

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 5.2

Commission Drafting Team Information

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I. CURRENT ABA MODEL RULE

**[There is no California Rule that corresponds to Model Rule 5.2,
from which proposed Rule 5.2 is derived.]**

Rule 5.2 Responsibilities of a Subordinate Lawyer

- (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.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 5.2

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 5.2

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE 5.2 (CLEAN)

Rule 5.2 Responsibilities of a Subordinate Lawyer

- (a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes* that the supervisor's proposed resolution of the question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 5.2)

Rule 5.2 Responsibilities of a Subordinate Lawyer

- (a) A lawyer ~~is bound by the Rules of Professional Conduct~~ shall comply with these Rules and the State Bar Act notwithstanding that the lawyer ~~acted~~ acts at the direction of another lawyer or other person.

- (b) A subordinate lawyer does not violate ~~the~~these Rules ~~of Professional Conduct~~or the State Bar Act if that lawyer acts in accordance with a supervisory ~~lawyer's~~lawyer's reasonable* resolution of an arguable question of professional duty.

Comment

~~[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.~~

~~[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate~~Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable~~If the subordinate lawyer believes* that the supervisor's proposed resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.~~of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

V. RULE HISTORY

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, which¹ 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 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]

¹ 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.)

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 previously discussed [in comment concerning proposed Rule 5.1], this rule belongs as part of the duty of competence. OCTC, however, does not oppose having this rule to clarify the duty of a subordinate attorney. This is already the law in California.
 2. OCTC is concerned that the Comment is unnecessary and merely repeats the rule.
- **State Bar Court:** No comments were received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Two comments, including a comment from OCTC, were received. One agreed with the proposed rule, 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

A. Related California Law

See Section V, above.

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 5.2: Responsibilities of a Subordinate Lawyer," revised May 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_2.pdf

- Forty-four jurisdictions have adopted Model Rule 5.2 verbatim.² Five jurisdictions have adopted a slightly modified version of Model Rule 5.2.³ Two jurisdictions have not adopted a version of Model Rule 5.2.⁴

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 in approach:
 1. 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. This provides added client protection.
 2. 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

² The forty-four jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

³ The five jurisdictions are: Connecticut, Florida, Georgia, Ohio, and Texas.

⁴ The two jurisdictions are: California and Virginia.

diffused: Who would be responsible for a failure to supervise if there are ten or twenty or forty lawyers working on a major project?

3. Model Rules 5.1(a) and 5.3(a) extend beyond the duty to supervise that is implicit in rule 3-110 and include a duty imposed 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 considerably wider application than the supervision standard currently part of rule 3-110. Again, there is additional client protection in adding definition to the duties of firm managers and supervisors.

4. 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.

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." In particular, there is abundant case law that sets forth the duties of a subordinate lawyer. See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 [161 Cal.Rptr.3d 700]; *In re Aguilar* (2004) 34 Cal.4th 386 [18 Cal.Rptr.3d 874]; *Moser v. Bret Harte Union High School District* (E.D. Cal. 2005) 366 Fed.Supp.2d 944.

2. Recommend editing Model Rule 5.2's language to include an obligation to comply with the State Bar Act and to further refine the language to make it

declarative and mandatory rather than descriptive.

- Pros: The substitution of “shall comply with” for “is bound by” more clearly signals the mandatory nature of the rule, which is more appropriate in a disciplinary rule. The other changes conform to the style of other proposed rules.
 - Cons: None identified.
3. Recommend editing the Model Rule comments to eliminate material that is practice guidance or that merely repeats or describes the Rule content.
- Pros: This conforms to the Commission Charter.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

There were no concepts rejected.

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:

There is no current rule that addresses duties of subordinate lawyers. However, proposed Rule 5.2 does not alter the current standard that each lawyer is responsible for acting ethically. Rather, it strikes an appropriate balance between those responsibilities and a subordinate lawyer’s organizational obligation to follow directions. Further, including a rule in the Rules of Professional Conduct that expressly states a subordinate lawyer’s obligations should, where appropriate, facilitate the ability of a subordinate lawyer to influence the decisions of the subordinate’s supervisors.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed Rule 5.2 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.2 in the form attached to this Report and Recommendation.