5 Things Associates Can Do When In An Ethical Minefield

By Andrew Strickler

Law360, New York (November 26, 2014, 5:03 PM ET) -- BigLaw associates are prone to legal mistakes that can land them in ethical danger zones, either through their own inexperience or by following the lead of a misguided superior.

A case in point: the Thompson & Knight LLP associate who derailed jury selection in a federal antitrust trial early this year when she allegedly spied on prospective jurors at the behest of a partner.

So what's a BigLaw associate to do when he or she winds up in ethical quicksand? The answer isn't "blame the partner."

"Your bar card is yours to lose," said Debra Squires-Lee, co-chair of the professional liability practice group at Sherin and Lodgen LLP. "Your ethical responsibilities are yours alone."

Below are five steps for associates to take when ethical trouble arises:

Run, Don’t Walk, to Fess Up

Time and again, legal ethics experts stress the importance of making a full and hasty disclosure to the firm’s general counsel, ethics committee, managing partner or whomever is tasked with addressing ethical and professional conduct issues.

The urgency is twofold: The potential damage of a breach or legal mistake to clients, the firm and individual attorneys can often be remediated if addressed quickly. And with lawyers’ communications with general counsel deemed privileged in jurisdictions including Massachusetts, Georgia and Oregon, “it is far better to be safe than sorry, and lawyers must be comfortable going to the firm’s general counsel with issues,” Squires-Lee said.

If an ethical breach does trigger blowback from a client or opposing counsel, a quick disclosure puts the firm in a better position to alert an insurance carrier of a potential problem and avoid a possible tussle about coverage.

“The first sign of any potential issue related to ethics or malpractice, bringing it to the partner assigned to the case, the managing partner or a management committee alleviates the threat of a claim and gives the firm an opportunity to address it before it becomes unfixable,” said Michael Shea, president of legal liability insurance broker Shea Barclay Group Inc.

Don’t Fix It

Young lawyers in particular are prone to knee-jerk reactions to blunders, and may be tempted to try to undo a minor legal mistake, hide an inadvertent breach of client confidentiality, or gloss over a gray-area decision by a colleague.
But beware the urge to fix it, experts advise. The issue may already be known or documented by others, and an attempt to make it go away is more likely than not to complicate the firm’s handling of the problem and raise repercussions for individual lawyers.

Even in the fluid world of social media — a rising arena for malpractice and other claims against lawyers — the simple act of deleting an errant Facebook post can look like a cover-up.

Going straight to a client with a heads-up about a perceived problem is also ill-advised, several experts said. In virtually every scenario, the interests of clients and young lawyers are better protected once the firm has the full facts.

“Once the cat is out of the bag, it’s hard to get it back in,” Shea said. “Make the notice to the firm as quickly as possible, and let them make a determination about how to handle it.”

Use Outside Resources

Particularly with ethical quandaries in unfamiliar legal areas or vague misgivings about a course of action, state bars are a solid resource for ethical guidance too many young lawyers overlook. Most bars maintain hotlines to help lawyers navigate ethical waters, experts said, and have a vast wealth of experience in nuanced areas of proper conduct.

“There may be a perceived downside that going to the bar is that they will take the lawyer’s name and information so they can note the advice that was given in case it does come back in a claim,” said Gilda Russell, a risk management consultant for insurance broker Paragon and Holland & Knight LLP’s former ethics and conflicts counsel. “But that’s just a theoretical downside, and I do think younger lawyers should think of the bar as helpful and not harmful.”

Squires-Lee points out that while the Model Rules of Professional Conduct include a safe harbor provision for subordinate lawyers who act in accordance with a supervisory lawyer’s direction on an arguable ethical issue, the junior lawyer who doesn’t believe the supervisor’s conclusion is reasonable must still inform the general counsel.

"If he or she still feels that the course of conduct is unethical, or even questionable, he or she can decide whether it is feasible to decline to participate," she said. "Depending on the issue, and the associate’s conviction, I would say the young lawyer can also seek external guidance from a lawyer or firm who specializes in legal ethics."

Make the Initial Disclosure Face-to-Face

Many 20-something lawyers are perfectly comfortable discussing sensitive questions via email or even in text messages. But when the time comes to tell a higher-up about a potential ethical failure, it’s far better to walk down the hall and knock on a supervisor or general counsel’s door.

A face-to-face discussion demonstrates the potential gravity of such problems to the firm, and gives the firm a moment to consider a response before any additional paper trail is made.

“If a firm realizes they have done something wrong, they’re not going to stick their heads in the sand, and they’ll want to address it at a higher level than a first or second year,” Russell said.

“There are ways to properly disclose and expose the firm to as little as necessary, and it takes a certain amount of experience to do that,” Russell said.

Recognize a Crime

There are blunders, and then there is flat out trouble. While outright criminal conduct is rare in BigLaw, it's not
Consider former mergers and acquisitions attorney Matthew Kluger, who served a lengthy prison sentence for orchestrating an insider trading scheme as an associate at Wilson Sonsini Goodrich & Rosati PC and three other firms over a 17-year period. Four years after attorney Scott Rothstein turned himself in to face Racketeer Influenced and Corrupt Organizations Act charges for a massive Ponzi scheme, two Florida lawyers were indicted in 2013 for their alleged roles in the rip-off.

Ethics experts say all lawyers would do well to recognize the difference between a professional conduct or ethical problem and something with real criminal implications, and act accordingly.

"If you're a potential defendant in a criminal matter, the stakes are higher," Russell said. "While I would advise taking it to the law firm so it can conduct its investigation, I'd also advise the associate to get their own counsel."

--Editing by John Quinn and Mark Lebetkin.