

# COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.1

## Commission Drafting Team Information

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## **I. CURRENT ABA MODEL RULE**

**[There is no California Rule that corresponds to Model Rule 5.1,  
from which proposed Rule 5.1 is derived.]**

### **Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers**

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable 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 conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
  - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### **Comment**

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed 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.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 5.1

Vote: 14 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 5.1

Vote: X (yes) – X (no) – X (abstain)

## **III. COMMISSION'S PROPOSED RULE 5.1 (CLEAN)**

### **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 satisfies 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 that 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*

[6] A lawyer will not be in violation of paragraph (c)(1) if the lawyer's decision to ratify a course of conduct is a reasonable\* resolution of an arguable question of professional responsibility.

[7] 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.

[8] 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.

[9] 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.

#### IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 5.1)

##### Rule 5.1 Responsibilities of ~~a Partner or~~Managerial and Supervisory ~~Lawyer~~Lawyers

- (a) A ~~partner in a law firm, and a~~ lawyer who individually or together with other lawyers possesses ~~comparable~~ 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 ~~conform to the Rules of Professional Conduct~~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 ~~conforms to the Rules of Professional Conduct~~complies with these Rules and the State Bar Act.
- (c) A lawyer shall be responsible for another ~~lawyer's~~lawyer's violation of ~~the~~these Rules ~~of Professional Conduct~~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 ~~is a partner or has comparable,~~ 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

~~[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or~~

~~government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.~~ Duties Of Managerial Lawyers To Reasonably\* Assure Compliance with the Rules.

[21] Paragraph (a) requires lawyers with managerial authority within a law firm\* to make reasonable\* efforts to establish internal policies and procedures designed ~~to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those 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] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.~~

[3] A partner,\* shareholder or other lawyer in a law firm\* who has intermediate managerial responsibilities satisfies 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 that 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 (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).~~ 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] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as~~ Whether ~~a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority~~ in particular circumstances is a question of fact. ~~Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate~~

*Paragraph (c) – Responsibility for Another's Lawyer's Violation*

[6] A lawyer will not be in violation of paragraph (c)(1) if the lawyer's decision to ratify a course of conduct is a reasonable\* resolution of an arguable question of professional responsibility.

[7] The appropriateness of remedial action ~~by a partner or managing lawyer under paragraph (c)(2) would depend on the immediacy of that lawyer's involvement and the nature and~~ seriousness of the misconduct. A supervisor is required to and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the ~~supervisor knows~~ lawyer knows\* that the misconduct occurred. ~~Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.~~

[8] 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.

~~[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.~~

~~[7] Apart from~~ 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. Whether lawyer. The question of whether a lawyer may can be liable civilly or criminally for another lawyer's lawyer's conduct is a question of law beyond the scope of these Rules.

~~[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a). the Rules of Professional Conduct. See Rule 5.2(a).~~

## **V. RULE HISTORY**

Although the origin and history of Model Rule 5.1 was not the primary factor in the Commission's consideration of proposed Rule 5.1, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 585 - 594 ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

Although there are no current rule counterparts in the California Rules to Model Rules 5.1 to 5.3, there is predicate authority in the California Rules and case law that is in line with those rules.

### **A. No Direct Counterpart But There Is Predicate Authority In Rules And Case Law**

#### **1. Discussion Paragraph To Rule 3-110 Identifies The Duty To Supervise**

The first Discussion paragraph to current rule 3-110 states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and nonattorney employees and agents." This Discussion paragraph provides citations to seven lawyer disciplinary cases, which<sup>1</sup> are listed below with a brief statement of the context in which discipline was imposed at least in part for a breach of supervisory responsibilities.

- *Waysman v. State Bar* (1986) 41 Cal.3d 452, 458 [224 Cal.Rptr. 101]

Lawyer was disciplined for misappropriating client money for office expenses. Lawyer's negligence in supervising his office was a factor in the misconduct.

- *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]

Lawyer settled client's claim without the client's consent. Lawyer claimed that secretarial errors caused a failure to promptly deliver the settlement proceeds to the client. This Court found that even without deliberate wrongdoing, fiduciary violations resulting from lapses in office procedure may be deemed "wilful" for disciplinary purposes and the lawyer failed to show that office staff was properly supervised.

