

The State Bar of California

# Rule 5.2 Responsibilities of a Subordinate Lawyer (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (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.

#### NEW RULE OF PROFESSIONAL CONDUCT 5.2 (No Former Rule) Responsibilities of a Subordinate Lawyer

### EXECUTIVE SUMMARY

In connection with consideration of current rule 3-110 (Failing to Act Competently), the Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated American Bar Association ABA Model Rules 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities Regarding Nonlawyer Assistants). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. Although these proposed rules have no direct counterpart in the current California rules, the concept of the duty to supervise is found in the first Discussion paragraph to current rule 3-110, which states: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."<sup>1</sup> The result of this evaluation is proposed rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers), 5.2 (Responsibilities of a Subordinate Lawyer), and 5.3 (Responsibilities of a Subordinate Lawyer), 3.2 (Responsibilities of a Subordinate Lawyer), 3.3 (Responsibilities Regarding Nonlawyer Assistants).

#### Rule As Issued For 90-day Public Comment

The main issue considered when evaluating a lawyer's duty to supervise was whether to adopt versions of ABA Model Rules 5.1, 5.2, and 5.3, or retain the duty to supervise only as an element of the duty of competence. The Commission concluded adopting these proposed rules provides important public protection and critical guidance to lawyers possessing managerial authority by more specifically describing a lawyer's duty to supervise other lawyers (proposed rule 5.1) and non-lawyer personnel (proposed rule 5.3). Proposed rules 5.1 and 5.3 extend beyond the duty to supervise that is implicit in current rule 3-110 and include a duty on firm managers to have procedures and practices that foster ethical conduct within a law firm. Current rule 3-110 includes a duty to supervise but says nothing about the subordinate lawyer's duties. Proposed rule 5.2 addresses this omission by stating a subordinate lawyer generally cannot defend a disciplinary charge by blaming the supervisor. Although California's current rules have no equivalent to proposed rule 5.2, there appears to be no conflict with the proposed rule 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.

The following is a summary of proposed rule 5.2 (Responsibilities of a Subordinate Lawyer).<sup>2</sup> This proposed rule has been adopted by the Commission for submission to the Board of

<sup>&</sup>lt;sup>1</sup> The first Discussion paragraph to current rule 3-110 provides:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

<sup>&</sup>lt;sup>2</sup> The Executive Summaries for proposed rules 5.1 and 5.3 are provided separately.

Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 5.2 adopts the substance of ABA Model Rule 5.2. Paragraph (a) provides that a subordinate lawyer has an independent duty to comply with the Rules of Professional Conduct. For example, a lawyer cannot claim he or she was just following the orders of a supervisor and therefore is not subject to discipline. However, paragraph (b) provides that when the supervising lawyer reasonably resolves an "arguable question of professional duty," the subordinate does not commit a violation by following the supervisor's direction.

There is one comment to the rule. The comment explains how the rule should be applied when a subordinate lawyer encounters a question involving professional judgment as to the lawyer's responsibilities under the Rules of Professional Conduct or the State Bar Act.

#### National Background – Adoption of Model Rule 5.2

As California does not presently have a direct counterpart to Model Rule 5.2, this section reports on the adoption of the Model Rule in United States' jurisdictions. 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:

<u>http://www.americanbar.org/content/dam/aba/administrative/professional\_responsibility/mrpc\_5\_2.pdf</u>

Forty-three jurisdictions have adopted Model Rule 5.2 verbatim. Five jurisdictions have adopted a slightly modified version of Model Rule 5.2. Three jurisdictions have not adopted a version of Model Rule 5.2.

#### Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 5.2 at its November 17, 2016 meeting.

#### Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. An omitted asterisk for a defined term was added.

## Rule 5.2 Responsibilities of a Subordinate Lawyer (Redline Comparison to the ABA Model Rule)

- (a) A lawyer is bound by the Rules of Professional Conductshall comply with these rules and the State Bar Act notwithstanding that the lawyer actedacts at the direction of another lawyer or other person.<sup>\*</sup>
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct<u>these</u> rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's<u>lawyer's</u> reasonable<u>\*</u> 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 of 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.