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Respondeat Superior: Never Send to Know for Whom the Bell Tolls: It Tolls for Thee

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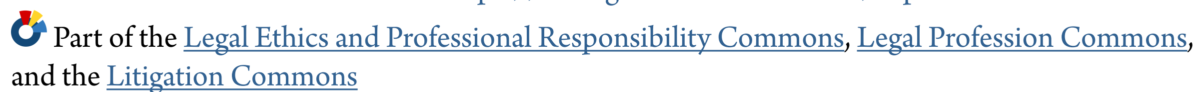
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By J. Charles Mokriski and Paul R. Tremblay

Respondeat Superior:

'Never Send to Know for Whom the Bell Tolls; It Tolls for Thee'

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Imagine this sad story: You're a partner in a small but prosperous law firm, and one of your brighter young associates blunders, and pretty badly. She betrays a client, then avoids his calls and e-mails, and finally misleads an arbitration panel in an effort to cover her sloppiness. She gets caught, and soon thereafter the Board of Bar Overseers and bar counsel present disciplinary charges against her. Very sad, indeed. Her career was so promising.

But let's make it sadder still—what if, when the BBO goes after her, they file similar charges against you, too? "What?" you say. "I wasn't even there. How can they charge me?" Indeed.

A case reported out of the District of Columbia last year concerned a law firm partner in exactly that situation, asking exactly that question. But charge him they did, and he forfeited his license to practice law for a month. His previously unblemished reputation is now forever tarnished.

While the rules are a little different down in D.C., the story is still a cautionary tale. Let us look at it more closely and see if it has any relevance to Massachusetts lawyers. Are partners responsible for the bad deeds of their associates?

The Cohen Troubles in DC

Herbert Cohen was a partner in a 12-lawyer firm in Washington, D.C. He introduced an important client, Dr. Schleicher, to one of his more promising young associates for help in registering a trademark with the U.S. Patent and Trademark Office. Dr. Schleicher later introduced to the firm David Dobbie, with whom he had entered into a business arrangement whereby Dobbie would be the exclusive distributor of the products to be sold under the trademark. Schleicher and Dobbie then had a falling out, and the young associate, who by that time had developed a good relationship with Dobbie, proceeded to file a withdrawal of the pending trademark application, without telling Dr. Schleicher, intending to file a new application in the name of Dobbie alone. That withdrawal falsely stated to the PTO that Schleicher's company "expressly abandoned" the application. Cohen was in the dark about these missteps, although the case had originally been his and he had some familiarity with it. When he learned of the betrayal he intervened and succeeded in undoing part of the harm visited on Dr. Schleicher. Notwithstanding Cohen's intervention and remediation, the good doctor still filed a bar complaint against both Cohen and the associate.

Bar Counsel filed many charges against the associate, including violations of several Rules of Professional Conduct, including Rules 1.3(b) (intentionally prejudicing a client); 1.4(a) (failure to keep a client informed); 1.7(b) (conflict of interest); 1.16(d) (failure to protect a client's interest and surrender papers when withdrawing); 3.3(a) (making a false statement to a tribunal); and 8.4(c) (engaging in dishonest conduct). But Bar Counsel also filed each of those same charges against Herbert Cohen, the partner who did not participate at all in the associate's malfeasance. And it added two more to his list: violation of Rules 5.1(a) (failure to establish firm procedures to supervise subordinates); and 5.1(c)(2) (establishing a managing lawyer's responsibility for the violations of a subordinate lawyer). After the bar disciplinary proceedings, which found violations of most of these rules, and an appeal to the D.C.

Court of Appeals, Herbert Cohen lost his bar card for 30 days.

The case is *In re Herbert Cohen*, 847 A.2d 1162, 2004 D.C. App. LEXIS 194 (2004). Let's see what lessons lawyers in Massachusetts might learn from this sad tale.

What the Story Means

Cohen's associate (and thus his law firm) engaged in egregious conduct—brazenly selling out a client in a pretty unambiguous (from the reported decision's rendering) conflict of interest where the firm's other client benefited directly. The associate also actively misled a tribunal. The bar authorities held Herbert Cohen vicariously liable for the sins of his associate because he didn't supervise the associate adequately, because (it seems) they felt he should have known about the associate's misdeeds, and because his firm had no procedures in place to ensure that the associates and members complied with the rules of professional conduct. Cohen lost his right to practice in a very public way for a month, costing him (we may presume) many thousands of dollars in lost business, to say nothing of his reputation and good will.