- *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [205 Cal.Rptr. 834]

Lawyer endorsed his client's name on a check payable to the client without client authorization and claimed that an office employee mistakenly deposited the check in

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<sup>1</sup> This first paragraph of the Discussion section was added operative May 26, 1989. (See Bar Misc. No. 5626, "Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation," December 1987.)



the lawyer's payroll account instead of the client trust account. This Court found the evidence demonstrated the lawyer's pervasive carelessness in failing to give the office manager any supervision and that the lawyer generally failed to instruct the office manager on trust account requirements and procedures.

- *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 – 123 [177 Cal.Rptr. 670]

Lawyer claimed that letter communications with a party represented by counsel without that counsel's consent were sent inadvertently by office staff. This Court found that the attorney was responsible for the work product of his employees, which is performed pursuant to his direction and authority.

- *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288]

Lawyer blamed secretary mismanagement for a disbursement from his client trust account when there were insufficient funds on deposit. This Court observed that the rule governing client trust accounts is binding upon attorneys – not lay personnel – and necessitates reasonable staff supervision in the handling of trust account matters.

- *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 – 858 [100 Cal.Rptr. 713]

Lawyer blamed his staff for mistakes in securing an execution against client's husband to collect attorney fees that the husband had already partially paid in a divorce proceeding. This Court disciplined the lawyer for the mistakes and stated that even though an attorney cannot be held responsible for every detail of office procedure, he must accept responsibility to supervise the work of office staff.

- *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161]

Lawyer relied on staff and a subordinate lawyer who failed to perform legal services for client. Even after a default judgment was entered and the client repeatedly sought assurances from lawyer that relief from default would be sought, lawyer failed to check on whether the subordinate lawyer and staff actually sought relief from default. This Court disciplined the lawyer for continued neglect in overly relying on, and failing to closely supervise, the subordinate lawyer and staff.

## 2. Case Law Precedent Is Consistent With Proposed Rule 5.2

Case law is consistent with the concept that a subordinate lawyer working at the direction of another lawyer remains accountable for complying with professional responsibilities.

In *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 [161 Cal.Rptr.3d 700], at the direction of a supervising lawyer, an associate added new defendants to the action. The added defendants sued plaintiffs and their attorneys for malicious prosecution. In rejecting the associate's argument that she was merely following a supervising lawyer's instructions, the court of appeal stated:

We recognize that an associate attorney is not in the same position as an attorney associating into a case. There is a clear imbalance of power between an often younger associate and an older partner or supervisor, and situations may arise where an associate is put into a difficult position by questioning a more experienced attorney's choices. Nonetheless, however, *every attorney admitted to practice in this state has independent duties that are not reduced or eliminated because a superior has directed a certain course of action.* (See Bus. & Prof. Code, § 6068.) Thus, the fact that she was following a superior's instructions is not a valid defense to malicious prosecution.

(*Mahaffey* at p. 1546, emphasis added.)

In *In re Aguilar* (2004) 34 Cal.4th 386 [18 Cal.Rptr.3d 874], no one from appellant's law firm appeared at an oral argument scheduled before the California Supreme Court. Contempt proceedings were brought against the managing attorney (Aguilar) and a subordinate attorney (Kent), who had given notice to the Court of his anticipated appearance for the firm. Kent had terminated his employment with the firm days before the scheduled argument date and the managing attorney knew that another firm attorney would need to make the appearance. (*In re Aguilar, supra*, at pp. 391-392.)

The Supreme Court found Kent in contempt for failing, without adequate justification, to notify the Court that he would not appear for the firm. The Court acknowledged that the firm was attorney of record. Nevertheless, it focused on the subordinate attorney's personal accountability, stating: "Kent's decision to leave the firm did not automatically terminate his professional responsibilities either to his former client or to this court." The Court reasoned: "Although Kent might have been fortunate enough to avoid any sanction had another attorney been promptly reassigned to the case, been able adequately to prepare for oral argument, and appeared at and presented oral argument on behalf of [appellant], Kent cannot avoid his share of responsibility for the interference with this court's operations that resulted when, without any advance notice, no attorney appeared . . . ." (*In re Aguilar, supra*, at pp. 391-392.) Model Rule 5.1 (Responsibilities Of Partners, Managers, And Supervisory Lawyers).

