

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers

- (a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these Rules and the State Bar Act.
- (b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer complies with these Rules and the State Bar Act.
- (c) A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if: (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

Comment

Paragraph (a) – Duties Of Managerial Lawyers To Reasonably Assure Compliance with the Rules.*

[1] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm* or its partners* engage in any ancillary business.

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities might satisfy paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm would not necessarily be required to promulgate firm-wide policies intended to reasonably assure the law firm's lawyers comply with the Rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this Rule.

[4] Paragraph (a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these Rules and the State Bar Act. This Rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public

sector legal agency or other legal department. See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).

Paragraph (b) – Duties of Supervisory Lawyers

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

Paragraph (c) – Responsibility for Another’s Lawyer’s Violation

[5A] A lawyer will not be in violation of paragraph (c)(1) if, having knowledge of all relevant facts, the lawyer’s decision to ratify a course of conduct is a reasonable resolution of an arguable question of professional responsibility.

[6] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows* that the misconduct occurred.

[7] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

[8] Paragraphs (a), (b), and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,*associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer’s conduct is beyond the scope of these Rules.

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[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm* or its partners* engage in any ancillary business.

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities might ~~not be required to implement particular measures~~ satisfy under paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm would not necessarily be required to promulgate firm-wide policies intended to reasonably assure the law firm's lawyers comply with the Rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this Rule.

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sector legal agency or other legal department. See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).

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[5A] A lawyer will not be in violation of paragraph (c)(1) if, having knowledge of all relevant facts, the lawyer’s decision to ratify a course of conduct is a reasonable resolution of an arguable question of professional responsibility.

[6] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows* that the misconduct occurred.

[7] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

[8] Paragraphs (a), (b), and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,*associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer’s conduct is beyond the scope of these Rules.

~~[9] This Rule does not alter the personal duty of each lawyer in a law firm* to comply with these Rules and the State Bar Act. See Rule 5.2(a).~~

Proposed Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
Synopsis of Public Comments

TOTAL = 5
A = 1
D = 2
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43ae	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-12-16)	Y	M	(c) Comment [3]	<p>1. In the final sentence of 5.1(c) "member of employee" should read "member or employee."</p> <p>2. We believe that Comment [3] could helpfully be rewritten to make clear that it is an interpretation of the lawyer's duty to make reasonable efforts as set forth in paragraph (a) rather than creating an additional duty. We would propose it be replaced with the following:</p> <p>"[3] A lawyer with intermediate managerial authority in a firm may satisfy the duty of reasonable efforts under paragraph (a) by relying on a designated managing partner or a management committee or other body, provided that person or body has appropriate managerial authority and is charged with that responsibility. If, however, the lawyer knows or reasonably should know that the designated person or body has not adopted or implemented appropriate measures, the duty of reasonable efforts requires</p>	<p>1. The Commission agrees and has made this correction.</p> <p>2. The Commission has made some changes in wording as a result of this suggestion; however, the Commission does not believe that Comment [3] in either its prior or current form can be read as imposing any duty in addition to those created by paragraph (a). In addition, although the suggested introductory language "lawyer with intermediate managerial authority" is shorter and simpler than the Commission's proposal, we think it might prove useful to underscore in this Comment that paragraph (a) is not limited in its application to firm partners/shareholders.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					that the lawyer take corrective action."	
X-2016-65b	Dan L. Carroll (09-9-16)	No	D	Paragraph (c)	The language: "A lawyer shall be responsible for another lawyer's violation of these Rules and the State Bar Act if: (1) the lawyer ... with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved;" will create potential liability for in-house ethics counsel who make good faith conflict determinations that eventually are seen differently by a court. He is particularly concerned about this b/c of the inherent unpredictability of conflicts concepts such as "substantially related", the burdens that will be placed on the individual lawyer and the firm in having to deal with ethics complaints that ultimately are not pursued by OCTC, and the possibility that lawyers as a result will decline to serve as in-house ethics advisors.	The Commission disagrees with the concern stated by the commenter. Nevertheless, the Commission has added a comment, tentatively numbered [5A], to address those concerns.
X-2016-66w	San Diego County Bar Assoc. (Riley) (09-15-16)	Yes	A	5.1	Supports the proposed Rule.	No response required.
X-2016-76n	L.A. County Bar Assoc. (Schmid) (09-24-16)	Yes	M	(a), (b), (c)(2), cmts. [3], [4]	1. Paragraph (b) could subject a Supervisory attorney to discipline whenever a subordinate attorney violates the Rules of Professional Conduct or the State Bar Act.	1. The Commission disagrees that paragraph (b) imputes liability for any violation of a subordinate lawyer. Paragraph (b), however, does require that

