but valid rules in various disciplines are likewise restrained in their application. The only way to conclude that Rule 5.2(b) is the silliest legal ethics rule based on cost-benefit analysis, however, is to lay a thumb on the speculative cost side of the scale. Ignoring the rule’s benefits—or nimbly picking them off that side of the scale with your free hand—helps too. If you leave the scales in balance, you cannot responsibly vote for Rule 5.2(b) as the silliest legal ethics rule because it actually serves very good purposes.

I acknowledge that I am at a disadvantage in this debate, because Professor Perlman, who has multiple Ivy League degrees, for Pete’s sake, received helpful comments from Monroe Freedman, Art Garwin, Stephen Gillers, and Nancy Moore on drafts of his article. I, however, have stayed at a Holiday Inn Express.

Endnotes

5. Cf. Iowa Supreme Court Attorney Disciplinary Bd. v. Dunahoo, 730 N.W.2d 202, 206 (Iowa 2007) (observing that lawyers’ acts or omissions “resulting from mere inadvertence or errors of judgment made in good faith do not justify attorney discipline”).
7. Id. at 451-52.
8. Id. at 466.
9. Id. at 476.
10. Id. (footnotes omitted).
13. See 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 19:1, at 1226 (2009) (stating that “the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized”).
18. See, e.g., In re Okrassa, 799 P.2d 1350, 1353-54 (Ariz. 1990) (rejecting junior prosecutor’s defense based on consultation with superiors); People v. Casey, 948 P.2d 1014, 1015-18 (Colo. 1997) (sanctioning associate where ethics rule clearly governed his conduct); Statewide Grievance Comm. v. Glass, No. CV950144258 S, 1995 WL 541810, at *2 & n.1 (Conn. Super. Ct. Sept. 6, 1995) (declining to excuse associate’s dishonesty); Attorney Grievance Comm’n v. Kahn, 431 A.2d 1336, 1351 (Md. 1981) (stating that junior lawyers may never act unethically simply because their employers so direct them, but referring to no ethics rules); In re Douglas’ Case, 809 A.2d 755, 761-62 (N.H. 2002) (rejecting Rule 5.2(b) defense because question of professional duty was not arguable); In re Kelley’s Case, 627 A.2d 597, 600 (N.H. 1993) (rejecting associate’s Rule 5.2(b) defense because “there could have been no ‘reasonable’ resolution of an ‘arguable question of duty’”); In re Estrada, 143 P.3d 731, 741 (N.M. 2006) (discussing junior lawyers’ responsibilities); In re Howes, 940 P.2d 159, 164 (N.M. 1997) (rejecting junior prosecutor’s defense based on New Mexico version of Rule 5.2(b) principally because “there was no ‘arguable question of professional duty’”); In re Bowden, 613 S.E.2d 367, 368-69 (S.C. 2005) (reprimanding associate).