## **VI. OCTC / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
**(In response to 90-day public comment circulation):**

1. As discussed, supervision should remain a part of the rule addressing competence. Supervision by an attorney is an essential part of lawyer competence. (See *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 522, fn. 29 [respondent's development and maintenance of adequate office management and accounting procedures are fundamental to his fulfilling multiple other duties, including his duties to competently perform legal services (rule 3-110(A)), to adequately communicate with his clients (rule 3-500; § 6068, subd. (m)), to protect his clients' confidential information (§ 6068, subd. (e)), and to properly handle and account for client funds and other property (rule

4–100).]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 [An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847; *Bernstein v. State Bar* (1990) 50 Cal.3d 221; *Gadda v. State Bar* (1990) 50 Cal.3d 344, 353-354; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403; and the discussion to current rule 3-110.) Also, as previously discussed, distinguishing between competence or diligence and failing to supervise is not easy. The concepts and lines are often blurry and unclear. Choosing the wrong rule to charge will result in a dismissal, even though respondent was on notice as to the basis of the charge. Many attorneys dispute the allegations, but never contend that the misconduct occurred, because of a lack of supervision until they are testifying at trial, long after the charges have been brought. If the court determines that the misconduct was the result of a failure to supervise, which was not alleged, the respondent could escape culpability for a failure to perform competently or diligently. Also, without some indication from the respondent or others that the misconduct was a result of a lack of supervision, the State Bar does not have probable cause to allege a failure to supervise.

2. OCTC, however, does not oppose having rules or Comments that clarify the duty of supervision as a part of the duty of competence. This is already the law in California.
3. If the rule is approved, OCTC supports Comments 1-4, and 7.
4. OCTC is concerned that Comments 5, 6, 8, and 9 are unnecessary and merely repeat the rule. For example, the statement in Comment 5, concerning whether a lawyer has direct supervisory authority over another lawyer in particular circumstances, is a question of fact. This is true of all facts.
5. Comments 6 discusses that the appropriateness of remedial action will depend on the nature and seriousness of the harm. This appears to be obvious and does not need a Comment.
6. Comments 8 discusses that subsections (a) through (c) create independent bases for discipline. This merely repeats the rule.
7. Comment 9 states that the rule does not alter the personal duty to comply with these Rules and the State Bar Act. This is obvious and unnecessary to state.

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same. See 90-Day and 45-Day Public Comment Synopsis Tables, Attachments \_\_\_\_\_ and \_\_\_\_\_.

However, OCTC did submit a further comment with respect to Comment [9] (formerly Comment [8] in the 90-day public comment version of the rule):

6. Comment 9 discusses that subsections (a) through (c) create independent reasons for discipline. This merely repeats the rule and is unnecessary. Also, OCTC is concerned with the third sentence of Comment 9, which states that paragraph (c) of this proposed rule and proposed rule 8.4 is the only time there is disciplinary liability for the conduct of a partner, associate, or subordinate lawyer. That comment is overly broad, and may encompass a fact pattern or other rule when this comment would not be accurate. (See for example Comment 1 to proposed rule 8.4.1 [duty of all attorneys in law firm to advocate for corrective action for harassment or discriminatory conduct by the firm or any of its other lawyers or non-lawyer personnel]; Section 6106.) OCTC finds the last sentence unnecessary in light of proposed rule 1.0(b)(3).

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**  
**(In response to 45-day public comment circulation):**

1. Supervision should remain a part of the rule addressing competence (Rule 1.1). Supervision by an attorney is an essential part of lawyer competence.
2. Comments 5, 8, and 9 are unnecessary and merely repeat the rule.
3. The first sentence of Comment 7 is unnecessary.
4. The term “knowingly” well established law providing that violations can be found based upon recklessness, gross negligence, or willful blindness, as well as “knowingly” or intentionally.
5. The Comment [9] discussion of subsections (a) through (c) merely repeats the rule and is unnecessary.
6. The third sentence of Comment [9] states that paragraph (c) of this proposed Rule and proposed Rule 8.4 are the only time there is disciplinary liability for the conduct of a partner, associate, or subordinate lawyer. That comment is overly broad because Rule 8.4.1, Comment [1] states that Rule 8.4.1 imposes on all firm lawyers an obligation to advocate corrective action.