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					<p>that lawyer make “reasonable efforts” to ensure that the other lawyer is complying with the Rules and the State Bar Act.</p> <p>2. Paragraph (c)(2) could subject a managerial lawyer to discipline for the conduct of a lawyer under the managerial attorney’s supervision even if that conduct was in the subordinate lawyers personal, rather than professional capacity.</p> <p>3. Paragraphs (a) and (c)(2) use of the phrase “managerial authority in a law firm” without defining the term, resulting in a lack of notice on who might have liability under the Rule.</p> <p>4. The phrase intermediate managerial responsibilities”</p>	<p>2. The Commission disagrees with the commenter’s assessment. Nothing in the Rule suggests that a supervising lawyer is responsible for conduct of a subordinate lawyer in the latter’s “personal capacity.”</p> <p>3. The Commission believes that the term “managerial authority” as applied to a law firm, which applies to a wide variety of organizations, including private law firms, government and corporate law offices, and legal services organizations, is not susceptible to a succinct definition appropriate in rules of professional conduct. Moreover, the Commission believes that the concept – those with authority to set the policies for compliance with the Rules, is not a foreign concept that requires a detailed exposition.</p> <p>4. The Commission has revised Comment [3] to clarify</p>

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					<p>contained in Comment [3] is not defined and therefore leaves unclear which firm lawyers have responsibility under the Rule.</p> <p>5. Comment [4] should be deleted or revised, as that Comment suggests that discipline could be imposed for violations of guidelines regarding the assignment of cases or workload distribution.</p> <p>6. Paragraph (c)(2), “whether or not a member of [sic] employee” should be revised to be “whether or not a member or employee.”</p>	<p>what is meant by “intermediate managerial responsibilities.”</p> <p>5. The Commission has not made the suggested change. If guidelines are implemented to provide measures that “give reasonable assurance” that lawyers in the firm comply with the Rules and State Bar Act, and a managerial lawyer violates those guidelines, for example, those relating to the assignment of cases and distribution of workload, then that lawyer is in violation of the rule. Measures that are not enforced or complied with cannot provide the required reasonable assurance.</p> <p>6. The Commission agrees and has corrected this typo.</p>
X-2016-104aw	Office of Chief Trial Counsel (Dresser) (09-27-16)	Yes	D	5.1	1. Supervision should remain part of Rule 1.1 b/c there is an established history of case law governing this duty that would be upset by reallocating the	1 – 3. The decision to separate diligence, competence and supervision into separate rules to enhance compliance and conform to the national

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					<p>supervision duty to a different rule that is structured differently.</p> <p>2. Competence and supervision can be hard to distinguish, so separating the two duties will lead to unwanted charging errors.</p> <p>3. Respondent lawyers often dispute a competence charge but at trial argue for the first time that what OCTC has described in an uncharged supervision issue.</p> <p>4. Comments [5], [6], [8], and [9] are unnecessary and merely repeat the Rule and Comment [6] also is obvious and not needed.</p>	<p>standard remains valid and OCTC should not have any greater charging difficulties than bar regulators in other jurisdictions. Most of the comments we have received favor treating these duties in separate rules. Separating competence and diligence is also consistent with other rules. See, e.g., proposed Rule 1.7(b)(1).</p> <p>4. The Commission disagrees with the commenter as to Comments [5] through [8]. The Commission believes each of those comments provide helpful explanation of the rule's application and so promotes compliance and facilitates enforcement. The Commission agrees that Comment [9] is not necessary.</p>