Is this a case of "There, but for the grace ..."? Could it happen here?

The initial impulse might be to distinguish the case (and thus conclude that "this just couldn't happen to me") based on the following two factors, omitted from the story as just told: first, the promising young associate was Cohen's son. And second, D.C., where Cohen practiced, has a version of Rule 5.1(c)(2) which holds supervising lawyers responsible for bad conduct of a subordinate not just when they "know" of it, but also when they "reasonably should know" of it. (The ABA Model Rule and the Massachusetts Rule lack the additional phrase "reasonably should know.") So, we might conclude, in Massachusetts, with associates who are not (literally) our children, supervising lawyers won't get into trouble if their associates happen to betray a client as Cohen's son did.

But not so fast. It is of course true that in Massachusetts a claim like that brought against Cohen would invite powerful and persuasive arguments that absent actual knowledge the supervising lawyer is off the hook. (Strongly supporting that argument is the great deal of attention paid in the Cohen opinion to the "reasonably should know" language added by D.C. to the Model Rule language.) But Cohen's discipline was also based on a violation of Rule 5.1(a), which reads in D.C. exactly as it does in Massachusetts. That rule reads as follows:

> A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct.

Our sense is that bar disciplinarians encountering such flagrant misconduct by an associate will want to look for the higher-ups to accept much responsibility. It would be hard to pin that blame on the higher-ups in Massachusetts under Rule 5.1(c)(2), but it would be far less hard to do so using Rule 5.1(a).

As it should be. While it is easy to relegate Rule 5.1(a) to the periphery of our consciousness, lawyers who profit from associates' work—sometimes handsomely, as law firm managers laud "leverage" as a key to profitability—ought to share responsibility for the harm that work sometimes causes. Only two states, New York and New Jersey, impose discipline on law firms, and intermittent efforts by the ABA to amend its Model Rules have never picked up much steam. That means that in most states only individual senior lawyers are left to answer for the misdeeds of their law firms' associates.

So what kinds of procedures would satisfy Rule 5.1(a)? It seems to us at least two protocols, likely in place in most medium and large firms. First, a firm ought to regularize close, direct supervision of associate work by more senior lawyers. Second, firms ought to offer (and require attendance at) periodic education sessions about the Rules of Professional Conduct and the law of lawyering. It's hard to imagine that Cohen's son missed the conflict between Schleicher and Dobbie because of inadequate training in conflicts doctrine, but it is not hard to imagine scenarios where serious mistakes and ethical lapses occur simply because a lawyer doesn't know what the rules say or mean. The rules governing conflicts of interest (1.7, 1.8, and 1.9), the tension between the lawyer's duties of confidentiality to clients (1.6) and candor to the court (3.3), and the need to keep zeal for a client's cause within the bounds of a lawyer's obligation of honesty (4.1 and 8.4) and fair play (4.2, 4.3, and 4.4) are rigorous but often subtle. They require the development of instincts, intuition, and insight that come only with constant refresher courses, mentoring, and monitoring by senior lawyers, which Rule 5.1 demands.

So the *Cohen* case, while from a different jurisdiction possessing a more stringent rule imposing supervisor liability for constructive, as well as actual, knowledge and with a unique set of facts, still serves as a welcome reminder to supervising lawyers of their potential exposure and, more important, of their duties toward their clients and their associates.

Finally, would law firm discipline serve the interests of clients better than individual sanctions as imposed in *Cohen*? It is true that the *Cohen* decision's reliance on Rule 5.1 leaves the managing partner, chair, or even "ethics counsel" at a law firm more at risk than other partners, and that seems problematic. Suggestions for law firm fines or, as argued recently by a student in an intriguing Harvard Law Review note (Collective Sanctions and Large Law Firm Discipline, 118 Harv. L. Rev. 2336 (2005)), for collective ethics sanctions against the lawyers working on matters in which misconduct occurs, deserve some serious thought. But we save that for another day. ■