- **State Bar Court:** No comments were received from State Bar Court.

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Two comments, including the above comment from OCTC, were received. One disagreed, and one agreed only if modified. A public comment synopsis table, with the Commission’s responses to each comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers,” revised May 5, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_1.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_1.pdf)
- Thirty-one jurisdictions have adopted Model Rule 5.1 verbatim.<sup>2</sup> Fourteen jurisdictions have adopted a slightly modified version of Model Rule 5.1.<sup>3</sup> Five jurisdictions have adopted a version of the rule that is substantially different from Model Rule 5.1.<sup>4</sup> Only California has not adopted a version Model Rule 5.1.

**IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

This Rule is part of an interrelated set of Rules 5.1 – 5.3 that incorporates into separate rules lawyers’ duties to supervise subordinate lawyers and nonlawyer assistants, (Rules 5.1 and 5.3, respectively) and states the duties of subordinate lawyers (Rule 5.2).

**A. Concepts Accepted (Pros and Cons):**

1. General: Recommend adoption of standalone rules patterned on Model Rules 5.1, 5.2 and 5.3 rather than maintain a duty of supervision in the competence rule (proposed new Rule 1.1, and currently rule 3-110).
  - Pros: There are a number of reasons for adopting this change:
    1. Rule 3-110 works well when the supervising lawyer is a sole practitioner or in a firm that is small enough so that the duty to supervise easily can be ascribed to a particular lawyer. Holding any one lawyer responsible for supervision in a larger law firm is more difficult because responsibility can be diffused: Who would be responsible for a failure to supervise if there are ten or twenty or forty lawyers working on a major project?
    2. Model Rules 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include imposing a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. A firm’s procedures and practices are pertinent, not just to competent representation, but also to representation in compliance with other ethical standards. For example, a law firm must have conflict checking procedures, and firm-wide systems that reasonably assure compliance with those procedures, in order to avoid conflicts of interest. Model Rules 5.1 and 5.3 therefore have a

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<sup>2</sup> The thirty-one states are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>3</sup> The fourteen jurisdictions are: Alabama, Alaska, District of Columbia, Florida, Georgia, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Vermont, and Virginia.

<sup>4</sup> The five states are: New Jersey, New York, Ohio, Oregon, and Texas.

considerably wider application than the supervision standard currently part of rule 3-110. There is additional client protection in adding definition to the duties of firm managers and supervisors.

3. The broader application of Model Rules 5.1 and 5.3 to all Rule violations and not just competence extends not just to a firm's procedures and practices under paragraph (a) of each Rule but also to supervision and control of subordinate lawyers and nonlawyers under paragraphs (b) and (c) of each Rule.

4. Rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties, except the requirement of competence. Model Rule 5.2 addresses this by stating that a subordinate generally cannot defend a disciplinary charge by blaming the supervisor. While California's current Rules have no equivalent to Model Rule 5.2, there appears to be no conflict between Model Rule 5.2 and current California law in that there is no known California authority that permits a subordinate lawyer to defend a disciplinary charge based on clearly improper directions from a senior lawyer. Compare *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 (That associate was following orders of a supervisor was no defense to a malicious prosecution claim). Adding a version of Model Rule 5.2 would provide fair notice to subordinate lawyers and provide a tangible basis for them to urge a senior lawyer to correct conduct and directions.

5. Model Rule 5.1 and 5.3 make clear that a lawyer's supervisory responsibility can extend to lawyers and non-lawyer personnel who are not within the first lawyer's law firm. Examples would include local counsel and contract lawyers who report to and are directed by a lawyer with primary responsibility so that the second lawyer operates much like an associate in the first lawyer's firm.

6. Proposed Rules 5.1, 5.2, and 5.3 complement one another in a logically consistent package. Also, Model Rule 5.2 strikes the proper balance between a subordinate's duties as a lawyer and the subordinate's duty to the organization.

7. Adopting these Rules would place the supervisory obligations of lawyers in the black letter rather than commentary. See public comment letter from Scott Garner, COPRAC, June 16, 2015.

- Cons: In its 9/2/2015 submission to the Commission, OCTC stated that the [current] rule and case law address the duty to supervise attorney staff and employees."

2. Recommend changing the title of the rule to conform to the paragraph (a) and (c) changes made to the corresponding Model Rule paragraphs by removing "partners" from the title and adding the term "managerial" to modify lawyers.

- Pros: It is important that there be no dissonance between the proposed Rule and its title so that there is no confusion about how the rule should be applied.
  - Cons: None identified.
3. Recommend adding to paragraph (b) the language “whether or not a member or employee of the same law firm”.
- Pros: The concept is important because a lawyer who has direct supervisory responsibility should not be able to avoid application of the Rule when acting through a lawyer who is outside the first lawyer’s firm.
  - Cons: The language should not be added for two reasons: First, the words are unnecessary (in that the Rule would have the same meaning without these words). Second, not including these words would remove the concept from the Rule (and doing so would avoid uncertain application in certain situations).
4. Recommend adding to paragraph (c)(1) the words “of the relevant facts and”.
- Pros: This addition is intended to limit a supervisor’s responsibility to the situation in which the supervisor knows of the relevant facts and not just the other lawyer’s conduct. Due to the definition of “know” the supervisor’s knowledge can be inferred from the circumstances. Adding these words makes it clear that a supervising lawyer cannot be responsible for another lawyer’s conduct unless the lawyer has knowledge of the relevant facts, and that knowledge can be inferred from the circumstances. The Commission believes it is important to balance the supervisor’s affirmative obligation to supervise against the risk that overly-inclusive language might cause supervisors to be seen as guarantors of the proper conduct of all lawyers and nonlawyer assistants they supervise.
  - Cons: These words are essential to the rule because a supervising lawyer cannot be held responsible for a subordinate’s work unless the supervising lawyer knows both the subordinate’s conduct and the facts showing that conduct to be wrongful.
5. Recommend editing the Model Rule comments to eliminate material that is practice guidance or that merely repeats or describes the Rule content.
- Pros: This is required under the Commission Charter.
  - Cons: None identified.
6. Add new Comment [6] in order to clarify the scope of supervisor’s responsibilities
- Pros: Consistent with the proposed addition of “of the relevant facts and” to paragraph (c)(1) and the Rule 5.2 recognition that some ethics issues have no

single reasonable answer, the Commission recommends the addition of new Comment [6] to assure that paragraph (c)(1) is not interpreted as making a supervising lawyer the guarantor of the correctness of a subordinate's resolution of an ethics issue. The Commission believes this reading of paragraph (c)(1) would strike an appropriate and reasonable balance between the need for supervisors to be responsible for the conduct of those who are supervised and the need to recognize that ethics issues sometimes have no certain answer.

- Cons: This concept, borrowed from proposed Rule 5.2, in that context has been criticized as undercutting personal responsibility.

7. Remove Model Rule, Comments [6] and [8].

- Pros: Neither comment explains the proper interpretation of the Rule and therefore is unnecessary.
- Cons: None identified.

**B. Concepts Rejected (Pros and Cons):**

1. Include the language in Model Rule paragraph 5.1(a) that imposes a duty on each firm partner to take action to assure the firm has appropriate systems in place.
  - Pros: Each partner should take whatever action that lawyer can to achieve the goals of this Rule, even if a particular lawyer does not participate in management or has no independent management authority. No firm partner should be permitted to be blind to wrongful conduct.
  - Cons: Mid-level and other partners who lack management authority would be at unnecessary risk from imposing on them a duty that they cannot fulfill in a meaningful way. If they would not have disciplinary risk, including them in the rule would be only aspirational.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

**C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:**

Proposed Rules 5.1 and 5.3 do not substantively change a lawyer's obligation to supervise, but they add responsibilities for those lawyers who control a law firm to create and enforce firm-wide policies, such as to check for possible conflicts of



interest, in order to make it more likely that firms will institute policies that will prevent Rule violations by individual firm lawyers.

**D. Non-Substantive Changes to the Current Rule:**

Not applicable.

**E. Alternatives Considered:**

None.

**X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

That the Board of Trustees of the State Bar of California adopt proposed Rule 5.1 in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 5.1 in the form attached to this Report and Recommendation

